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IMPACT OF RICHARD A. EPSTEIN

James W. Ely, Jr.*

It is a widely accepted premise that Professor Richard A. Epstein has exercised a pervasive influence on American legal thought. In a much quoted statement, Dean William Michael Treanor, for instance, has declared: “[a]lmost certainly, in recent years Professor Richard Epstein has influenced political discourse about the Takings Clause more than any other academic.”¹ Another observer asserted that Professor Epstein “provided the intellectual framework for the property rights movement.”² In a dramatic movement, Senator Joseph R. Biden, Jr., held up Epstein’s book on takings and repeatedly interrogated Supreme Court nominee Clarence Thomas as to whether he agreed with Epstein’s position regarding the constitutional protection of economic rights.³ In 2001, a prominent law professor claimed that “in recent years it appears that scholarship by those on the Right . . . has had more profound effects on social policy than has scholarship by those on the Left.”⁴ To support this contention he cited Epstein’s book on takings.⁵

It should be noted that many of these assertions about Epstein’s supposed influence have been advanced by his critics. They seem to almost delight in picturing Epstein as a gray eminence whose nefarious views are poisoning the legal culture. But more sympathetic observers have also trumpeted his impact. Henry G. Manne,

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¹ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 815 (1995); see also William Michael Treanor, *Translation Without Fidelity: A Response to Richard Epstein’s Fidelity Without Translation*, 1 GREEN BAG 2D 177 (1998) (“Few legal scholars can even dream of having the effect that Richard Epstein has had on law and on politics, and his remarkable influence is probably greatest in the area of takings law.”).

² Ed Carson, *Property Frights: Why Property Rights Initiatives Are Losing at the Polls*, REASON, May 1996, at 27, 28.

³ *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 113–15, 127, 397 (1991) (statements of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary). The incident is recalled in Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005, § 6 (Magazine), at 42.

⁴ Richard O. Lempert, *Activist Scholarship*, 35 LAW & SOC’Y REV. 25, 28 (2001).

⁵ *Id.*

for example, insisted in 1988 that Epstein was “already beginning to have a substantial influence on a new debate” over economic rights.⁶

How accurate are these claims? Any attempt to measure the impact of a particular scholar is fraught with hazard. There are no easy or mechanical guideposts by which to assess a person’s influence on judges, legislatures, or the legal culture generally.⁷ It seems fair to conclude that most legal scholarship has no impact whatsoever.⁸ Despite these cautionary comments, I hope in these brief remarks to evaluate Professor Epstein’s influence upon current legal thought regarding the rights of property owners within our constitutional scheme.

I start by assessing his impact on judicial decisions pertaining to property rights. For years, Professor Epstein has been the leading academic spokesman in support of a more vigorous interpretation of the property clauses of the Constitution. His primary focus has been upon the Takings Clause of the Fifth Amendment. Yet, contrary to the commentators noted above, one must conclude that Epstein’s impact upon judicial decisions interpreting this clause has been slight. The Supreme Court has rarely cited Epstein’s work and then only in connection with peripheral or non-controversial points.⁹ Citations of his leading work, *Takings: Private Property and the Power of Eminent Domain*, by lower federal and state courts have similarly been infrequent. Even when cited by courts, it is far from clear that the work had a decisive influence on the outcome of particular cases.¹⁰ In fact, several judicial opinions comment on Epstein’s views only to reject them.¹¹ A line of celebrated regulatory takings decisions, from *Nollan v. California Coastal Commission*¹² through *Dolan v. City of Tigard*,¹³ however welcome to property rights enthusiasts, fell well short of adopting Epstein’s analysis of takings issues. Epstein’s argument that rent control

⁶ Henry G. Manne, *Introduction*, GEO. MASON U. L. REV., Winter 1988, at 1,3.

⁷ For instructive studies of the difficulties in assessing the influence of towering figures, see M. Todd Henderson, *The Influence of F.A. Hayek on Law: An Empirical Analysis*, 1 N.Y.U. J.L. & LIBERTY 249 (2005); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

⁸ One study has concluded that most law review articles are rarely even cited. Posting of Tom Smith to The Right Coast, <http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html> (July 13, 2005, 14:52).

⁹ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987).

¹⁰ In several cases the book has been cited rather generally and does not appear to have been determinative of the outcome. See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180 n.12 (Fed. Cir. 1994); *Sacramento Mun. Util. Dist. v. United States*, 61 Fed. Cl. 438, 443 (2004).

¹¹ See *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (rejecting Epstein’s assertion that contracts are a form of property protected by the Fifth Amendment), *cert. denied*, 517 U.S. 1243 (1996).

¹² 483 U.S. 825 (1987).

¹³ 512 U.S. 374 (1994).

constitutes a type of regulatory taking¹⁴ has yet to convince courts.¹⁵ Even during recent terms, the Supreme Court majority opinions did not betray the slightest influence of Epsteinian thinking.¹⁶

In addition to his efforts to strengthen the regulatory takings doctrine and put some teeth into the “public use” requirement, Epstein has sharply criticized the determination of “just compensation” in eminent domain cases.¹⁷ He has charged that courts systematically undercompensate owners and approve valuations that do not make the loser whole.¹⁸ Such inadequate valuations, of course, undercut the protective function of the Takings Clause. To date, however, courts have not demonstrated any interest in revisiting the contested question of just compensation.¹⁹

This is not to say that Epstein’s impact on the courts has been negligible. One could, for example, detect the effect of Epstein’s views in the dissenting opinions in *Kelo v. City of New London*.²⁰ In particular, Justice O’Connor’s criticism of earlier decisions conflating the “public use” requirement with the police power mirrors Epstein’s position.²¹ One observer has maintained that the plurality Supreme Court decision in *Eastern Enterprises v. Apfel*²² “reflects the influence of the libertarian anti-regulatory policy of scholars like Professor Richard Epstein.”²³ Moreover, some

¹⁴ RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 186–88 (1995) [hereinafter EPSTEIN, TAKINGS]; Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 742–50 (1988).

¹⁵ See, e.g., *Fed. Home Loan Mortgage Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47 (2d Cir. 1996) (specifically rejecting Epstein’s position).

¹⁶ See James W. Ely Jr., “Poor Relation” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39 (analyzing and criticizing the Supreme Court’s property decisions during the 2004–2005 term).

¹⁷ Richard A. Epstein, *In and Out of Public Solution: The Hidden Perils of Forced and Unforced Property Transfer*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 316, 317 (Terry L. Anderson & Fred S. McChesney eds., 2003).

¹⁸ EPSTEIN, TAKINGS, *supra* note 14, at 182–86; Epstein, *supra* note 17, at 317–21.

¹⁹ See generally Bruce L. Benson, *The Mythology of Holdout as a Justification for Eminent Domain and Public Provision of Roads*, 10 INDEP. REV. 165, 181–85 (2005) (criticizing undervaluation in eminent domain proceedings); Gideon Kanner, *When Is “Property” not “Property Itself”: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57 (1969); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 115–20, 128 (2002) (noting that the fair market value test “generates a relatively stingy award relative to other possible standards”).

²⁰ 545 U.S. 469, 494–523 (2005) (O’Connor & Thomas, JJ., dissenting).

²¹ Compare EPSTEIN, TAKINGS, *supra* note 14, at 178–79 (noting that the “public use” requirement needs either a public good or universal right of access not just a state’s police power), with *Kelo*, 545 U.S. at 501–02 (O’Connor, J., dissenting) (stating that “public use” does not always equate to police power).

²² 534 U.S. 498 (1998).

²³ Lisa R. Strauss, Note, *The Takings Clause as a Vehicle for Judicial Activism: Eastern Enterprises v. Apfel Presents a New Twist to Takings Analyses*, 16 GA. ST. U. L. REV. 689, 732–33 (2000).

commentators have asserted that Professor Epstein's work on regulatory takings has found expression in decisions by the Circuit Court for the Federal Circuit.²⁴ The reversal of the highly controversial *Poletown* decision by the Michigan Supreme Court in 2004 also bears traces of Epstein's reading of the "public use" clause.²⁵

Professor Epstein's writings, of course, extend beyond the Takings Clause. If Epstein has had only limited impact on judicial treatment of takings claims, his calls for revitalization of the Contract Clause²⁶ and for renewed protection of economic rights under the Due Process Clause have fallen entirely on deaf ears.²⁷

Courts have had no opportunity to address Epstein's contention that the progressive income tax rate amounts to an uncompensated taking of property.²⁸ But this argument has received little attention and seems highly unlikely to prevail.²⁹

In contrast, I submit that Professor Epstein has had a much larger impact on legal culture and that intellectual currents generated by his efforts may ultimately affect judicial behavior. To put this contention in perspective, I invite you to consider the prevailing attitudes toward property rights when Professor Epstein began to address this subject. The legal realist movement in the early twentieth century had done much to undermine traditional conceptions of property rights.³⁰ Since the New Deal era, courts

²⁴ Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 192–93 (1995).

²⁵ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)). Epstein was a sharp critic of the *Poletown* decision. EPSTEIN, TAKINGS, *supra* note 14, at 179–80.

²⁶ Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

²⁷ Richard A. Epstein, *The Mistakes of 1937*, GEO. MASON U. L. REV., Winter 1988, at 5, 13–20.

²⁸ See EPSTEIN, TAKINGS, *supra* note 14, at 295–305.

²⁹ For a discussion of Epstein's views concerning progressive rate taxation, see Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85 (1996); Eduardo Moises Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221, 245–46 (1995).

³⁰ See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001).

Notwithstanding these variations, the motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare. The realist program of dethroning property was on the whole quite successful. The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy. Not

by and large had given short shrift to any constitutional challenge to economic regulations.³¹ Scholarly interest in economic rights was moribund.³² Busy attempting to legitimate the New Deal revolution,³³ most scholars applauded the apparent demise of constitutional protection for the rights of owners.³⁴ The Contract Clause³⁵ and the Due Process Clause, in so far as the Due Process Clause pertained to economic rights, were essentially written out of the Constitution. The regulatory takings doctrine, while recognized in theory by courts, was ignored in practice. There appeared to be no identifiable limit on the power of government to take property for “public use” under the power of eminent domain. One scholar even maintained that the very concept of private property had disintegrated and lost its special place in legal thought.³⁶ When I was approached by Oxford University Press to write a short history of property rights

coincidentally, state intervention in economic matters greatly increased in the middle decades of the twentieth century, and the constitutional rights of property owners generally receded.

Id. (footnotes omitted); see also GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 381 (1997) (discussing the impact of legal realists and concluding that “[t]he bundles-of-rights idea also reflects the insight that ownership is not absolute and autonomous but relative and relational”); BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998) (discussing efforts by progressives and legal realists to recast property rights).

³¹ JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 126–34 (2d ed. 1998).

³² James L. Oakes, “*Property Rights*” in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 608 (1981) (noting that “during a time of expanding social legislation” the rights of owners “were essentially confined to a legal dust bin”).

³³ KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 2 (2004) (“[T]he new constitutional scholarship was in its very sinews heavily implicated in the political project of justifying, institutionalizing, and (as conditions worked to decay its foundations) defending the New Deal constitutional regime.”); see also David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 2–9 (2003) (criticizing Progressive and New Deal era historians for tailoring constitutional history to serve political objectives).

³⁴ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 116 (1991) (“For the first 150 years, few doubted that the Founding Federalists placed a high constitutional value on private property and market freedom. Since the New Deal had transparently repudiated *this* Founding commitment, modern courts would have to find a way of preserving those fragments of the Founding ideal that had survived the popular repudiation of the property-oriented conception of limited government.”).

³⁵ James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 382 (2005) (“The general eclipse of property rights affected the Contract Clause, which fell into disuse by the Supreme Court for decades. For all practical purposes, the guarantee of the Contract Clause was now subordinated to state regulatory authority.”).

³⁶ Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980).

in the late 1980s, I seriously questioned in my own mind whether the topic was of more than purely historical interest.

Professor Epstein was the primary intellectual force in changing the terms of debate over property in the constitutional order. Once dismissed for advancing strange ideas that contradicted the conventional wisdom, Professor Epstein has seen his views resonate more widely than his critics expected. The subordination of property, once taken for granted, is now open to discussion. No thoughtful scholar can address the topic of regulatory takings without coming to grips with Epstein's arguments. Specifically, his work has been the catalyst for an outpouring of scholarship on the origins and history of the Takings Clause.³⁷ It is not too much to conclude that Professor Epstein's work has triggered a national dialogue on the role of property in American constitutionalism. The vigor with which critics assail Epstein's views—he has been compared to Thomas Malthus³⁸ and derided as a radical reactionary³⁹—is a backhand testament to their intellectual appeal and impact.

It bears emphasis that Professor Epstein's influence extends far beyond the academy and the narrow confines of legal literature. He has waged a broad intellectual offensive on behalf of the rights of property owners. Unlike most scholars, Epstein has reached a popular audience through lectures and newspaper essays. Indeed, the widespread negative reaction to the recent *Kelo* decision is partly a tribute to Professor Epstein. Without his tireless efforts to highlight the importance of property and his ability to stimulate other scholars to explore issues relating to the rights of owners, it is unlikely that the public would have perceived so acutely the dangers *Kelo* posed for ordinary citizens.⁴⁰ Even Justice Stevens, striking a somewhat defensive note, felt

³⁷ Some of this literature has sought to rebut Epstein by insisting that the Takings Clause was not originally intended to cover regulation. See, e.g., Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053 (2004); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). Other scholars have lent support to his position that the Fifth Amendment includes regulatory takings. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1561–93 (2003); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 428–36 (2003). See generally James W. Ely, Jr., "That Due Satisfaction May be Made": *The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992) (arguing that the Takings Clause is a safeguard for property owners).

³⁸ Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 22 (1986).

³⁹ William Greider, *The Right and US Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, at 21.

⁴⁰ For the public reaction, see Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation*, NAT'L L.J., Aug. 1, 2005, at 1; Joi Preciphs, *Eminent-Domain Ruling Knits Rivals—High*

compelled to explain that he really was not comfortable with the outcome in *Kelo* and thought that private market forces should be sufficient in most situations to achieve economic development.⁴¹

Aside from helping to transform the dialogue over property rights, Professor Epstein has played a key role in challenging the statist Progressive/New Deal consensus that has dominated historical scholarship for decades. His assaults on the welfare state and redistributionist programs have done much to reopen debate about the New Deal legacy. As Bruce A. Ackerman correctly pointed out, a vigorous reading of the Takings Clause “clearly threatens the new economic order wrought by Roosevelt, whose legitimacy forms the very bedrock of post-New Deal constitutional law.”⁴² Revisionists have called into question long-standing assumptions about the legitimacy of the regulatory state and have begun to reclaim the pre-1937 tradition of judicial solicitude for the rights of property owners.⁴³ This growing body of historical literature has taken several forms. Some scholars have challenged the standard celebratory accounts of the New Deal and offered a negative assessment of its impact on economic freedom.⁴⁴ A number of volumes provide a more favorable treatment of pre-New Deal jurists who sought to safeguard economic rights by limiting the reach of government.⁴⁵ David Bernstein’s provocative book provides historical evidence to vindicate Epstein’s argument that licensing laws and labor regulations promoted by progressives harmed economic opportunities for blacks.⁴⁶ In a magisterial work, Richard Pipes has emphasized the pivotal role of private property in the growth of democratic institutions and protection of individual rights.⁴⁷

Court’s Decision Puts Conservatives and Liberals Together, as Both Sides See Threats, WALL ST. J., July 8, 2005, at 4A. As of this writing, at least twenty-four states have enacted legislation to reign in the use of eminent domain for economic development purposes. The National Conference of State Legislatures is tracking state eminent domain legislation enacted in reaction to *Kelo*. See National Conference of State Legislatures, Eminent Domain: 2006 State Legislation, Sept. 12, 2006, <http://www.ncsl.org/program/natres/postkeloleg.htm>. In addition, the House of Representatives, by a vote of 365 to 33, adopted a resolution expressing its “grave disapproval” of the majority opinions in *Kelo*. H.R. Res. 340, 109th Cong., 151 CONG. REC. H. 5592 (2005) (enacted).

⁴¹ Linda Greenhouse, *Justice Weighs Desire v. Duty*, N.Y. TIMES, Aug. 25, 2005, at A1.

⁴² BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 149 (1977).

⁴³ ELY, *supra* note 31, at 134; MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001).

⁴⁴ JIM POWELL, FDR’S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE GREAT DEPRESSION (2003).

⁴⁵ See HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 (1995); Joseph Gordon Hylton, *David Josiah Brewer: A Conservative Justice Reconsidered*, 1994 J. SUP. CT. HIST. 45.

⁴⁶ DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001).

⁴⁷ RICHARD PIPES, PROPERTY AND FREEDOM (1999).

Even some liberal scholars have questioned the disparagement of property rights and noted the link between economic and personal liberties.⁴⁸

Epstein's call for a new analysis of takings law and property rights generally have contributed significantly to a re-evaluation of constitutional jurisprudence. Prevailing legal norms, however, stop far short of Epstein's vision. The standard account of a triumphant New Deal, although bruised and somewhat on the defensive, retains considerable force among scholars. Still, few can match Epstein's achievements in questioning conventional wisdom and energizing a long dormant dialogue over property rights in American constitutionalism. Moreover, the final returns concerning impact are not yet available. As that great philosopher Yogi Berra reminded us: "[i]t ain't over 'til it's over."⁴⁹ It is entirely possible that the long range influence of Professor Epstein on law and policy shall prove to be considerable.

⁴⁸ Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 CATO SUP. CT. REV. 9.

⁴⁹ PAUL DICKSON, *BASEBALL'S GREATEST QUOTATIONS* 43 (1991).