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TAKINGS: AN APPRECIATIVE RETROSPECTIVE

Eric R. Claeys*

I. WHY *TAKINGS*

In these short remarks, I hope to assess Richard Epstein's scholarly legacy by evaluating the legacy of his book *Takings: Private Property and the Power of Eminent Domain*.¹ I do so for a few reasons. One relates to my own interests. While I am honored to contribute to this tribute to Professor Epstein, I am exceedingly conscious of how little I know of the many areas on which he has written. In most of those areas, I can highlight my own ignorance more easily than I can identify any shortcomings in Professor Epstein's work. Since I have written considerably about takings, I prefer to focus there and discreetly distract attention away from my ignorance elsewhere.

My other reason for focusing on *Takings* relates to Professor Epstein. If he is going to be judged by any single work, *Takings* is probably that book. *Takings* is now twenty years old. Professor Epstein once told me that nine books out of ten are not cited within a decade of their publication. Since *Takings* is still getting cited (or, if you like, vilified) two decades after its publication, it seems fair to survey the influence it has had (or, if you like, the damage it has wrought).

II. *TAKINGS*'S CONTROVERSIAL LEGACY

If you think I jest when I use terms like "vilified" and "damage wrought," consider the reaction that *Takings* provoked immediately after its publication. In prominent reviews, by respectable and otherwise quite thoughtful scholars, *Takings* was called "a disturbing book,"² a "patent and howling failure,"³ and an "intellectual wasteland."⁴ Peg Radin described its style of argument as "philosophical camel-swallowing."⁵ Frank Michelman dismissed the kind of property theorizing associated with Epstein's project as "obtuseness."⁶

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¹ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter EPSTEIN, *TAKINGS*].

² Calvin R. Massey, *An Assault upon "Takings" Doctrine: Finding New Answers in Old Theory*, 63 IND. L.J. 113, 113 (1987) (book review).

³ Thomas Ross, *Taking Takings Seriously*, 80 NW. U. L. REV. 1591, 1592 (1986).

⁴ Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1830-31 (1986) (book review).

⁵ Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1669 n.6 (1988).

⁶ Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1628 (1988).

And those criticisms are the quick dismissals, not the jeremiads. "The book's only useful contribution," Mark Kelman decried, "may be to expose more fully the moral venality and intellectual vacuity of formal, legalized libertarianism."⁷ Kelman's hostility paled in comparison to that of leading property theorists, who intuited that *Takings* unsettled how legal scholars have talked about property for generations. Joseph Sax sputtered that Epstein is a "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."⁸ And, for my personal favorite, Thomas Grey fulminated that "*Takings* belongs with the output of the constitutional lunatic fringe, the effusions of gold bugs, tax protestors, and gun-toting survivalists."⁹

III. TAKINGS AND TAKINGS DOCTRINE BETWEEN 1985 AND 2002

If two or three critics dismiss a book as a polemical screed, the book probably is a screed. But if many leading academics make such accusations, and continue to do so long after the book has been released, the book probably has struck a raw and important nerve. *Takings* struck such a nerve.

I doubt I can give a comprehensive explanation of all the reasons why *Takings* was so controversial. In this Essay, let me focus on two reasons that seem to me in hindsight particularly important. One reason is doctrinal. While *Takings* was primarily a theoretical work,¹⁰ Epstein illustrated his theory by applying its lessons to constitutional takings doctrine. In doing so, Epstein made a surprisingly persuasive case that federal takings doctrine could support most of the principles that informed pre-New Deal "*Lochnerism*."¹¹ *Lochnerism* refers to *Lochner v. New York*¹² and the collection of substantive due process doctrines by which pre-1937 federal courts declared invalid laws that unreasonably interfered with natural-law-based individual property and liberty rights.¹³ Of course, when I call Epstein's case "persuasive," I do not mean that he convinced all readers. But many lawyers and the U.S. Supreme Court have invested a great deal of intellectual capital in the principle that *Lochnerism* was discredited in 1937, then and forevermore. While *Takings* by no means persuaded such lawyers, to them it seemed convincing enough to persuade more impressionable minds. In particular, *Takings* was alarming because it seemed to offer a roadmap that might be followed by the conservative and originalist judges that President

⁷ Mark Kelman, Searching for the Libertarian Core of Legalism: Comments on Richard Epstein's *Takings* 34 (unpublished manuscript), quoted in Ellen Frankel Paul, *A Reflection on Epstein and His Critics*, 41 U. MIAMI L. REV. 235, 237 (1986) (emphasis omitted).

⁸ Joseph Sax, *Takings*, 53 U. CHI. L. REV. 279, 293 (1986) (book review).

⁹ Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 23 (1986).

¹⁰ See EPSTEIN, *TAKINGS*, *supra* note 1, at 3 ("This book is an extended essay about the proper relationship between the individual and the state.").

¹¹ See *id.* at 277-82.

¹² 198 U.S. 45 (1905).

¹³ See, e.g., EPSTEIN, *TAKINGS*, *supra* note 1, at 279-80 nn.29-30.

Ronald Reagan and Attorney General Edwin Meese were appointing to the federal bench.

Takings was plausible in large part because it finessed some of the main problems that conventional legal wisdom assumed were lethal to *Lochnerism*. In the conventional wisdom, one leading problem with *Lochnerism* was not substantive but interpretive. In the late New Deal, Justice Robert Jackson,¹⁴ William Winslow Crosskey,¹⁵ and others insisted that *Lochner* was wrong primarily because “due process” did not give judges a blank check to strike down laws they happened to dislike. The original meaning of “due process,” after all, was *process due* or “the principle of legality.”¹⁶ While this concept is somewhat rough around the edges, the core refers to something like the following: the right to be punished by force of law only by duly appointed and impartial government officers, only under pre-existing legal procedures, and only for substantive conduct that was illegal under positive law in force at the time of the offense. That conception of due process caused the late New Deal Court to scale back the *Lochner* Court and early New Deal Court’s economic substantive due process case law.

Takings still provided a simple but deft response to such criticisms: even if *Lochner* substantive due process did not have a sound pedigree in the text of the Constitution, the Takings Clause¹⁷ does. While the late New Deal Court narrowed substantive due process, it did not eliminate it outright. To narrow it, it confined the doctrine to apply primarily when state regulations threatened individual constitutional rights specifically enumerated in the Bill of Rights.¹⁸ The Court has since recast some older *Lochner* substantive due process cases as pure Takings Clause cases.¹⁹ But as *Takings* intimated, the Takings Clause could plausibly cover most *Lochner* doctrine.²⁰ After all, it specifically protects “private property,” and not against deprivations without due process but against “takings.”²¹ Many elements in American law assume that “private property” refers not only to the “vulgar and untechnical sense of the physical

¹⁴ See, e.g., ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF CRISIS IN AMERICAN POWER POLITICS* 56 (1941).

¹⁵ See 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1106–07 (1953).

¹⁶ See Gary Lawson, *Due Process Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 337, 337–38 (Edwin Meese III et al. eds., 2005).

¹⁷ U.S. CONST. amend. V.

¹⁸ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁹ The Court frequently cites *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897), as authority for incorporation of the Fifth Amendment. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Strictly speaking, *Chicago, Burlington* was not an incorporation case but a case in which natural-law or higher-law principles informed due process. Be that as it may, the Court has recast *Chicago, Burlington* as an incorporation case.

²⁰ EPSTEIN, *TAKINGS*, *supra* note 1, at 279–81.

²¹ See U.S. CONST. amend. V. Of course, “takings” are qualified by the public-use and just-compensation requirements. See *Palazzolo*, 533 U.S. at 617.

thing,” but also “the right to possess, use[,] and dispose of it.”²² As Epstein showed, this understanding’s pedigree goes back to Blackstone.²³ In this same tradition, the notion of a “taking” can apply not merely to actions that oust a landowner from her land, but also to any tort-like interference with possession, use, and control for any species of property.²⁴ Within federal takings doctrine as it is conventionally understood, *Takings* thus circumvented important textualist and originalist objections to *Lochner* substantive due process doctrine.²⁵ In the 1980s, President Reagan and Attorney General Meese made it a priority to defend originalism, and they nominated originalists like Antonin Scalia and Robert Bork to the federal bench. Conventional academics thus worried that *Takings* would give a new group of judges, not sufficiently educated in the conventional catechism, a guidebook to revive *Lochner*-style property and contract rights.

These worries turned out to be largely overdrawn. For one thing, the case law has moved on. Because Epstein’s main intentions were theoretical and not practical, the roadmap he drew in *Takings* was too radical to penetrate doctrine directly. I will summarize the main constraints quickly here, for I have explained them in greater detail elsewhere.²⁶ The originalist arguments against *Lochnerism* were never the only reasons why the doctrine fell out of favor; those arguments always ran with substantive arguments in favor of interventionist property regulation. As it turned out, many of Reagan’s and Meese’s conservative judicial appointees turned out to favor those pro-regulation substantive arguments—if not as enthusiastically as Justices William Brennan or John Paul Stevens, at least closely enough not to support any aggressive rollback of Great Society or New Deal regulatory programs. Many judicial conservatives are moderate or, if you like, conventionalist. They adhere to precedent to a far greater extent than originalists or strong advocates of judicial restraint, in part because they believe in *stare decisis* for its own sake, and in part because they subscribe to most of the substantive principles in the seminal New Deal cases.²⁷ Justices O’Connor and Kennedy turned out to be such moderates or conventionalist conservatives.²⁸

More surprisingly, *Takings*’s substantive arguments did not reconcile themselves easily with important substantive attachments of the Court’s unqualified

²² *United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945).

²³ See EPSTEIN, *TAKINGS*, *supra* note 1, at 22 (“[P]roperty . . . consists in the free use, enjoyment, and disposal of all [an Englishman’s] acquisitions, without any control or diminution, save only by the laws of the land.” (quoting WILLIAM BLACKSTONE, *COMMENTARIES* *2, *2)).

²⁴ See *id.* at 35–56 (discussing torts against property as “takings”).

²⁵ See *id.* at 277–82.

²⁶ See Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187 (2004). For a survey of the same cases that is far more enthusiastic about the result, consider Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004).

²⁷ See Claeys, *supra* note 26, at 190, 203–15.

²⁸ See *id.* at 189–90.

conservatives—Chief Justice Rehnquist and Associate Justices Scalia and Thomas.²⁹ Blackstone's conceptions of "private property" and "takings" require interpreters to construe constitutional text broadly enough to allow courts to develop sophisticated doctrines to distinguish proper "regulations" of property from confiscatory "takings" of use and disposition rights. Such tests sweep broadly. The interplay between the *prima facie* taking and the defense of police regulation expands the discretion of the judges who consider both sides. That sweep and discretion go against the conservatives' preferences for bright-line and formal rules.³⁰

These two factors caused the takings counterrevolution to peak and ebb in the same case, the Court's 1992 decision in *Lucas v. South Carolina Coastal Council*.³¹ In *Lucas*, the Rehnquist Court's moderates agreed with the conservatives that, in regulatory-takings law, the Court's general interest-balancing formula ought to give way to a *per se* rule compensating owners when regulations eliminate all productive uses of their land not already limited by background property law.³² However, Justice Kennedy concurred separately to warn that he did not want to see the Court's takings law ossify around "a static body of state property law."³³ In 2001, in a separate opinion in the relatively narrow decision *Palazzolo v. Rhode Island*, Justice O'Connor hinted that she would not follow *Lucas* broadly.³⁴ She insisted that, in regulatory-takings cases, she would continue to follow as her "polestar . . . the principles set forth in *Penn Central*," the dominant restatement of regulatory-takings law.³⁵ In 2002, Justice Stevens wrote for a six-vote majority including Justices Kennedy and O'Connor to limit *Lucas* virtually to its facts and insist that *Penn Central*'s government-friendly interest-balancing formula remained the framework within which most regulatory-takings claims ought to be tried.³⁶

Takings's doctrinal lessons have not been durable in the academe, either. Most legal academics are unlikely to be convinced by Epstein's doctrinal arguments, for they are not sympathetic to the Lockean and classical-liberal underpinnings of those arguments. More surprisingly, however, many of the legal academics who *are* sympathetic to Lockean classical liberalism have not been impressed by *Takings*'s doctrinal arguments. Academics sympathetic to classical liberal political theory tend to be sympathetic to originalist constitutional theory.³⁷ While such academics may be impressed

²⁹ See *id.* at 190.

³⁰ See *id.* at 220–21.

³¹ 505 U.S. 1003 (1992).

³² See *id.* at 1014–15.

³³ See *id.* at 1035 (Kennedy, J., concurring).

³⁴ See 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

³⁵ *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

³⁶ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (2002).

³⁷ I make this claim descriptively and as a claim about correlation without any further claim on causation. Gary Lawson, for one, maintains there is no necessary connection between libertarian or conservative politics and originalist interpretive commitments. See Gary Lawson,

by *Takings* on the merits, they do not take its doctrinal implications seriously. Most originalist academics doubt that the Takings Clause is doctrinally relevant to state property disputes. The Takings Clause limits the actions of states only if the Fourteenth Amendment Due Process Clause incorporates that Clause; originalist scholars doubt that the Fourteenth Amendment Due Process Clause incorporates other constitutional guarantees.³⁸ Because state and local regulations—zoning, conservation, preservation, and rent control—raise most of the difficult takings questions, this view of the Fourteenth Amendment Due Process Clause would dramatically shrink the federal courts' takings docket.

Takings's doctrinal lessons *may* become relevant again to academic scholarship, but it is difficult to say. Even if the Fourteenth Amendment Due Process Clause does not limit states from taking use and disposition rights by regulation, the Fourteenth Amendment Privileges or Immunities Clause still may.³⁹ But the meaning of that clause is one of the most difficult problems in constitutional law. Supreme Court doctrine treats this clause as virtually a dead letter, for the *Slaughterhouse Cases* read the clause to impose only a few core national privileges already guaranteed elsewhere in the Constitution.⁴⁰ Some scholars, notably David Currie⁴¹ and John Harrison,⁴² hold that the clause does not protect substantive rights but formal non-discrimination rights. In other words, states have substantial discretion regarding what "privileges" and "immunities" to provide for their citizens, but once they have chosen whatever privileges and immunities they decide to provide, they must provide those rights on justifiably equal terms to all citizens.⁴³ Others, notably Michael Kent Curtis⁴⁴ and Akhil Amar,⁴⁵ hold that the Privileges or Immunities Clause serves as an incorporation clause. In their view, the clause makes applicable to the states the legal rights, including habeas

Conservative or Constitutionalist?, 1 GEO. J.L. & PUB. POL'Y 81, 82 (2002).

³⁸ See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949). For alternative views, consider MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 62–66 (2006); James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": *The Evolution of Unenumerated Rights in the Nineteenth Century*, 9 U. PA. J. CONST. L. (forthcoming 2007), available at <http://ssrn.com/abstract=881833>.

³⁹ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

⁴⁰ See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1873).

⁴¹ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 239 & n.12 (1985).

⁴² See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1419–20 (1992).

⁴³ See *id.* at 1422–24.

⁴⁴ See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 65 (1986).

⁴⁵ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 387–89 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*]; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 166–69 (1998) [hereinafter AMAR, *BILL OF RIGHTS*].

corpus and Bill of Rights guarantees, that the Constitution makes applicable to the federal government.⁴⁶ Still others are sympathetic to the position taken by Supreme Court Justice Bushrod Washington in the 1823 circuit decision *Corfield v. Coryell*.⁴⁷ In this view, the Privileges or Immunities Clause does protect substantive rights, natural rights deemed in Civil War political thought to be essential “privileges” or “immunities” of citizenship in a free and republican state.⁴⁸ Professor Epstein has encouraged such a reading of the clause, although he readily admits that this reading requires much more detail work.⁴⁹

Although I cannot prove my intuition with academic rigor here, I suspect that the *Corfield* interpretation is correct, that Epstein is on the right track, but that there is even more detail work to do than Epstein has suggested. Even scholars who are originalists are not sufficiently sensitive to the ways in which pre-1900 jurists used terms like “privilege,” “immunity,” “right,” and “freedom.”⁵⁰ In some contexts, these terms were used as synonyms. In others, the terms differed in subtle ways.

My intuitions follow those of David Upham⁵¹ and Adam Mossoff,⁵² who have suggested that, in nineteenth-century legal context, “privilege” and “immunity” referred to civil rights designed to secure the natural rights inextricably intertwined with citizenship in a free and republican government. One pre-*Corfield* case construing the Comity Clause⁵³ determined whether a right counted as a “privilege” or “immunity” by asking whether the right was a “civil right, which a man as a member of civil society must enjoy.”⁵⁴ In this context, “civil society” refers to a society of individuals living under principles of social compact consistent with early Enlightenment natural-law and -rights theory. To determine whether a particular legal right counted as one “which a man as a member of civil society must enjoy,” Upham has explained, this pre-*Corfield* case and others drew generally on natural-law principles and Britain’s colonial history to determine whether a given right was both natural and one that a republican government

⁴⁶ See AMAR, AMERICA’S CONSTITUTION, *supra* note 45, at 389; CURTIS, *supra* note 44, at 202–03.

⁴⁷ 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (listing “fundamental principles” contained in privileges and immunities).

⁴⁸ See Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 334, 340–46 (2005); see also CURTIS, *supra* note 44, at 114–15.

⁴⁹ See Epstein, *supra* note 48, at 344.

⁵⁰ See, e.g., AMAR, BILL OF RIGHTS, *supra* note 45, at 169.

⁵¹ David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483 (2005).

⁵² Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892062.

⁵³ U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

⁵⁴ *Campbell v. Morris*, 3 H. & McH. 535, 565 (Md. 1797).

could withhold from aliens but not citizens.⁵⁵ In this conception, privileges and immunities consisted of rights like the right to travel; to acquire, use, and dispose of one's real and personal property; to be free from alien-based commercial taxes; to practice one's own trade; and to enjoy the general rights of life and liberty necessary to exercise these more citizen-based rights.⁵⁶ Obviously, privileges and immunities excluded rights that were wholly the creation of political life, like rights of public office.⁵⁷ Less obviously, they also excluded rights that were so essential to human freedom that natural law required them to be provided to all persons by all governments—republican, despotic, and others in between.⁵⁸ For instance, though a republican nation could grant or withhold legal property and contract rights from aliens as a matter of indulgence, it could not withhold from aliens the right to religious conscience any more than it could from citizens.⁵⁹ This latter implication is surprising, even perverse. It suggests that the Comity Clause and the Privileges or Immunities Clause deny the federal government the power to protect American citizens from state invasions of what many regard as their most important rights. Nevertheless, originalism claims to follow the plain and original meaning of text, no matter what the consequences.

In any case, if this reading of the Privileges or Immunities Clause is correct, the rights to acquire, use, and dispose of property count as Fourteenth Amendment “privileges,” and *Takings* is relevant for academics who are interested in the original meaning of the Privileges and Immunities Clause. If so, if Professor Epstein cares to issue a new edition of *Takings*, and if he cares more about making his title more accurate than snappy, he may want to retitl the second edition *Abridgements*. *Takings* is a dense book because it considers seriously the justifications that a classical-liberal government has to regulate property without confiscating it.⁶⁰ Under the Fifth Amendment, those regulatory defenses justify property interferences that would otherwise count as constitutional “takings.”⁶¹ Under the Fourteenth Amendment (originally construed), those defenses justify interferences that would otherwise count as “abridgments” of one species of constitutional privileges or immunities.⁶²

All the same, in the case law, it remains the case that *Tahoe-Sierra*⁶³ discredited most novel regulatory-takings challenges for the foreseeable future. In the scholarship, *Takings* has a tiny hole to thread between the substantive commitments of most property scholars and the formalist commitments of most constitutional originalists.

⁵⁵ See Upham, *supra* note 51, at 1494–96.

⁵⁶ See *id.* at 1493, 1498.

⁵⁷ See *id.* at 1493.

⁵⁸ See *id.* at 1497–98.

⁵⁹ See *id.* at 1495 (election), 1500 (property), 1523 & n.183 (conscience, citing N.Y. CONST. of 1777, art. XXXVIII).

⁶⁰ See EPSTEIN, TAKINGS, *supra* note 1.

⁶¹ See *id.* at 100–04.

⁶² U.S. CONST. amend. XIV, § 1.

⁶³ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

That hole will probably not broaden in the foreseeable future. Yet even if its impact was limited, *Takings* still helped initiate a significant change in constitutional doctrine. Many legal academic works aspire to do as much. Few succeed, and fewer still inform the law as much as *Takings* did for fifteen years.

IV. *TAKINGS*'S THEORETICAL LEGACY

Takings's longer-lasting legacy, however, has been for property theory. Looking back, *Takings* may have done more to lend respectability to a classical-liberal conception of property than any other legal scholarship written in recent memory. Legal scholarship tends to assume that the best metaphor for describing property is the "bundle of rights," a package of unrelated rights each of which may be included or removed as social policy requires. *Takings* sketched in one understandable work an alternative conception: property as a unitary whole of complementary rights.⁶⁴ *Takings* did not by itself discredit the still-dominant "bundle-of-rights" metaphor, and it left unanswered many important questions about the classical-liberal conception. Nevertheless, *Takings* made the classical-liberal conception respectable enough to deserve consideration in subsequent theoretical scholarship on property. Neither *Tahoe-Sierra* nor subsequent scholarship can diminish this important contribution.

To get a sense of the contrast between *Takings* and conventional property theory, consider the following quote from one property casebook:

In an earlier era, theorists tended to emphasize the unitary nature of ownership The owner had the right to use or dispose of the thing owned, with relatively little regard for the rights of others Currently, most theorists think of ownership of property as a "bundle of rights" or figuratively, a "bundle of sticks." One might have a right to use a thing, but not to sell, bequeath or otherwise transfer it. Alternatively, one might have a right to use or transfer land, but not to build on or otherwise develop it. Under this theory, the bundle of rights can be disaggregated into distinct rights or sticks. According to this view, it is misleading to talk of ownership of any object; one can only talk of owning a number of distinct rights with respect to that object.⁶⁵

I choose this quote because it is representative of mainline property scholarship. The authors provide no citations for these claims. They do not need to, for they are restating a way of breaking down legal rights and responsibilities that is generally shared by most academics. The authors softly suggest that the classical-liberal conception

⁶⁴ See EPSTEIN, *TAKINGS*, *supra* note 1.

⁶⁵ EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* 1 (5th ed. 2006).

of property was extreme, because it allowed owners to use their own property “with relatively little regard for the rights of others.”⁶⁶ Appealing to people’s prejudices in favor of progress and modern trends, they then tout as more sophisticated and refined a view whereby property consists of “a number of distinct rights” rather than an integrated whole.⁶⁷ In what follows, let us refer, as many academics do, to this modern view as the “bundle-of-rights” view.⁶⁸

The “bundle-of-rights” view is far more contestable than most contemporary academics assume. To be sure, it is merely an analytical tool. An analyst does not generate any particular assignments of property rights or duties simply by reducing the competing interests into particularized rights and duty claims. Even so, the “bundle-of-rights” approach still facilitates relatively interventionist theories of government. The central question dividing classical-liberal property theory from contemporary property theory is this: as a general matter of government policy, is it better to maximize an owner’s control over the important policy decisions associated with assets we call property, or is it generally better to make these assignment decisions on an ad hoc basis, leaving owners, regulators, consumers, neighbors, and other outside interested parties with different input in different situations? Classical-liberal theories of government assume the former. The unitary approach to property promotes the goals of classical-liberal theories of government: By maximizing owners’ control over important use and disposition decisions, integrated property rights exploit owners’ general information advantages over outsiders, simplify relations between owners and strangers, and encourage owners to invest in their assets. Since the early twentieth century, however, prevailing theories of government have preferred to intervene more often. They prefer to set aside these general and slow-developing goods to pursue more immediate goods preferred by legislative majorities. The “bundle-of-rights” approach facilitates such regulation. Because it treats different property claims as disaggregated rights, it expands the free action that legislators and regulators have to set policy. Once property is disaggregated, regulators can sort through particular rights claims piecemeal. Regulators may socialize a few owners’ rights to satisfy the demands of legislative majorities while still leaving the owners with a substantial residue. Regulators can insert or remove different sticks in an owner’s bag, but the owner still has “property” as long as she still has a bag and other sticks.

To appreciate this connection between property theory and government theory, one must go back to the period from 1880 to 1930. Early in this period, leading political scientists at new research universities propounded more interventionist theories of government.⁶⁹ One academic, Lester Ward, proposed a new social science he called

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See, e.g.,* DENNIS J. MAHONEY, *POLITICS AND PROGRESS: THE EMERGENCE OF AMERICAN POLITICAL SCIENCE* (2004); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 3–114 (1973); DAVID M. RICCI, *THE*

“sociocracy” and defined as “‘the scientific control of social forces by the collective mind of society for its advantage.’”⁷⁰ Woodrow Wilson defined the “object” of constitutional government as, first, “to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need,” and, second,

to give to the operation of the government thus shaped under the influence of opinion and adjusted to the general interest both stability and an incorruptible efficiency. Whatever institutions, whatever practices serve these ends, are necessary to such a system: those which do not, or which serve it imperfectly, should be dispensed with or bettered.⁷¹

Such theories of government provided important groundwork for legal realism. Many if not most realists subscribed to the assumptions about expertise that followed from theories of government and administration like Ward and Wilson’s. For instance, Edward Robinson contrasted the “experts” of the classical-liberal order, who were “continually mistaking the vividness of their moral indignation for the probable efficiency of their devices for social control,” with the *real* experts—elite lawyers who understood themselves to be “social engineers.”⁷² Other realists drew the necessary implications for property theory. As has been explained elsewhere,⁷³ Wesley Hohfeld developed a new taxonomy of legal obligations to make legal terminology more precise.⁷⁴ Importantly for property theory, he reconceived of *in rem* rights as clusters of *in personam* rights. In classical-liberal property theory, an owner’s right over a thing was understood as a right to exclude the rest of the world from that thing. In Hohfeld’s conception, the owner instead enjoyed thousands of fine-grained rights to be free from interference by the many individuals who might have an interest in that thing. “[T]he supposed single right *in rem* . . . really involves as many separate and distinct ‘right-duty’ relations as there are persons subject to a duty.”⁷⁵

TRAGEDY OF POLITICAL SCIENCE: POLITICS, SCHOLARSHIP, AND DEMOCRACY (1984); John Marini, *Progressivism, Modern Political Science, and the Transformation of American Constitutionalism*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME* 221 (John Marini & Ken Masugi eds., 2005).

⁷⁰ 1 LESTER F. WARD, *DYNAMIC SOCIOLOGY* 61, 137 (1883), *quoted in* CHARLES EDWARD MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 330 (Johnson Reprint Corp. 1968) (1920).

⁷¹ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 14 (1908).

⁷² Edward S. Robinson, *Law—An Unscientific Science*, 44 *YALE L.J.* 235, 236 (1934).

⁷³ See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 333–50 (1997).

⁷⁴ WESLEY NEWCOMB HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 23, 35–37 (Walter Wheeler Cook ed., 1923).

⁷⁵ See WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING*

Although Hohfeld never used the phrase “bundle of rights” himself,⁷⁶ Hohfeld’s contemporaries quickly used his taxonomy of legal obligations and his parsing of in rem rights to recast property as such bundles of rights. Thus, in an article on rate regulation, economist Robert Hale recast the general “right of ownership in a manufacturing plant [to be], to use Hohfeld’s terms, a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products.”⁷⁷ In a short comment on tax law, Arthur Corbin claimed that “‘property’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities.”⁷⁸

The realists’ view of property dominated so thoroughly for so long that, by the 1970s, most legal academics ceased to take seriously the earlier alternative. In *Private Property and the Constitution*, Bruce Ackerman began his argument by establishing that “one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. They learn that only the ignorant think it meaningful to talk about owning things free and clear of further obligation.”⁷⁹ Instead, “the law of property considers the way rights to use things may be parceled out amongst a host of competing resource users.”⁸⁰ Ackerman connected this contrast about property to the corresponding contrast about expertise by associating the primitive view with “lay” people and the non-primitive view with “scientists.”⁸¹ “[S]o far as the Scientist is concerned,” he concluded, “it would be much better (but for the inconvenience involved in abandoning shorthand) to purge the legal language of all attempts to identify any particular person as ‘the’ owner of a piece of property.”⁸² Ackerman was not advancing new ground with this statement. Indeed, around the same time, the U.S. Supreme Court insisted in *Penn Central* that:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the

AND OTHER LEGAL ESSAYS, *supra* note 74, at 65, 74–82, 94. Instead of in rem and in personam, Hohfeld used “multital” and “paucital.” *Id.* at 77.

⁷⁶ See ALEXANDER, *supra* note 73, at 322 & 455 n.40.

⁷⁷ Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922).

⁷⁸ See, e.g., Arthur L. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922).

⁷⁹ BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26 (1977).

⁸⁰ *Id.*

⁸¹ *Id.* at 27.

⁸² *Id.*

nature and extent of the interference with rights in the parcel as a whole⁸³

No surprise, then, that Thomas Grey concluded in 1980 that “[t]he substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory.”⁸⁴

These passages fairly reflect what academic and judicial opinion leaders thought of property circa 1985. The “bundle-of-rights” metaphor had obliterated the classical-liberal approach—Grey’s “thing-ownership” view and Ackerman’s “primitive” and “lay” view. While other works may have tried to resurrect and refresh the classical-liberal view, *Takings* succeeded in doing so. *Takings* made respectable the arguments why property can and should consist of the fullest rights of control, use, and disposition consistent with the like rights of others and the proper needs of the public.⁸⁵ Classical-liberal property theory is often derided on the ground that it leaves little room to make property rights relative to the public’s needs; using leading examples, *Takings* defined and made specific the most important justifications classical-liberal theory gives governments to restrain abuses of property rights.⁸⁶ Contemporary law and theory assume as true the “bundle-of-rights” view of property; *Takings* explained why property theory needs a “unitary conception of ownership” to get the common law and the property system up and running.⁸⁷ Time and again, he suggested that to sever the rights of possession, use, and disposition “creates a high degree of incoherence with no return payoff.”⁸⁸

Takings therefore made respectable and accessible in late twentieth-century legal jargon a system of understanding property that had been treated more or less as a straw man for at least a generation. If it did not persuade all of its readers, the vituperation it generated confirms that its arguments were taken *very* seriously. After *Takings*, classical-liberal property theory can no longer easily be brushed aside casually in legal scholarship. Of course, such theory is still brushed aside, quite often. Nevertheless, for serious scholars, Epstein raised the bar. Before *Takings*, one could assume that the classical-liberal approach was merely a “primitive” and “lay” approach, while the “bundle-of-rights” approach was the only “scientific” approach in town. After *Takings*, serious scholars need to consider the possibilities that the law can draw non-facile assignments of property rights and harms, connected by non-arbitrary causal connections, and that these assignments generally promote social welfare by taking advantage of the selfish information and production advantages owners have over neighbors, competitors, and consumers.

⁸³ Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).

⁸⁴ Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

⁸⁵ See EPSTEIN, *TAKINGS*, *supra* note 1, at 57–62.

⁸⁶ See *id.* at 107–21.

⁸⁷ *Id.* at 61.

⁸⁸ *Id.* at 60.

To be sure, *Takings* did not establish the classical-liberal approach to property beyond all criticism. The book consists of a meaty middle of case illustrations and legal conclusions⁸⁹ bookended by a spare and more explicitly normative opening⁹⁰ and conclusion.⁹¹ *Takings* really assumes rather than establishes a Lockean understanding of government; its contribution is therefore to unfold what “property,” “regulation,” “taking,” “public use,” and “just compensation” all must mean for the law consistent with that Lockean understanding. As a result, in an important sense, the book’s lessons are rather contingent: *if* liberty of action and the social goods created by industry play a substantial or dominant role in one’s conception of the good political order, and *if* this political theory is more attractive than the many contenders Epstein did not consider, then one can develop a coherent account of “property,” “regulation,” and “takings” to do the legal detail work such theory requires.

In addition, there are tensions simmering beneath the surface between the classical-liberal cases Epstein mines and Epstein’s rationalizations of them. Most of the leading classical-liberal cases were written by judges steeped in a tradition of natural law and natural rights, with roots in Cicero, Roman law, Locke, the Scottish common-sense movement, Protestant theology, Grotius and other early Enlightenment treatise writers, and other sources.⁹² While different sources in this tradition varied in emphasis and outlook, many founding era and nineteenth-century Americans embraced a consensus view—with all the dangers that come from consensus, to be sure—insisting that the freedoms of life, liberty, and property were natural rights, circumscribed by principles of natural law limiting the proper boundaries in which such rights could be exercised. In *Takings*, and even more so later, Epstein has mined this tradition for its results while subtly replacing its foundational commitments. Epstein began as a natural-rights theorist. By the time he wrote *Takings*, he was torn between natural-rights theory and a rule utilitarianism that generally applied Bentham’s and Hume’s basic commitments to modern academic vernacular.⁹³ Since then, Epstein has become a dyed-in-the-wool utilitarian⁹⁴—although, because of his rule utilitarianism, he is

⁸⁹ See *id.* at 35–329.

⁹⁰ See *id.* at 1–34.

⁹¹ See *id.* at 331–50.

⁹² See, e.g., MARK WARREN BAILEY, *GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910*, at 24–112 (2004) (tracing antebellum post-secondary education, moral philosophy as a theoretical and practical science, and the concept of providential design); ANNA HADDOW, *POLITICAL SCIENCE IN AMERICAN COLLEGES AND UNIVERSITIES, 1636–1900*, at 43–167 (Williams Anderson ed., 1939) (tracing political science-related courses from 1770–1865).

⁹³ See EPSTEIN, *TAKINGS*, *supra* note 1, at 5 (claiming that the natural-rights political tradition “is consistent, I believe, with both libertarian and utilitarian justifications of individual rights, which, properly understood, tend to converge in most important cases”). On my read, *Takings* is slightly more utilitarian than natural-rights based. See, e.g., *id.* at 7–9 (developing the case for Lockean political theory in utilitarian terms).

⁹⁴ See RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL*

more sympathetic to natural-rights theory and prescriptions than most contemporary academics.⁹⁵ As a result, the Epstein of *Takings*, and to a greater degree the Epstein since, defends classical liberalism primarily because it promotes social welfare, not because it secures individuals liberty to which they are entitled by natural law and right.

Although I cannot develop my reservations fully here, let me at least suggest why I prefer the American natural-law/natural-rights tradition and the earlier Epstein to the more mature Epstein. On one hand, I doubt that Epstein's rendition of utilitarianism is as stable as Epstein assumes. Interested readers may consult criticisms already made of Epstein's utilitarianism by Larry Alexander and Maimon Schwarzschild⁹⁶ and by Eric Mack,⁹⁷ so let me simply restate some of the more prominent objections. Many of Epstein's justifications for basics like self-ownership and property acquisition are problematic.⁹⁸ Some of Epstein's arguments, especially the need to define liberty rights with reference to a non-arbitrary rule, can easily be finessed in societies that have already established rights and then carry forward pre-existing assignments of ownership and liberty rights.⁹⁹ The typical counter-example is the American South of 1850,¹⁰⁰ which assumed and enlarged on the slave-holding patterns of the South of 1830. Separately, it is difficult to say that, strictly as a predictive matter, all members of an unorganized society would prefer self-ownership to other schemes, if the less talented can identify the more talented and try to socialize their talent.¹⁰¹ One may finesse such objections by positing that some kinds of utility, like the utility in self-ownership, rate so high that they dominate over more case-specific sources of utility. If not made delicately, however, such arguments can be non-falsifiable and raise hard questions

LIBERTY WITH THE COMMON GOOD 9–39 (1998) [hereinafter EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY*]; Larry Alexander & Maimon Schwarzschild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 QUINNIPIAC L. REV. 657, 657 (2000).

⁹⁵ See EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY*, *supra* note 94, at 14 (acknowledging that natural-rights theorists and classical-liberal utilitarians, “for all their differences . . . are all—when compared with the Marxists, socialists, communitarians, republicans, and feminists of our time—peas from the same pod”); Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXFORD J. LEGAL STUD. 219 (2005) (using H.L.A. Hart's natural law theory to develop a comprehensive account of basic legal institutions).

⁹⁶ Alexander & Schwarzschild, *supra* note 94. For Professor Epstein's response to those criticisms, see Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783 (2000).

⁹⁷ Eric Mack, *Comment: A Costly Road to Natural Law*, 12 HARV. J.L. & PUB. POL'Y 753 (1989). For Professor Epstein's response, see Richard A. Epstein, *Postscript: Subjective Utilitarianism*, 12 HARV. J.L. & PUB. POL'Y 769 (1989).

⁹⁸ See Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y, 713, 728–29 (1989).

⁹⁹ See Richard A. Epstein, *Taking Stock of Takings: An Author's Retrospective*, 15 WM. & MARY BILL RTS. J. 407, 415–16 (2006).

¹⁰⁰ See Mack, *supra* note 97, at 761–62.

¹⁰¹ *Id.* at 762–63.

about whether rule utilitarianism is a sustainable form of utilitarianism at all.¹⁰² If it is hard for utilitarianism to justify self-ownership, it is all the harder for it to justify property ownership.

On the other side of the divide, I doubt Epstein sufficiently appreciates the best of the natural-law/natural-rights tradition. In his most in-depth statement on natural-rights theory, Epstein criticizes such theory for pressing to the “logical extreme” of the maxim “*fiat justitia ruat coelum*” (“let justice be done though the heavens may fall”).¹⁰³ He thus makes the distinctly modern and anachronistic assumption that moral theories with pedigrees in early Enlightenment political theory are deontological and not consequentialist—such theories focus on the intrinsic merits of particular actions with little regard for the larger consequences of such action.¹⁰⁴ Epstein also suggests that prominent natural-rights writers tried to have it both ways, by appealing both to the supernatural or natural obligatory foundations of individual rights and to the happy social consequences of such rights.¹⁰⁵

While it would take considerably more space than I have here to prove the point, I suspect Epstein’s generalizations about natural-rights theory are not applicable to American natural-law/natural-rights theory and its antecedents in the best early Enlightenment liberalism. My sense is that many of the early natural-law treatise writers, Locke, and the Americans did not conceive of natural rights as deontological maxims or trumps. Rather, such rights were understood in consequentialist terms—in some cases (the treatise writers and many of the Americans, though not Locke) in teleological terms. Many scholars, and especially many law professors, assume that theories of natural rights and law must make deontological claims because they speak of nature and moral rights. In reality, as political theorist Thomas West likes to say, many natural-rights theories are “eudaimonistic,”¹⁰⁶ referring to *eudaimoneia*, the term Aristotle uses to refer to complete ethical happiness. Such theories of ethical and political philosophy first use psychology to identify the different sources of human happiness. They then use reason to analyze those different sources, to determine which provide the most useful and intelligible benefits for individuals, and which seem the most durable and profound. As West¹⁰⁷ and, at length, Peter Myers¹⁰⁸ contend, Locke’s political philosophy follows this approach. The *Second Treatise* does

¹⁰² See Alexander & Schwarzschild, *supra* note 94, at 660.

¹⁰³ EPSTEIN, PRINCIPLES FOR A FREE SOCIETY, *supra* note 94, at 11–12.

¹⁰⁴ *Id.* at 10–12.

¹⁰⁵ *Id.* at 14.

¹⁰⁶ See Thomas G. West, *Nature and Happiness in Locke*, CLAREMONT REV. BOOKS, Spring 2004, at 54, 55 (reviewing MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* (2002)). West describes Locke’s political and ethical philosophy in such terms.

¹⁰⁷ *Id.* at 56–57.

¹⁰⁸ PETER C. MYERS, *OUR ONLY STAR AND COMPASS: LOCKE AND THE STRUGGLE FOR POLITICAL RATIONALITY* 37–39 (1998).

so in muted fashion,¹⁰⁹ and the *Essay Concerning Human Understanding* makes even clearer the psychological and experiential foundations of morality and justice.¹¹⁰ Locke's approach contrasts from ethical or political philosophies like that of Immanuel Kant, whose second formulation of the "categorical imperative" holds that a maxim is right only if the actor who follows it "can at the same time will that it should become a universal law."¹¹¹ The "imperative" deduces rights from reason and universal will without analyzing the ways in which human happiness is at once motivated and limited by human passions. Teleological philosophers distinguish Kant on this ground;¹¹² my sense is that the opinion leaders in the early Enlightenment natural-rights tradition could, too.

All the same, Professor Epstein and I are lawyers first and philosophers, if at all, only second. While philosophers have every right to expect rigor in philosophical justification, we lawyers understand that theoretical arguments need to be tempered by the demands of government work. I do have my reservations about *Takings's* philosophical foundations, but as a lawyer I admire the rejoinder that book made to decades of contrary property theory. And as a scholar, I am grateful for the trail Professor Epstein paved for those of us who admire a theory of property fit for the society in which responsible citizens dedicate themselves to securing their mutual freedom.

¹⁰⁹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹¹⁰ JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690).

¹¹¹ IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James W. Ellington trans., Hackett Publishing 3rd ed. 1993) (1785).

¹¹² On this basis, virtue ethicist Elizabeth Anscombe criticized that "imperative" as "useless without stipulations as to what shall count as a relevant description of an action with a view to constructing a maxim about it" and complained that Kantian ethical philosophy is often not "equipped with a sound philosophy of psychology." G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1, 2, 4 (1958). Contemporary natural-law scholar Alasdair MacIntyre has criticized Kantian moral theories on similar grounds. See ALASDAIR MACINTYRE, *Hume on "Is" and "Ought,"* in *AGAINST THE SELF-IMAGES OF THE AGE: ESSAYS ON IDEOLOGY AND PHILOSOPHY* 109, 124 (Univ. Notre Dame Press ed. 1978) (criticizing moral philosophy influenced by Kant for making "the autonomy of ethics . . . logically independent of any assertions about human nature," and praising Hume and Aristotle because they "seek[] to preserve morality as something psychologically intelligible").