

REVIEWS

TAKINGS

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Takings: Private Property and the Power of Eminent Domain.

RICHARD A. EPSTEIN. Harvard University Press, Cambridge, Mass., 1985. Pp. xi, 362. \$25.00.

Ordinarily a fundamental reexamination of a constitutional provision by a well-known scholar is an occasion for celebration. That the author's perspectives are unconventional, as are Professor Epstein's, should only add excitement and challenge to the book. Unhappily, there is little to celebrate here. The book is not a developed work of history, of logic, of philosophy, or of textual analysis.¹ Though it is some of all these things, it is none of them consistently. Sometimes it claims to rest upon empirical observations about what works;² at other times all practical considerations are rejected in the name of preserving the rule of law.³ When all else

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¹ A typical example of the way Professor Epstein deals with the text of the Constitution is his two sentence dismissal of the general welfare clause, which begins, "The structure of the clause suggests . . ." and quickly concludes: "it should be read narrowly, in parallel to the other two heads, public debt and common defense, and in sharp opposition to any system of coerced transfer payments between citizens." P. 295. He gives similarly short shrift to the sixteenth amendment. See p. 296 n.42. Epstein is not dismissive of the text, but he does not give it a great deal of attention. See p. 162 n.6.

² "What set of institutions will tend to guarantee [civic virtue?]" Epstein asks. "The first is the facilitation of voluntary transactions, which are generally positive-sum games, because people deal only with their own property." P. 345. This remarkable observation is backed up by no evidence or reference of any kind. Epstein simply asserts it as fact.

³ For example, "It will be said that my position invalidates much of the twentieth-century legislation, and so it does. But does that make the position wrong in principle?" P. 281. Or, "[b]ut the idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law." P. 24. Here, as elsewhere in the book, Epstein leaves uncertain whether he is advocating submission to principle, however grievous the results, or whether he is saying the principled (as he sees it) interpretation of the Constitution will always turn out the best results. Compare p. 24 with p. 25. See also his discussion of the flat tax (which is required since, according to Epstein, progressive taxation is unconstitutional),

fails, it resorts to the casual assertiveness of the op-ed columnist.⁴

Such a patchwork cannot sustain a serious work of scholarship. One reason, as the following pages show, is that Professor Epstein never reveals the rules of the game by which he is playing. Or perhaps it would be more accurate to say that the game is one whose rules only he knows. Is it fair criticism to show that Epstein at times has history wrong? Or that his philosophy is not really consistent with the writings of Locke or Hobbes, on whom he relies? Apparently not, for the book is overtly ahistorical, and does not purport to be consistent with any existing philosophy. If this is Epstein's own philosophy, what brand is it? At some times it spins out a natural rights theory, at others a utilitarian approach. Is the book only as good as the empirical assumptions upon which the utility of its theory is premised, or is it ultimately pure natural rights theory? In fact the book purports to be constitutional theory, but it makes no effort to come to terms with more than a century of constitutional law development. Constitutional decisions (and common law developments) that do not fit the theory are simply discarded as wrong. Professor Frank Michelman, upon reading the book, observed that "it has a genre problem. We don't know what is authoritative." That is one of its baseline failings.

I. HISTORY AND LOGIC IN CONSTITUTIONAL INTERPRETATION

At the very heart of the book is the startling proposition that taxation is unconstitutional as a taking of property if its effect is to redistribute wealth. Epstein's argument is largely based on notions of consistency, which go something like this: if, as all agree, it violates the eminent domain clause for government to take away *A*'s property and give it to *B*, then it must equally violate the clause for government to take away the property of many *As* (by taxation) and give it to many *Bs* (via redistributive social welfare programs).⁵ Most of the book consists of this sort of formal analysis.

Epstein's argument purports to rest on a principle of consistency based on the "internal written logic of the text" of the Constitution.⁶ His treatment of traditional economic regulation is illus-

where he asserts that a flat tax is desirable in practice, as well as constitutionally imperative. Pp. 298-300.

⁴ Asserting that government should "get out of the welfare business entirely," Epstein says that his judgment to this effect "rests on the *belief* that once the state runs a transfer system, it can never extricate itself from the intolerable complications that follow." P. 322 (emphasis added).

⁵ P. 308.

⁶ P. 28.

trative. He concedes that there was some influential support in the pre-constitutional period for the view "that extensive wage and price controls did not offend the eminent domain principle."⁷ What if those who wrote the Constitution did not view wage or price controls as violating the eminent domain clause? No matter, says Professor Epstein, their position may be ignored. According to Epstein, the framers "may have meant to endorse both the takings clause and wages and price controls without knowing the implicit tension between them. If they cannot have both, then their explicit choice takes precedence over their silent one."⁸ "[T]he unwritten expectations of the framers . . . must yield to the internal written logic of the text."⁹

May we ask why the Constitution must be interpreted this way? Whether or not consistent enough to satisfy the author's taste for symmetry, it is possible the framers of the Constitution believed that the government should be allowed to impose wage and price controls but that property owners should be protected from the sort of individualized seizures that had a long history of abuse.¹⁰ This is the first of a number of instances in which it is essential for the reader to distinguish—as the author does not—between what the text says, or what canons of construction demand of inconsistent texts, and what Professor Epstein believes a principled Constitution ought to say.

Among the more striking examples of his view of principled analysis is his assertion that all government torts are takings.¹¹ Since, as even he admits, it has always been assumed that government was immune from tort liability, why doesn't a textual analysis lead one to believe that when the writers of the Constitution spoke of property "taken," they at least meant to exclude property injured as a result of unintentional government torts?¹² At this

⁷ P. 27.

⁸ P. 28.

⁹ *Id.*

¹⁰ Nor is it obvious why the amenders of the Constitution could not have wanted to permit progressive taxation while continuing to protect owners against the more limited kind of government conduct that courts had long recognized as takings. Epstein construes the sixteenth amendment, authorizing the federal income tax, as merely removing the requirement of apportionment between the states, and not as sanctioning progressivity. See *supra* note 1.

¹¹ Pp. 43-44.

¹² Epstein recognizes the force of this point, and that some state constitutions—unlike the federal constitution—use both the words "taken" and also "damaged." Here the author relies on an analytical argument about the relation between takings and torts, rather than on the text of the document. Epstein does not feel obliged to read the text of the Constitution literally. P. 37. Apparently the "internal written logic of the text" is not literal.

point Epstein seems not to rely on the text, but rather on “[t]he natural rights theory behind the Constitution.”¹³ Is Epstein now talking about a theory that the framers held and incorporated in the Constitution? A theory they should have held, whether or not they actually held it?¹⁴ Or is Epstein now saying that “the internal written logic of the text” is some natural rights theory? The book offers no direct answer, but the outcome is clear enough. Professor Epstein’s interpretive foray produces a Constitution that comports perfectly with his personal political philosophy: people form governments only to keep the peace and to protect property. While the state may take property when necessary to do its job, it may never redistribute it: “whenever any portion of [property] is taken from [an individual], he must receive from the state . . . some equivalent.”¹⁵ In this way, according to Epstein, private autonomy is maximized, overreaching by the state is eliminated, and the Constitution’s wealth-protecting goal is fully realized.

II. A WORLD WITHOUT POLITICS

Anticipating practical objections, Epstein wipes them out with a single righteous stroke: “But the idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law. If the next generation can do what it wants, why bother with a constitution to begin with . . . ?”¹⁶ Just how far is Epstein willing to go in ignoring practical consequences? What if the resolute refusal by the rich ever to give up a penny of their wealth foments political instability so that the effort to keep everything turns out to risk everything? Is the Constitution a suicide pact? If Epstein were to say yes, it is, then he could be dismissed as a crank without further ado. So he says no, but his no is neither simple nor clear. It demands some scrutiny.

The conventional argument in favor of welfare in a private property system, Epstein says, is that “the rich . . . are spared the violence that would overcome them if the poor were shut out from the social gains. The peace obtained is worth more than the money paid to obtain it.”¹⁷ So viewed, the welfare payment is little more than a strategic bribe that spares the payers the greater costs of

¹³ P. 42.

¹⁴ See *supra* notes 7-10 and accompanying text for Epstein’s treatment of the framers’ actual views about wage and price controls.

¹⁵ P. 15.

¹⁶ P. 24.

¹⁷ P. 316.

police enforcement and control.¹⁸ Epstein in general rejects such bribery. "The first defense against violence should be police measures, which can be modified as exigencies arise. Transfer payments are rarely a suitable means to counteract violence"¹⁹

Grudgingly, however, Epstein recognizes one class of situations in which transfer payments are justified: where there is "a clear and present danger of social unrest that cannot be handled by conventional techniques [i.e., the police]. [For example, i]t is hard to quarrel with providing free food in a flood-torn town to reduce the chances of looting"²⁰ Immediately, however, he draws the line: "[i]t is equally hard to see how the same argument justifies the food stamp program as an antidote to revolution."²¹

The first thing to notice here is how Epstein has shifted from constitutional analysis to a pundit's pronouncement, full of questionable factual assumptions. In the same paragraph he opines that "where the opportunities for individual advancement are left open as a system of limited government would leave them (for example, without barriers, such as the minimum wage, to entry in labor markets), there is less reason to fear that some permanent underclass will remain a constant threat to the social order."²² What determines these "constitutional" distinctions Professor Epstein draws? So far as I can tell, nothing more than his political judgments. Certainly nothing in the Constitution implies them; his "clear and present danger" test simply states as a legal rule, without textual support, his bald conclusion that the Constitution distinguishes between imminent rioting and less immediately threatening levels of public dissatisfaction.²³

In fact, with the concession that sometimes "[t]he peace obtained is worth more than the price paid to obtain it,"²⁴ Epstein moves from the realm of logic and principle to that of empirical judgments.

Does one wait until the poor are massed at the gates, throwing stones; or should one forestall discontent by giving a little more, or

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Here, where doing so supports the result he favors, Epstein adopts a version of a first amendment standard of judicial review, clear and present danger. Elsewhere he concedes that the Constitution does not demand an identical standard for first amendment and eminent domain cases. *See* p. 137.

²⁴ P. 316.

a little earlier? And who is to make those determinations? Is the scope of the Constitution's strictures to be set by Richard Epstein's opinions of the prospects for social unrest, and what it takes to quell them?²⁵ Professor Epstein does not address this issue, because he assumes that the need for redistribution would almost never arise. But clearly under his analysis it would be incumbent on the federal courts to decide as constitutional facts the degree of potential for social instability and the amount of redistribution—if any—necessary to reduce it, in order to determine the constitutionality of redistributive legislation.

So we would have federal courts determining the bargain that ought to be made between rich and poor, management and labor, landlord and tenant, in order to maintain a stable social order. These are the sorts of questions that ordinarily lie at the very heart of the political process, the centerpieces of legislative judgment in a democratic society. Yet under Epstein's approach they become questions with which, in the guise of constitutional factfinding, only courts can deal. Although Professor Epstein might be more willing than others to see an activist judiciary, I can hardly imagine that he would embrace a world in which regulation of the economy basically shifts from legislatures to federal courts.

Most likely Professor Epstein thinks he has proposed a world in which there is very little government, rather than one in which there is a good deal of government, but in which it is shifted to federal courts and away from legislatures. For Epstein posits a simple world in which judgments of the sort discussed above rarely have to be made. In the elemental world that he imagines,²⁶ where facts are clear, rights unambiguous, and balancing of delicately poised interests unnecessary, politics has no role.

In essence he asks his reader to acquiesce in his empirical/po-

²⁵ Epstein has some rather distinctive views about how to bring about an ideal society. Here, for example, is the kind of argument he makes against the propriety of collective bargaining for workers, and in favor of the appropriateness of yellow dog contracts (one of his examples of a voluntary transaction):

Hunger breeds fear; fear breeds aggression; aggression, conflict; and conflict, civil disorder and decay. Civic virtue, then, depends upon sufficient personal liberty, security, and wealth to keep most people far from the thin edge. What set of institutions will tend to guarantee these political conditions? The first is the facilitation of voluntary transactions, which are generally positive-sum games, because people deal only with their own property.

P. 345.

²⁶ As an example of just how elemental that imaginary world is, consider the following: "Any attack on this social legislation does not mean that the state cannot continue to govern. . . . The police can function; the courts are open; the army is at the ready . . ." P. 281.

litical judgment that redistributive legislation is unneeded and undesirable in a well-ordered and well-functioning society. He gives the game away when he says, "It is hard to see how the same argument [that justifies giving away food in a flood-torn town to avoid looting] justifies the food stamp program as an antidote to revolution."²⁷ It really isn't hard to see at all. Indeed, one might (and some do) see the whole New Deal, which Epstein so deplors, as a skillful counter-revolutionary strategy to save capitalism by making a series of timely transfer payments. Is Epstein saying, factually, that such a judgment could not plausibly have been made in the 1930s? Is he saying that the New Deal capitulated too soon? That if the government had held out longer against the poor, it might have had to give less, and thus that it violated the Constitution by not toughing it out more?

Even if one takes a deep breath and adopts the moral posture of Professor Epstein's universe, we are left with a constitutional theory that is ultimately only an appendage of his politics.

III. CAN GOVERNMENT STAY OUT OF THE ECONOMY?

Is there anything to be said for Professor Epstein's sweeping rejection of the political process? At its best, the Epstein thesis runs something like this: Property rights are, after all, constitutional rights, and they are of no less status than other constitutional rights. The very essence of such a right is its insulation against the ordinary political process. Even recognizing that constitutional rights are usually not absolute, we have some devices to assure that at least they receive the weight and deference they deserve. We require that even justifiable legislation that intrudes on constitutionally protected territory not be overbroad, that it represent the least intrusive means of meeting a legitimate problem, and so forth. Were such an approach to be adopted as to property rights, it would, among other things, provide a means for invalidating widely recognized excesses in areas such as land use zoning. That is Epstein at his most plausible. Where does it lead?

The first problem inheres in the superficially uncontroversial observation that property rights—no less than first amendment rights—are of constitutional status. While Epstein is careful to concede that first amendment rights may have a special standing,²⁸ he seems always to assume that the basic idea of speech and reli-

²⁷ P. 316.

²⁸ See p. 137.

gious protection—that government should fundamentally keep out—also applies to property and eminent domain, at least to the extent of leaving property owners no worse off than they were previously. But the very thing that makes the eminent domain clause different, and puzzling, is the long history of government economic regulation and even redistribution. It is precisely because government has so much and so often felt impelled to involve itself in the economy that the takings clause of the Constitution has, at least for most commentators, presented such a dilemma.

An interesting vantage point from which to consider Professor Epstein's notions is the involvement of government in the early days of industrialization. Though Epstein, in discussing the Mill Acts, proposes a more favorable settlement for landowners than did most courts,²⁹ it is far from clear that his scheme would obliterate all redistribution in favor of the new industrial interests.³⁰ Government changed the rules, including the rules of property, to let the technological revolution go forward. It is notable that Epstein is at his most moderate in discussing the sorts of transitions that accompany industrial or technological development.³¹

I am aware of no evidence, in Epstein's book or elsewhere, to suggest that the history, language, or logic of the eminent domain provision shows an intent to prevent all redistributive intervention in the economy, though that notion is central to Epstein's thesis. His moderation in discussing the industrial revolution suggests at least an implicit awareness of the problem. Neither the text nor the history of the eminent domain provision demands the minimalist state Epstein urges, and in the preceding pages I hope I have indicated that a quite logical and coherent world—even a principled world—might well operate on the notion that while property is entitled to some considerable protection against government, there could and should be room also for some government-mandated redistribution.

²⁹ See pp. 170-75.

³⁰ Professor Epstein probably assumes that his proposal to divide the surplus, p. 173, would make the landowner whole. He tries to be consistent in theory, but interestingly none of his proposals would stymie industrial development, as contrasted with the absolute bars he imposes on welfare-type redistribution.

³¹ In addition to the Mill Acts (where Epstein takes quite a liberal view of the "necessity" required to permit a finding of public purpose), and airplane overflights, discussed *infra* at text accompanying notes 48-50, see also p. 179 (discussing Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981)). There he seemingly acquiesces in the finding of a public purpose in a case of neighborhood condemnation to permit General Motors to build a new factory. All Epstein demands is consequential damages for the residents. See pp. 52, 83, 179.

IV. HEALTH AND SAFETY REGULATION

Professor Epstein acknowledges the propriety of health and safety regulation, seeing it as analogous to common law protection against nuisance or trespass. What changes would he bring about in this area of the law? As Epstein defines the content of property rights and the scope of takings (defining both far more expansively than is conventional or traditional), virtually every legislative decision, including the most ordinary health and safety regulations, would bear a heavy burden of justification. Only where it could be demonstrated that there is not "some less restrictive alternative available"³² could such regulation pass constitutional muster.

Epstein never explains why he adopts this particular standard of judicial review, which he calls "intermediate scrutiny,"³³ for takings cases.³⁴ About all we know is that he thinks we have too much economic regulation now and believes "intermediate scrutiny" would do away with much of it. No doubt it would. But that the optimal amount of regulation will follow from this standard—rather than one more stringent or one more lenient—apparently rests on unstated empirical assumptions. For again, surely neither the clause's text nor its "internal written logic"³⁵ mandates intermediate scrutiny as the proper standard for judicial review.

The author does not deign to tell us how much regulation—even the most widely-accepted examples, such as airplane safety, fire regulation, or poison control—would pass muster under his test. Nor does he explore how effective private tort litigation is likely to be in meeting even the most rudimentary demands of public health, safety, and welfare. Everyone might agree that less regulation would be better if these demands still could be satisfied; but Epstein nowhere shows that they could.

While Epstein would doubtless urge that this is a book about theory and principle, and not an empirical investigation, it must again be emphasized that a great deal turns on the plausibility of his factual assumptions, always confidently asserted, but never demonstrated. To avoid the "suicide pact" problem, Epstein must show his proposal offers adequate, but not excessive, protection;

³² P. 138.

³³ P. 137.

³⁴ Perhaps we should be grateful for this moderation. He might have suggested that health regulation that is costly can only be sustained on proof of "clear and present danger" of an epidemic.

³⁵ P. 28.

but he doesn't offer a whit of support for this.

V. THE ASSUMPTION OF "99.9%" CLARITY

To Professor Epstein, the physical world is divided into distinct, owned parcels where each proprietor is and should be free to do what he or she wishes, constrained only by the reciprocal rule that there be no invasion of other parcels. The whole moral force—such as it is—of the book depends upon the accuracy of this simple model of a world of mine and thine and clear lines between.³⁶ The force of Epstein's claim that his clear and predictable rules will limit judicial discretion and permit a true rule of law also depends on the workability of his models with their clear and simple rules. Otherwise, there are hard cases, difficult judgments, and room for legitimate compromises in the world of politics. But things are not nearly as clear as Epstein says they are. Nor are Epstein's rules as clear and predictable as he says they are. A few illustrative cases should suffice to suggest how much the real world departs from Epstein's simple model.

A. Water Rights

Epstein uses water law presumably to bolster his general claim that government has been taking away property rights. He asserts that when the government changes water levels to improve a river for navigation, thus impairing access or use by riparians, it has taken their rights. I admit to being unsure whether Epstein is describing what he thinks the common law is, what he thinks it constitutionally must be, or what he would like it to be.

If Epstein is simply describing what water law would look like in a legal system he would invent, he is of course certainly free to dream. If, however, he thinks that existing water law somehow supports his theories of eminent domain, he is entirely off base. Epstein begins by positing rights as between private owners, and then suggests that the state should be in no better position than a private owner. His premise is that "[u]sing the natural condition of the water as the baseline of entitlements means that no individual . . . may change the flow in ways that prevent others from using . . . the waters in question."³⁷ Both reasonable-use riparianism and prior appropriation law (the water law of most of the western

³⁶ "Yet through all the doctrinal murkiness, the settled legal rules make perfectly clear, more than 99.9 percent of the time, who, if anyone, possesses and owns anything." P. 24.

³⁷ P. 70.

states) reject such a prohibition. Is it possible that Epstein is arguing that both of these doctrines are philosophically indefensible or constitutionally impermissible? Is it possible he is saying that only the natural flow doctrine is a principled rule of water law? If so, he is in effect arguing that both the entire industrialization of the country, going back to the Mill Acts,³⁸ and the irrigation of the arid west, rested on philosophically or constitutionally impermissible foundations.³⁹ Professor Epstein also bypasses a fascinating opportunity offered by water law to explain and test his view of the original entitlement to property against which constitutional takings must be tested. Was the refusal of some western states to recognize riparian rights, because they were unsuitable to the needs of arid regions, a taking of property?⁴⁰

B. The Physical Invasion Test: Wetlands Regulation and the Coming-to-the-Nuisance Problem

In *Just v. Marinette County*,⁴¹ landowners were required by county zoning to forego almost all development of wetlands they owned within a specified distance of navigable waters, to their economic detriment. To Professor Epstein, this is a simple case. He says there was no harm to the property of another, and no "physical invasion" by the Justs of another's property. Therefore there was no conduct that would be a tort in the private realm. Thus, according to Epstein, the state had no right to regulate, and the regulation was a taking of the Justs' property: "[T]he normal bundle of property rights . . . regards use, including development, as one of the standard incidents of ownership . . . *Just* is a condemnation of these development rights, and compensation is thus required."⁴²

Let's take another look at *Just*. Wetlands border a navigable body of water. Whatever else one may say about the status of navi-

³⁸ See pp. 170-75, where he discusses the Mill Acts in the setting of the public use doctrine.

³⁹ This is only one of several matters in the book that would reach back to invalidate very long-standing institutions. Epstein's view of the public use limitation is another. A public use, according to his (novel and eccentric) view is only possible where there is "universal access at a nondiscriminatory price." P. 179. For example, urban renewal that provides housing only to those within certain income limits is, according to Epstein, unconstitutional because it is redistributive; it does not offer universal access at a non-discriminatory price. Epstein's interpretation of the public use provision would invalidate tax-financed poorhouses, a public function that has been carried out since Elizabethan times.

⁴⁰ See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

⁴¹ 56 Wis. 2d 7, 201 N.W.2d 761 (1972), discussed by Epstein at pp. 121-23.

⁴² P. 123.

gable waters (which is rather complicated), clearly the Justs did not own them. Yet, because of the biological and hydrological connection between the Justs' wetlands and the navigable waters, the ordinary use and development of the wetlands would damage the navigable waters. True, this is not the harming of the property of another in the conventional sense of nuisance or trespass law. And, true, the harm would happen without any physical invasion or trespass, since the drying up of the wetlands would terminate their role as a biological feeder of the adjacent navigable waters.

Here is a case that traditional property law does not comfortably fit. To be sure, the Justs owned land, and certainly had an expectation of developing it. On the other hand, whatever developmental right the Justs would ordinarily have, there is certainly no authority to suggest that they had a right to damage a navigable river. Rather than seeing the case as a puzzling one that challenges the propriety of his "no physical invasion, no governmental right to regulate" approach, Epstein blandly applies a mechanical physical invasion test, and simply asserts that this was a case in which the state wanted to make the Justs' lands into a wildlife sanctuary.

The supposed strength of Epstein's physical invasion test, and of his reliance on traditional tort law standards as a measure, is its moral quality. In a world in which individuals have distinct and independent items of property, there is at least some claim to be left alone, both by others and by the state. But if interdependency is the dominant fact (your land is inextricable from the navigable waters that you do not own)—and that is the essence of the wetland, as revealed by modern biological knowledge—then it would seem that the traditional property approach, such as the physical invasion test, would deserve thoughtful reconsideration. It is Professor Epstein's total unwillingness to deal with such issues and his unblinking reliance on wholly formalistic distinctions that take both analytical and moral force from his arguments.⁴³

Moreover, Epstein is quite opportunistic in applying his rules. In the *Just* case, mechanical application of the no-invasion theory permits him to find an unconstitutional taking. Yet later in the book, he says that though the physical invasion test has a "Cartesian appeal," one cannot "make physical invasion the sole touch-

⁴³ Epstein's analysis is not saved by his recognition that there is always some uncertainty at the edges of decision, such as deciding whether a marginal case is or is not a nuisance. See p. 114. What is wrong with Epstein's analysis of the *Just* case is not that it mischaracterizes "at the edges," but that it refuses to examine the nature of different interests in property and their relationship to each other.

stone . . . [There must be] a mixture of utilitarian and distributive considerations: everyone will be better off by relaxing the absolute conceptions that drive the system of private property."⁴⁴ A nice point, but apparently not nice enough to apply to the *Just* case.

Nor nice enough to apply to the coming-to-the-nuisance problem,⁴⁵ which has troubled most commentators.⁴⁶ To Epstein the case is easy. If the first user was emitting fumes across property lines, he was violating the physical invasion test, and he must yield to the new residents. What Professor Frank Michelman, as thoughtful a commentator as we have in legal academia, found a very troubling problem—what type of strategic behavior by one party or the other could have avoided the harmful interaction between the parties—is just tossed aside by Epstein: "[T]he causal question is only this: did the brickmaker discharge pollution onto the land of his neighbors? That question can be answered by the simple techniques of observation."⁴⁷ What has happened to the notion that we must sometimes relax mechanical rules in favor of "utilitarian and distributive considerations"?⁴⁸

C. Airplane Overflights: The Ad Coelum Rule

I turn finally to the airplane overflight cases.⁴⁹ Here in theory one might expect Epstein to insist that the airline must pay off every landowner over whose tract the plane flies, a clear instance of physical invasion under the ad coelum doctrine. Yet, he does not insist on compensation in this instance. Why? Perhaps such a result seems too impractical, even for a book that purports to scorn such considerations. Perhaps the overflight is not as threatening economically as social welfare legislation and land use regulation, which are the central targets of the book. Whatever the reason, for most airplane overflights Epstein creates an exception to his usual

⁴⁴ Pp. 229-30.

⁴⁵ How does one choose between the first user—an industrialist who has located out in the country and is doing no harm until, years later, residential development begins on his borders—and the new residents who now sue to enjoin the first user as a nuisance?

⁴⁶ See pp. 118-21.

⁴⁷ P. 119.

⁴⁸ P. 230. It might have cleared things up if Epstein had troubled to explain the relation between his treatment of the coming-to-the-nuisance cases and his "locality rule," which provides that "everyone who suffers the limited nuisances of others is fully compensated by the parallel right to inflict limited nuisances upon others," pp. 232-33, and which seems to offer the opposite result for the coming-to-the-nuisance cases.

⁴⁹ See p. 235.

rules. His explanation is that the landowner does not seek real compensation for the overflight, but only "holdout value,"⁵⁰ and landowners derive benefits from air transport in the form of cheaper goods and services which leave them better off than if there had been no use of the airspace.

Surely this is an odd view. Why not say that the landowner would be yet better off if he could obtain some rental value for his airspace, and also get the benefits of air transportation? Professor Epstein asserts—without further explanation—that to have both the benefits of the transportation and the right of exclusion would constitute double payment.⁵¹ Yet an owner of land is permitted to demand compensation from a pipeline company that wants to run a pipeline underneath his tract, even though he will also be better off as a result of the transportation of gas or some other substance. So far as I know such payments have never been considered double compensation, and have always been required in eminent domain law. Is Epstein fashioning some new and expanded version of the offset rule in condemnation law? Is he here again playing by the rules of a game known only to him?

CONCLUSION

The airplane overflight cases with which I ended my review are only minor blemishes in this book whose far more significant failures I remarked earlier. But they illustrate a point that particularly needs to be emphasized. The economic world is more complex and unruly than Professor Epstein would wish it. Complexity means that judgments are required; judgments mean that some sort of political process is needed. The legal world is also more complex than Epstein admits. His simple formal rules risk becoming trivial where they are predictable (as in *Just*), and they are far less certain and predictable than Professor Epstein believes.

Of course Epstein is not alone. He joins a group of conservative lawyers—like Cooley, Dillon, and Field—who a century or so ago fought the last losing battles against industrialization from behind the rampart of the public purpose doctrine. To Professor Epstein I offer the conclusion of Chief Justice Shaw, reflecting on the sorts of claims Epstein makes, when they were much more in style back in 1839:

⁵⁰ *Id.*

⁵¹ *Id.*

It is difficult, perhaps impossible, to lay down any general rule, that would precisely define the power of the government, in the acknowledged right of eminent domain. It must be large and liberal so as to meet the public exigencies; and it must be so limited and constrained, as to secure effectually the rights of the citizen. It must depend in some measure, upon the nature of the exigencies as they arise, and the circumstances of particular cases.⁵²

The fascination of the eminent domain clause is that it poses the question how political and economic processes which permit redistributions that are widely perceived as necessary can be controlled in a world that recognizes and gives great respect to property rights. The pity is not that Professor Epstein has failed to master the paradox implicit in this question, for many others (including this reviewer) have tried and failed. The pity is that he has become the prisoner of an intellectual style so confining and of a philosophy so rigid that he has disabled himself from seeing problems as beyond the grasp of mere formalism.

⁵² *Boston Water Power Co. v. Boston & Worcester R.R.*, 40 Mass. (23 Pick.) 360, 394-95 (1839).