

CHAPTER 2

THE TAKINGS CLAUSE, TAKINGS DOCTRINE CIRCA 1985 & RICHARD EPSTEIN'S THEORY

CONSTITUTIONAL TEXT AND ORIGINAL INTENT

The Takings Clause states in its entirety: "nor shall private property be taken for public use, without just compensation." By its terms, the clause's scope is quite narrow: It applies only when the government "takes" private property and it does not prevent such takings, but rather requires that the government provide "just compensation" when takings occur. While the term "take" is not defined in the Constitution, it most naturally means an expropriation of property, such as when the government exercises its eminent domain power to acquire private property to build a road, a military base or a park.

This plain language interpretation of the clause is consistent with both the intent of the Framers of the Constitution and the opinions of the Supreme Court in the eighteenth and early nineteenth centuries. While there is considerable academic disagreement over the Framers' general views on property, there is little debate that the Framers believed that the Takings Clause only would prohibit actual expropriations of private property. Even justices like Antonin Scalia, who have applied the clause beyond its text and original meaning, start from a recognition that the Framers believed the Clause would only apply to actual expropriations of property.¹ Similarly, there is no dispute that until the second half of the nineteenth century, the Supreme Court steadfastly refused to extend the clause beyond actual expropriations. An 1870 opinion by the Supreme Court illustrates clearly the position the Court took during this era:

[the Takings Clause] has always been understood as referring only to direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. . . . [I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.²

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— *Justice Antonin
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THE EVOLUTION OF MODERN (PRE-1985) TAKINGS LAW

“all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community”
 — *Mugler v. Kansas*

The notion that the Takings Clause may confine government actions beyond the purposeful expropriation of property emerged gradually over the next one-hundred years as the Supreme Court ruled on cases in which government action very closely resembled expropriations of property. The first of these cases, *Pumpelly v. Green Bay Company*, involved a state-authorized dam that flooded Pumpelly’s property. In requiring compensation, the Court noted:

[i]t would be a very curious and unsatisfactory result, if in construing a provision of constitutional law. . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it has not taken for the public use.³

To avoid this “curious and unsatisfactory” result, the Court ruled that, “where real estate is actually invaded,” a taking may be held to have occurred.⁴

Nearly fifty years later, in the 1922 case of *Pennsylvania Coal v. Mahon*, the Court expanded the reach of the Takings Clause again to encompass particularly oppressive regulations. *Mahon* involved the Kohler Act, a state law that prevented coal companies from mining coal that formed the support for the surface area. Pennsylvania law recognized this “support estate” as a distinct property interest, and Justice Holmes’ found the Act “purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate...”⁵ Justice Holmes declared that the Pennsylvania law had “very nearly the same effect for constitutional purposes as appropriating or destroying [the estate],” and, again relying on this analogy to an expropriation of property, declared that when regulations “go too far” they can be considered takings.⁶

At about the same time the Court, in *Pumpelly*, first expanded the reach of the Takings Clause beyond actual expropriations, the Court also clarified that the clause was not intended to interfere with legitimate attempts by legislatures to protect public health and safety. In doing so, the Court established a “nuisance exception” to takings liability. The exception originated in *Mugler v. Kansas*, a case involving a state law that prohibited the operation of breweries. The Court ruled in *Mugler* that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community”⁷ and that the Takings Clause does not require compensation for losses a property owner may sustain “by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”⁸

Following *Mugler*, the Supreme Court applied the nuisance exception to justify a significant number of legislative prohibitions without compensation.⁹ The Court recognized that declaring an activity a nuisance falls within the province of the legislature, and that the legislature is not limited to outlawing only those activities that have been considered by courts to be common law nuisances.¹⁰ The Court also acknowledged that what is and is not a nuisance would change over time and that the legislature could declare that uses that were formerly commonplace are contemporary nuisances.¹¹

Justice Brennan summarized the status of takings law prior to 1985 in his opinion for the Court in *Penn Central Transportation Co. v. City of New York*.¹² As Justice Brennan noted, the question of what constitutes a regulatory takings (i.e. when a regulation was sufficiently akin to an expropriation) “has proved to be a problem of considerable difficulty” and the Court “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”¹³ Instead, the Court relied upon a balancing of three factors: (1) the economic impact of the regulation, (2) the extent the regulation interferes with “distinct investment-backed expectations,” and (3) the character of the government action.¹⁴ Under *Penn Central’s* balancing test, no one factor is alone determinative,¹⁵ and significant diminutions in property value are generally permissible without compensation.¹⁶

While not always simple to apply, the doctrine the Court devised in *Pumpelly*, *Mugler*, *Mahon* and *Penn Central* had a logic based on the text and the original meaning of the clause. The clause was applied primarily to prevent uncompensated expropriations of property. Where the clause was extended beyond expropriations, the Court was careful to limit the clause’s application to regulations that reasonably could be characterized as being akin to expropriations.

PROFESSOR EPSTEIN’S ANTI-REGULATORY BLUEPRINT

Enter Professor Epstein. In a theory first articulated in the late 1970s and, with a grant from a conservative foundation, printed in book form in 1985,¹⁷ Professor Epstein posited that the Takings Clause could be used as a tool to implement the Reagan administration’s crusade against federal regulations. Put another way, Epstein theorized that the Takings Clause renders unconstitutional any and all redistributions of wealth, and thus renders “constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, [and] progressive taxation.”¹⁸

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Professor Epstein’s thesis is simple enough to describe. He contends that there is a natural right to property ownership, and that, based on the philosophy of John Locke, the government has only a very limited right to interfere with such ownership. Property ownership, in turn, consists of a bundle of rights, of which possession, use, and disposition are the most important. Any governmental interference with any of these rights, Epstein asserts, is a taking that must be compensated — “no matter how small the alteration and no matter how general its application.”¹⁹

To reach his result, Epstein suggested that the Supreme Court should revise then-standing precedent in several critical ways. First, and most importantly, Epstein argued that the Court should dramatically increase the number of regulatory actions that are subject to judicial review. Under *Penn Central*, the Court reviewed a very narrow category of cases under the Takings Clause; typically only those regulations that had a significant impact on the value of the “parcel as a whole.”²⁰ Epstein argued as follows: (1) that property ownership can be divided into “incidents” or “sticks in the bundle” (such as the right to use the property, the right to exclude others and the right to sell or grant property to one’s heirs) and that the Takings Clause “extends to each stick in the bundle as well as to the bundle itself,”²¹ and (2) that the Takings Clause protects against partial as well as total takings. In other words, according to Epstein, if the government interferes in any way with any of the sticks-in-the-bundle, the property owner has a potential takings claim.²²

Second, Epstein advocated a reconstruction of the nuisance exception to Takings Clause liability. As described above, the nuisance exception crafted by the Supreme Court in *Mugler* and subsequent cases was an evolving doctrine, defined by the legislature and changing with new notions of what constitutes an injurious use. Epstein advocated that the Court adopt a narrower, static definition of the nuisance exception that would, in essence, freeze the notion of what is a nuisance to the narrow category of injurious uses (generally involving physical invasions of neighboring properties) that historically have been recognized as a nuisance by common law courts.

Finally, citing favorably to the Supreme Court’s discredited opinion in *Lochner v. New York*, Epstein argued that courts should apply a form of heightened scrutiny to examine the link between the ends (purposes) of land use regulations and the means for achieving those ends.

EPSTEIN CRITIQUED

Although criticized (if not ridiculed) within the legal academy as “shallow,”²³ a “travesty of constitutional scholarship,”²⁴ and a failure as a matter of history, logic, philosophy and textual analysis²⁵ — *Takings* has been used as a legitimizing tool by those interested in using the Takings Clause to halt government regulation.²⁶ More importantly, as described in detail in Chapter Five, many of the

changes to takings doctrine that Epstein proposed now have found their way into federal case law, and the judges and justices making these critical alterations to constitutional law have relied extensively upon *Takings*.²⁷ It is therefore important to articulate, clearly and early in this report, the legion and severe flaws in Professor Epstein's work. These flaws render Epstein's work thoroughly unable to bear the intellectual weight that conservative and libertarian judges, activists and policy makers have tried to rest upon it.

Correcting John Locke

The principal reason *Takings* is both dangerous and disingenuous is that it purports to be a book about what the text of the Constitution says, but it is actually an extended description of what Professor Epstein wishes the Constitution said.²⁸ Most remarkable is Epstein's claim that his end result—the requirement of compensation for virtually any regulation that diminishes the value of property—is commanded by the text of the Constitution.²⁹ How Epstein reaches this point is difficult to follow, as his theory of interpretation is both elusive and internally inconsistent. He begins his book by contending that property is a natural right and that Locke's philosophy of limited government animates the Constitution. Both claims are controversial, and Epstein offers no evidence that the Framers believed property was a natural right (nor does he explain how such a belief is reflected in the Constitution), nor does he confront the vast body of scholarly literature that demonstrates that Locke was only one of several philosophers influential at the time the Constitution was framed.³⁰ What is truly amazing, however, is that after extolling the influence of Locke, Epstein seeks to "correct" a portion of Locke's philosophy that is inconsistent with Epstein's theory.

Specifically, Locke believed that property originally was owned in common as a gift from God. Individuals, according to Locke, could acquire private property by investing their labor in the property, and as a result, one could assert private property rights in the product of one's labor. These private rights, however, could only be exercised "where there is enough, and as good left in common for others."³¹ Locke's theory of property, which Epstein contends influenced the Constitution, thus provided for the right of each person to an equal share of property and precluded private acquisitions of property that would deprive others of this right. Instead of confronting this aspect of Locke, and explaining how it can possibly fit with Epstein's theory that individuals should be completely free to acquire as much property as possible, Epstein brushes it aside by "correct[ing]" Locke's philosophy to allow for the unfettered acquisition of private property. This correction, although done almost casually by Epstein, is a radical restatement of Locke's philosophy. As one commentator noted, it is "akin to a Christian claiming that Judaism is consistent with his religion, with a small correction of Judaism texts to embrace Jesus Christ as the Son of God."³²

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— Charles Fried

Epstein's "Plain Meaning"

"My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause."

— Robert Bork

Epstein's superficial and manipulative treatment of Locke, which occurs early on in *Takings*, gives a good preview of things to come. After explaining the philosophical foundations of his theory, Epstein then addresses constitutional interpretation directly. Contrary to generations of scholars who have struggled to make sense of the Takings Clause, Epstein suggests that the answer is easy: simply follow the ordinary language of the text. Epstein thus blithely contends, in a mere 12 pages of his 350 page book, that the language of the Takings Clause alone, which requires that "private property shall not be taken for public use without just compensation," renders suspect any interference with any strand in a property owner's bundle of rights—i.e., almost all social welfare and land-use regulation of the last sixty years. He recognizes that the key terms in the clause—private property, taken, public use, and just compensation—are not defined in the Constitution, but suggests that the terms can be concretely defined by looking to "the way these words [were] used in ordinary discourse by persons who are educated in the normal social and cultural discourse of their own time."

One has the immediate impression when reading this section of Epstein's book that it cannot be that simple, and one wonders why—if the answers are all in the plain language of the constitutional text—Epstein felt the need to begin his book with a discussion of natural rights and Locke's philosophy. The answers become clear in the ensuing chapters, as Epstein fails to adhere to the "plain language" approach he advocates and continually falls back on philosophical and natural rights arguments to support his theory. As Joseph Sax observed, Epstein's inexplicable shifts gives one the sense that Epstein is playing a game "whose rules only he knows."³³ Not surprisingly, Epstein's interpretive shell game "produces a Constitution that comports perfectly with his personal political philosophy."³⁴

An example should give a good idea of how Epstein accomplishes his task. Perhaps the most important question in takings law today is whether property owners should be compensated when a land-use regulation diminishes the value of a piece of property, but does not take away all value. True to his conservative values, if not to constitutional principle, Epstein argues that property owners of course must be compensated under such circumstances. According to Epstein, a "taking" has occurred whenever the government "diminish[ed] the rights of the owner in any fashion. . . no matter how small the alteration."³⁵

There is one problem with this contention: the word "take" does not mean "diminish" today, and there is no evidence that it ever did. The same is true with the word "alter"—it simply does not mean "take" and never did. There is thus no way to justify Epstein's conclusion as flowing from the text of the Takings Clause. On the contrary, it turns out that with regard to perhaps the most crucial and controversial issue in takings law, whether property owners should be compensated whenever regulations diminish but do not eviscer-

ate property values, Epstein's own anointed theory of constitutional interpretation—following the plain language of the text—leads to precisely the opposite result of that which he advocates. True to form, Epstein does not confront this obvious inconsistency, but ducks it; he never offers a definition of the term “take,” nor does he argue that his expansive notion of the reach of the Takings Clause is consistent with the ordinary meaning of the term “take.” Instead, he falls back on his philosophical argument that the Framers, in reliance on Locke (corrected, of course, to suit Epstein's theory), granted the government very limited power to interfere with private property. As observed by Professor Alexander, while Epstein's contention “is an argument for a broad construction of takings, it is surely not the argument of a textual literalist.”³⁶

The inconsistencies in Epstein's theory can be illustrated by another example. Epstein argues on the one hand that we should interpret the words of the Takings Clause according to the way those words were used by educated persons at the time of the framing of the Constitution. But then he suggests, on the other hand, that we should simply ignore what those same educated persons actually did in terms of regulating land, labor, or wages. It is therefore not important to Epstein that the framing generation allowed extensive land-use regulations and wage and price controls; Epstein is not at all concerned that his interpretation is inconsistent with the evidence regarding the Framers' original intent. Why, though, should we ignore what these educated persons did when trying to discern how these same educated persons would have interpreted the words in the constitution? After all, even Epstein acknowledges that historical sources “are exceedingly helpful in allowing us to understand the standard meanings of ordinary language as embodied in constitutional text.”³⁷ Historical sources, in turn, indicate quite strongly that the standard meaning of the phrase “take private property” did not encompass land-use regulations.³⁸

Epstein's Call For Judicial Activism

In short, Epstein's conclusions about the scope of the Takings Clause are at odds with the “plain language” method of constitutional interpretation which he advocates. His conclusions rest instead on vague, adulterated philosophical foundations that he fails to connect to the Constitution itself. The blatant and repeated inconsistency between his “plain language” approach and the radical results he reads into the Constitution, together with his occasional reliance on natural rights and his corrected version of Locke's philosophy, largely explain why *Takings* was received with such disdain by constitutional scholars. The book simply does not offer a principled means of interpreting the Takings Clause. Rather it offers an abundance of smoke and mirrors that advocates and judges sympathetic with Epstein's distaste of government regulation can use to provide some semblance of authority to their arguments about what the Takings Clause means. And this appears to be precisely what Epstein intended. In his book and in the op-ed pages of the *Wall Street Journal* in an article entitled “Needed: Activist Judges for

“The history presented in th[is] Article shows, to the contrary, that regulation of non-injurious uses of land was very common at the time of the nation's founding.”

— John Hart

Economic Rights,”³⁹ Epstein suggested that implementing his theory would require “a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had.”⁴⁰

Epstein’s call for judicial activism has been answered in part by the Federal Circuit and the Supreme Court, both of which, as described later in this report, have expanded the scope of the Takings Clause in recent years, often along lines suggested in Epstein’s book.⁴¹ Epstein’s call has also inspired the constitutional litigation strategies of the current property rights movement, which increasingly has turned its attention to the federal judiciary as the means by which it will accomplish its agenda.⁴² Judicial activism, of course, is loudly decried by the same conservatives who comprise the property rights movement—Orrin Hatch, to cite one prominent example—on the grounds that unelected federal judges should not, without clear support in the Constitution, interfere with democratic law-making. This criticism, however, applies with perfect and ironic force to the expansion of the Takings Clause as such an expansion is without clear support in the Constitution or in the historical evidence regarding original intent. Indeed, prominent conservative legal scholars—including Robert Bork and Charles Fried—have strongly criticized the Takings Project on just this basis.⁴³

Nor can this particular brand of judicial activism be justified on the ground that federal courts would simply be correcting defects in the legislative process. Constitutional scholars have defended judicial protection of “discrete and insular minorities” against claims of judicial overreaching by arguing that it is appropriate, and indeed enhances the democratic operation of government, for federal courts to protect those who are shut-out from the normal political process because of systemic prejudice or a denial of access to power.⁴⁴ Judicial intervention, in other words, might be appropriate to correct a legislative process that does not pay sufficient attention to the needs and concerns of “discrete and insular” minorities. With regard to most property owners, and certainly with regard to developers, it is quite difficult to justify federal court intervention on the ground that such groups or individuals have limited access to or are routinely shortchanged by the political process.

In the end, then, Richard Epstein and the promoters of the Takings Project are calling for federal judges to interfere substantially with a plethora of democratically-enacted and democratically-supported legislative measures, even though such a result is not commanded by the language of the Constitution, not explained by reference to the Framers’ intentions, and not justified by any coherent constitutional theory. This call for heightened judicial protection, moreover, is made on behalf of a group that generally does quite well in the legislative process. It is difficult to imagine a less compelling agenda for the federal judiciary.

“In what follows I shall advocate a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had.”

— Richard Epstein

Endnotes

¹ See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1028 n.15 (1992) (“Justice Blackmun is correct that early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all. . . .”); see also, *id.* at 1056—58 (Blackmun J. dissenting); EPSTEIN, *supra* Ch. 1, note 2, at 26—29 (recognizing historical evidence that the many of the Framers thought the Takings Clause was limited in application to physical expropriations but concluding that there is no need “to take into account the actual historical intentions of any of the parties who drafted or signed the document”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 825 (1995); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) at 230 (“My difficulty is not that Epstein’s constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause.”).

² *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551—52 (1870).

³ 80 U.S. (13 Wall.) 166, 177—178 (1872).

⁴ *Id.* at 181.

⁵ 260 U.S. 393, 414 (1922).

⁶ *Id.* at 414—15.

⁷ *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

⁸ *Id.* at 669.

⁹ See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (prohibition on operation of a gravel pit); *Miller v. Schoene*, 276 U.S. 272 (1928) (infected cedar trees); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition on brickyards); *Murphy v. California*, 225 U.S. 623 (1912) (pool halls); *Powell v. Pennsylvania* 127 U.S. 678 (1888) (ban on sale of oleomargarine); see also *Chicago, Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561 (1906) (no compensation required when railroad forced to tear down and rebuild an unsafe bridge).

¹⁰ *Goldblatt*, 369 U.S. at 593; *Hadacheck*, 239 U.S. at 411; *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915) (declaring it “beside the question” whether a livery stable was a common law nuisance and noting that the legislature could “declare that in particular circumstances . . . a livery stable shall be deemed a nuisance in fact and in law. . .”).

¹¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive. . . while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.

Id. at 387.

¹² 438 U.S. 104 (1978).

¹³ *Id.* at 123—24.

¹⁴ *Id.* at 124.

¹⁵ *Id.* at 130—31 & n. 27.

¹⁶ *See Euclid*, 272 U.S. at 384 (permitting 75% diminution in value); *Hadacheck*, 239 U.S. at 405 (permitting 92.5% diminution in value from \$800,000 to \$60,000); *see also* *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 645 (1993) (rejecting a takings claim based on allegations that an employer’s “with-drawal liability” from a multi-employer pension plan required payments of “46% of shareholder equity,” on the grounds that “our case have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”).

¹⁷ EPSTEIN, *supra* Ch.1, note 2, at xi (recognizing “a generous grant from the Institute for Educational Affairs”).

¹⁸ *Id.* at x.

¹⁹ *Id.*

²⁰ *See Penn Central*, 438 U.S. at 130—132.

²¹ EPSTEIN, *supra* Ch.1, note 2, at 58.

²² *See id.* at 57, 62.

There is no hierarchy among incidents, no degrees of ownership. There is a partial taking of property if possession is removed, and use and disposition remain; if use is removed, and possession and disposition remain; or if disposition is removed, and use and possession remain. Nor is there a requirement that the loss of the incident be total; partial losses of single incidents may determine the measure of damages, but may not negate the taking. Any deprivation of rights is a taking, regardless of how it is effected or the damages it causes.

Id. at 62.

²³ Thomas Ross, *Taking Takings Seriously*, 80 NW U. L. REV. 1591, 1592 (1987).

²⁴ Thomas C. Grey, *supra* Ch.1, note 8, at 24. Earlier in Grey’s article he notes that, in many respects, *Takings* “belongs with the output of the constitutional lunatic fringe.” *Id.* at 23.

²⁵ *See* Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279, 279 (1986). For additional evidence of the disdain with which scholars received *Takings*, *see* text and notes below and Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* §9—6, at 606 n.6 (2d ed. 1988) (“the gaps, flawed assumptions and argumentative elisions in Epstein’s reactionary interpretation of the Fifth Amendment [are] too numerous to address fairly here . . .”); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556, 567 (1995).

²⁶ *See* Ross, *supra* Ch.2, note 23, at 1592, 1603; Treanor, *supra* Ch. 2, note 1, at 815 (“[a]lmost certainly, in recent years Professor Richard Epstein has influenced political discourse about the Takings Clause more than any other academic”); Ed Carson, *Property Frights (property rights)*, REASON, May 1, 1996, at 29; (“Richard Epstein provided the intellectual framework for the property rights movement. . . . Public interest law

firms, such as the Institute for Justice, Pacific Legal Foundation, and the Northwest Legal Foundation, used Epstein's work to launch a property rights renaissance in the courts.")

- ²⁷ See e.g., Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 *Env'tl L.* 171, 193 (1995) ("[w]hat is even more remarkable about *Florida Rock* is that its 'partial takings' doctrine seems to have come directly from Professor Epstein's book").
- ²⁸ See BORK, *supra* Ch.2, note 1 at 230 (1990) ("Epstein has written a powerful work of political theory, one eminently worth reading in those terms, but has not convincingly located that political theory in the Constitution"). As Professor Sax observed in his review, "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." Sax, *supra* Ch.2, note 25, at 280.
- ²⁹ See EPSTEIN, *supra* Ch.1, note 2, at 31.
- ³⁰ See Treanor, *supra* Ch.2, note 1 at 823—24 ("Epstein's equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke had no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as *the* ideology of the framing."); Flaherty, *supra* Ch.2, note 25 at 567 ("if the past two generations of historical work have settled upon any point, it is that Lockean philosophy was *not* dominant in the eighteenth century. . . .")(emphasis in original).
- ³¹ See EPSTEIN, *supra* Ch. 1, note 2, at 10—11 (citing JOHN LOCKE, *OF CIVIL GOVERNMENT*, ¶27 (1690)).
- ³² *Id.* See also Charles Fried, *Protecting Property—Law and Politics*, 13 *HARV. J.L. & PUB. POL'Y* 44, 48—49 (1990). Fried, Solicitor General during Reagan's presidency, wrote with regard to Epstein's "correction" of Locke that "Locke himself. . . was insufficiently Lockean" for Epstein, and thus "Professor Epstein is moved to complete not only the text of the Constitution by reference to the Lockean spirit, but Locke's text itself." *Id.*
- ³³ Sax, *supra* Ch.2, note 25, at 280.
- ³⁴ *Id.* at 282.
- ³⁵ Epstein, *supra* Ch.1, note 2 at 57.
- ³⁶ Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 *U. Miami L. Rev.* 223, 225 (1986).
- ³⁷ EPSTEIN, *supra* Ch.1, note 2, at 29.
- ³⁸ See John F. Hart, *Colonial Land Use Law and Its Significance For Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252, 1258 (1996) ("Today's doctrine of regulatory takings only makes sense as a reading of the Takings Clause if, as the Court has said, land use regulation was confined to injurious uses when the Fifth Amendment was adopted, with regulation of noninjurious uses coming much later. (citation omitted). The history presented in the Article shows, to the contrary, that regulation of non-injurious uses of land was very common at the time of the nation's founding. This prevalence implies that the Framers did not address regulation in the Takings Clause because they did not regard regulation as a form of taking.") (citation omitted).

³⁹ Grey, *supra* Ch.1, note 8, at 22 n2 (quoting the article).

⁴⁰ See EPSTEIN, *supra* Ch.1, note 2, at 30.

⁴¹ See, eg., James L. Huffman, *Judge Plager's "Sea Change" in Regulatory Takings Law*, 6 *FORD. ENVTL. L.J.* 597, 600—10 (1995) (praising Judge Pager's opinion in *Florida Rock*, but suggesting that it could have been improved by an even closer adherence to the doctrine outlined by Professor Epstein); see also James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's Private Property and the Power of Eminent Domain*, 17 *ENVTL. L.* 153 (1986).

⁴² See, eg., Fried, *supra* note 32, at 48 ("The text and inspiration for some of the boldest of the recent litigation efforts has been Richard Epstein's celebrated book, *Takings*.); Ed Carson, *supra* Ch.2, note 26; Mark Pollot, *GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA*, at 161 (1993) ("If lasting change is to come in property rights protection, it will come from court actions that resolve questions that are presently unresolved. Legislation is too open to change whereas judicial rulings of constitutional dimension cannot be changed by the legislature.").

⁴³ BORK, *supra* Ch.2, note 1, at 223, 230—231 ("[t]hough I am more in sympathy with [Epstein's] political ends than I am with the objectives of the ultraliberals, I do not think they establish satisfactorily that those ends may be reached through the Court"); see Fried, *supra* Ch.2, note 32, at 48—51. See also, Deborah Graham, *Conservative Academics: Rising Stars*, *Legal Times*, Mar. 18, 1985, p.1. ("Epstein has gained a certain amount of disfavor among some conservatives because they think he favors judicial activism."). In a typically superficial passage in his book, consisting of one and one-half pages, Epstein asserts that his theory does not "depend upon a belief in judicial activism in cases of economic liberties," because the consequences of his theory "are necessary implications derived from the constitutional text and the underlying theory of the state that it embodies." EPSTEIN, *supra* Ch.1, note 2, at 30—31. As explained above, Epstein's theory most certainly is not a necessary implication of the constitutional text. What "theory of the state" the text embodies, in turn, is a matter of serious scholarly debate, utterly ignored by Epstein, who inexplicably argues just pages before this assertion that constitutional terms should not be interpreted with reference to their purposes or the values served by them.

⁴⁴ The most famous explication of this political process theory of judicial review is John Hart Ely's *DEMOCRACY AND DISTRUST* (1982).