

PANEL 3 Q&A: DISCUSSION ON
BALANCING PRIVATE PROPERTY AND
COMMUNITY RIGHTS

PANELISTS

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EPSTEIN. I want to make some observations about what Marc said about the relationship of process to property rights. One of the key consequences of his position is that the just compensation element simply disappears from the equation. We are thus left with a pure administrative state model in which a broad class of stakeholders each seeks to gain the largest share of a pie that shrinks with each additional move. Historically, we know very well that when those games get played, the transaction costs consume most of the potential gains. It is therefore not uncommon to find cases like *Monterey v. Del Monte Dunes at Monterey, Ltd.*,¹ where essentially disputed development applications can run on nearly twenty-year cycles without any clear agreement precisely because these bargaining games have no unique solution. With each breakdown in negotiation, the cycle starts again. The antidevelopment forces surely have the upper hand.

1. 526 U.S. 687 (1999).

Yet keep the social objective in mind: the object of this exercise is not to maximize transaction costs; it's to minimize transaction costs along the path to mutually beneficial solutions. Open-ended negotiations in a system of weak and indefinite property rights move matters in the wrong direction. Nor is the problem made any easier because of disagreements as to how to treat exactions. One of the great mistakes of Justice Kennedy's concurring opinion in *Eastern Enterprises v. Apfel*² is that the basic analysis somehow changes when the analysis moves from the Takings Clause to the Due Process Clause on the view that an exaction of money does not count as a taking of private property.

But this is, again, an odd and unproductive distinction to say the least. Just think of the way in which the process works. Suppose it turns out that the coal companies decide not to pay the money into the fund. Well, what's the government going to do? It's going to impose a tax lien on the property in order to collect it. A tax lien is in fact a form of property of the government. Now, we know from cases like *Armstrong v. United States*³ that the government takes property when it manipulates or destroys liens on property without just cause. The people whose liens get demoted or dissolved are entitled to get full compensation for the consequent loss in value.

The great danger in this area is to fragment property rights into obscure subclasses in order to avoid the consequences of having to decide cases in accordance with a general theory. Vagueness, which is to some people a nice word, is in fact one of the most costly words in the English language. Another term for it is uncertainty. What that uncertainty does is create an endless cycle of delay and bargaining costs. The correct rules on compensation minimize the cost of these negotiations by reducing them to disputes over the value of the partial interests taken to obtain some environmental benefit. The task here is not to maximize political participation; it is to minimize stress and confusion.

2. 524 U.S. 498, 540 (1998). In his opinion, Justice Kennedy wrote:

Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest.

3. 364 U.S. 40 (1960).

Now, there still remains a serious area for political deliberation, for the government has to determine collectively the value of the interest, as with the lateral easement in *Nollan v. California Coastal Commission*.⁴ One reason why it is so difficult for governments to get their act together is that they possess, under current law, well-nigh complete discretion in choosing how to structure their tax regime. Since the political process is corrupt on the taxation side, collective deliberations do not necessarily yield reliable signals to regulated parties. But it is never wise to try to counteract the political breakdown on one side of the process by creating an equal breakdown on the other side of the process. What is needed is a return to first principles on taxation to develop a system that corrects the mistakes in the taxing system, which requires creating a regime that allows the government to achieve any desired revenue level with a minimum of political discord. Solving that problem raises the same issues that occur with takings.

And how do we accomplish that? The best way is to take a leaf from Justice O'Connor's fine First Amendment opinion in *Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue*.⁵ She's as sound on that issue as she is shaky on property law.⁶ She basically required a flat tax in speech cases in order to avoid abuse without limiting revenue constraints. Well, the law should follow her lead and avoid dangerous ad hocery with other property taxes with the host of special exemptions and multiple rates that increase political drag without raising revenues.

The moral is clear. It is not possible to cure the problems in public deliberations of taxation by messing up takings law. It is necessary to fix both problems. Two wrongs only make things worse. The second wrong never corrects the first.

EAGLE. The whole purpose of property rights is to have clear, definitive, defined, advance assignments of who owns what, so people can then exchange things to their mutual benefit. When you start with

4. 483 U.S. 825 (1987).

5. 460 U.S. 575 (1983).

6. See Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing is Not Enough*, 1 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 177 (2012).

Penn Central and you start creating prongs and subprongs and start creating Ptolemaic epicycles on the nature of property, then it gets so confusing that of course we seek recourse in the kind of administrative process that Marc's talking about. But as my mentor, Myres McDougal, once said: to rearrange the piles in the Augean stables is not to cleanse them. What we really have to do if we're talking about redistributive elements is to go to the top level possible, which is, namely to say, what kind of tax system we want, as Richard just said. Once you figure that out, you find a way of empowering other people, and then people can negotiate freely over particular entitlements.

POIRIER. Just a thought on the question of uncertainty. Clearly with regard to environmental matters and I think with regard to land use, there is often an unavoidable uncertainty. It's not clear what's going to happen when people do stuff. The people who make decisions, if you rely on pure property rights, may not be informed, or they may not care, and afterwards there are lots of costs, and it's hard to undo the decisions. And when you try, you get transaction costs that may be greater than including people in negotiations up front.

I also want to suggest again, because my view is that many natural resources (often including land) have many stakeholders, that there is an important communitarian element to facilitating negotiations. It's messy. It's not perfect. But I think the alternative can in many cases be worth it.

EPSTEIN. No. Strong Disagreement. What you're doing is you're playing the uncertainty card, but you're playing it in the wrong way. That is, we often have private disputes with respect to land use between neighbors where there are uncertain consequences. There are two ways in which the law can try and solve that. One is that it can adhere to the common law rule that says to let the owner go ahead and develop in whatever fashion he or she wants, but the moment that development causes actual or imminent harm, the law will shut it down with an injunction, no questions asked, until the problem is fixed. Knowing that this remedy is available creates powerful incentives for developers to cleanse their stables before they pollute their neighbor's. In consequence, very few harmful interactions arise.

What you're proposing is, in the alternative, a system in which, before anybody does anything, everybody else gets to review everything. And the difference in legal regimes is that yours shuts out not only the bad, but also the good. Your program imposes costs in 1,000 cases instead of one. The process of legitimate development can be slowed to a crawl.

There are better ways to handle uncertainty without relying on an endless permit process, which completely deviates from all the private rules that have been used for centuries in issuing injunctions. The private law approach is far superior to the modern permit system. It is a dangerous form of mistake to posit that some set of community values mystically alters the equation under direct regulation. That conclusion is wrong.

The way to protect the community is through a strong injunction, which allows all people to organize their lives in peace. The permit system is not about protection but about aggression in the effort to intervene so early on in the process that property owners will be stopped by government officials unless they buy those officials off. Uncertainty, in effect, is a strong argument for the common law rules, not for the administrative process.

MERRILL. Hi, I'm sorry to play lawyer here, but the theory of *Nollan* and *Dolan*, I thought, was rather clearly anchored to a concept of the eminent domain power and the idea that what was happening in those cases was that the government was engaging in a taking of property that would ordinarily require just compensation but was doing so in the guise of this quid pro quo exaction. The Takings Clause is applicable in those cases, I think, because the underlying exchange involved something that would ordinarily be governed by eminent domain and require just compensation.

When you get to *Koontz*, the one thing that all the Justices seem to agree upon is that ordinary taxes are not going to be subject to the Takings Clause. But Richard and Steven want to take *Koontz* and build on top of it this sort of ideal taxation regime which is going to coincide with the sort of principles that the Takings Clause reflects.

EPSTEIN. That's correct.

MERRILL. Unfortunately, the thing the Justices all agreed upon is that they're not going to go down that path. They're not going to create an ideal—

EPSTEIN. Shame on them.

MERRILL. —tax regime under the Takings Clause.

EPSTEIN. There's no question that these guys resist generalization and serious theories. Our job as law professors is not to give excuses for their wretched intellectual performance. It's to decide whether they're right or wrong. In these cases, they are dead wrong. That's the lawyer's answer.

MERRILL. Maybe in some ideal universe they're wrong, but—

EPSTEIN. Well, that's what the justices have to do. They have to think from first principles instead of deciding cases based on their own twisted precedents. Once they do that, they will basically take a rather different view of the world if they do it—

MERRILL. That's your vision of how things ought to work.

EPSTEIN. Yeah.

MERRILL. I'm sort of stuck in the world where things are going to work the way they're going to work, and maybe you can nudge them one way or another. For better or for worse, the Court is not going to subject taxation to the Takings Clause or to any kind of takings analysis. And so, what you're really talking about is sort of reforming the law of equal protection as it applies to taxes or something like that, which is a project that has hardly been started.

I think the real battleground in *Koontz* is going to be over whether or not *Koontz* is limited to in lieu exactions, which are exactions of money that are offered as a substitute for a specific real property transfer, or whether somehow it's going to break free of the unconstitutional conditions moorings in the context of eminent domain and become some kind of free-standing intermediate scrutiny doctrine

for financial exactions. My prediction would be that it's going to be limited to in lieu exactions because that is the thing that is anchored to the theory that underlies *Nollan* and *Dolan*, which is what this is all about—evasions of the power of eminent domain.

EPSTEIN. Property rights also include restrictive covenants, right? And indeed, the modern law says that restrictive covenants and easements—one possessory, one non-possessory—are servitudes covered by the same private law principles. So now, under your theory, what's going to happen when somebody says that the requirement of a setback is in fact the state-imposed restrictive covenant? May the state now demand a lateral easement in order to remove that restriction? Does the law now exempt every zoning law from scrutiny, or it does subject them to a property analysis based on the simple proposition that the state has taken a restrictive covenant under a zoning law? I think you'd have to say that the exemption of zoning laws is total. But in principle the answer is that there are no strong grounds for distinction.

So I agree with you on the prediction that zoning laws will routinely prevail. But I don't understand where the normative case for that proposition comes from.

EAGLE. I have problems with the in lieu concept here as well. Years ago, Gideon wrote an article called *Tennis, Anyone?* It was a nice article about *Ehrlich v. City of Culver City*⁷ and the notion that either you put artwork in your new building or you have to pay a city a 2% fee in lieu of putting artwork in your new building.

Gideon asked, quite correctly, "Does this mean that if I put up a building, I'm limiting the space in the city where artwork could otherwise be displayed?" I mean, that was a silly concept to begin with. And attaching it as an in lieu fee doesn't make it any more coherent.

EPSTEIN. Look, I'm going to put it another way. There's no way to do takings law right on a partial equilibrium basis. What happens is private property is our most comprehensive and systematic legal conception. Takings and taxes are not categorically distinct. So what happens is all these efforts to develop these artificial subcategories,

7. 911P.2d 429 (1996).

which make the judges feel comfortable with themselves, don't work to organize the field. It is interesting to compare with this First Amendment law where the justices actually care about what's going on. There magically all these supposed distinctions between taxes, regulations, and liability rules disappear. The justices don't have one set of rules for takings, another set of rules for regulations, one set of rules for injunctions, and another set of rules for fines. What they do is they have a consistent theory, which is why their performance is much better there than in the takings area.

And so what's happened is that with property rights, the justices celebrate this endless ad hocery, which is the legacy of *Penn Central*, right? Ad hoc solutions are in fact the fundamental source of the current judicial error.

. . . .

AUDIENCE. You also said that the power of eminent domain exists to overcome holdout problems. You also said there is no holdout problem in. . . .

EPSTEIN. But I also said that takings law was designed to deal with the problem of indefinite rights. The holdout problem arises when everybody tries to impose the liability for public expenses on everybody else. Essentially there is no unique solution to that game. It's a common pool problem with respect to liabilities, and we have eminent domain solutions for oil and gas that stabilize rights and increase production. We need to have similar rules for taxation and regulation. If we don't do it, then perhaps incremental changes will produce moderate amelioration, but we'll never get maximum improvement. That was the point of my takings book. That's what you, Tom, disagreed with when you reviewed it. You wanted to do theory on a part-time basis, which I resisted. Once we start down the road with a coherent theory, we should take it all the way. First Amendment law does a better job of that even if it is not perfect. Takings law never tried. What you have to fear in the end is becoming a *Penn Central* ad hoc basis guy if you continue to push down this line of argument

MERRILL. You have a principled theory on the Takings Clause. You said it implies when the government takes unrecognized property—

EPSTEIN. No, because all these things are property. Money is not property, so if the government announces Mr. Merrill, we are now charging you \$100,000—

....

EPSTEIN. Well, I mean, if they take all your money in your banking account, that's not property? Sure it is.

MERRILL. I just—I see it differently. I think the hardest part is to see the mess. And it sets the minimum standards. Why aren't you railing at Congress instead of at the United States Supreme Court?

EPSTEIN. I do. I'm not selective. I'll rail at both branches of government. I mean, I think the Congress is often bankrupt as well on these issues. The point here is this: just because the Courts are inept doesn't excuse Congress from being inept and vice versa. All of them work according to the same ad hoc theory. That approach is bad no matter who relies on it. So I think that we should attack both branches with equal vigor and for the same reason.

MERRILL. You know that, that is a quixotic pursuit.

EPSTEIN. All intellectual work is quixotic.

MERRILL. No, all intellectual work is not quixotic.

EPSTEIN. It essentially—what happens is—

MERRILL. Sometimes you can't travel down certain roads.

EPSTEIN. What happens is you see major system difficulties taking place in this country, and your response is to patch this little hole and let this other one get larger. And my view is that—

KRIER. We've been living with this same structure since *Pumpelly* and *Mahon*.

EPSTEIN. No.

KRIER. If you look over the cases, essentially the system has been stable. Most of the things that have happened since *Mahon*, though exactions are an interesting side case, have just been logical—purely logical—extensions of *Mahon*.

EPSTEIN. No. I think that's just dead wrong.

KRIER. I disagree.

EPSTEIN. I do. *Euclid* is a massive extension that goes beyond either *Pumpelly* or *Mahon*. Period.

KRIER. *Euclid* was not framed as a takings case.

EPSTEIN. But it is a takings case. I mean, the fact that somebody doesn't call it that—that's what the trial judge did down below. He called it a takings case.

AUDIENCE. But the opposite strategy doesn't work either, Richard. Not everything is a takings case.

EPSTEIN. All the world's a taking, some of which are justified and some of which have implicit compensation—that's the point about being systematic. When you modify the property rights for your advantage, you've taken them.

BURLING. To interject here just a little bit, because I hear these arguments, and they're wonderful arguments, but when I go to court—

EPSTEIN. We don't care about that—

BURLING. I have to deal with judges who don't get any of this. We have to explain in the simplest terms possible. And of course, I'd love to have Richard as my expert witness, but it ain't going to happen. It ain't going to work.

So my challenge is to take these ideas or these words and to try to get a court to have a basic understanding, and that is very tough, because the judges are basically illiterate about property law, property

rights, and they're certainly totally illiterate about what any of the professors have talked about today.

BERLINER. So, Jim, my question is directed to you, although obviously other people may have a view on it. But it's about what's going to happen with legislative exactions. Where do you think that's going? And then also, I was wondering whether legislative exactions actually sound in due process in addition to takings. Let's say you have an exaction that has no mooring at all. You want to build something, and whatever that something is, you've got to pay \$100,000 to a local charity. The requirement has no relationship to what you are building, to the property, to anything. So, it doesn't have nexus. It doesn't have proportionality. You can analyze it as a property question, but isn't it a substantive due process problem as well? So, I have two linked questions about legislative exactions.

BURLING. The first part of the question is, where is this likely to go? I think if the courts look at this seriously and intellectually properly, they'll go back to the dissent, to the denial of cert in the *Georgia Parking Authority* case where Justices Thomas and O'Connor said that there is really no intellectual difference between an exaction that's imposed adjudicatively or legislatively. Despite the fact that in the *Ehrlich v. Culver City* case, the California Supreme Court said that legislative exactions were open to the full air of sunlight, and therefore, you're not going to have the oppression animating *Nollan* and *Dolan*—that's just nonsense. You have just as much oppression from legislative bodies with a majoritarian impulse as you do from adjudicative bodies.

So when you're talking about an exaction that's totally unhinged from anything, you can look at it in the context of either takings or due process. My problem with due process is that due process in 2014 is rational basis, meaning no review at all if you can come up with any idiotic excuse for this at all. And I was telling Robert Thomas earlier today, during my first trip to Honolulu I opened the newspaper, and the mayor was quoted saying, "I think for every golf course we should demand \$100 million in exactions."

So it's exactly your situation. No connection whatsoever. I think I'd much rather look at that in the takings context, because they're taking your underlying right to develop that golf course, your development

of that right of that property. And that's where the taking stems from. If you start only looking at it in due process terms, looking at whether there's a rational basis for stealing \$100 million dollars—of course there's a rational basis for stealing \$100 million. I could do a lot of good things for everybody here if I had \$100 million. Trust me. I would.

EPSTEIN. That's why the Kennedy due process opinion in *Eastern Enterprise* means it's five justices against a strong stand on retroactivity as opposed to five justices for. When he made the case turn due process, every subsequent challenge has failed.

EAGLE. You know, you can talk about legislative versus administrative exactions, or you could try to split the difference by talking about giving credence to comprehensive rezoning but not giving credence to small-scale rezoning. But the essential difference between exactions and taxes is that taxes should be broad based. And if they're broad based, they'll be voted by the people only if in fact you get this kind of welfare-improving move that Richard was talking about earlier. When the *Euclid* case was decided, you know that George Sutherland was a believer in substantive due process. But he had this notion of mobs and contagion and revolutions about which he was so concerned. In a kind of Hobbesian move, he was willing to give power to the government to arbitrarily divide the cities into districts to prevent foment, and that, I think, is still the basis of a large part of the judicial mentality here, which is that if we go back to this notion of looking at property rights instead of the notion of looking at stakeholder interests, people are going to rebel, and we're going to be in trouble.

KANNER. This is wonderful, and I'm informed and enlightened and amused, but there's one thing that you guys slid over a little too quickly. And I hear the same story from New York. The great majority of judges are former prosecutors. I scan the legal papers to see who gets appointed, and we're talking about something like twelve, fourteen—eleven to one. There was one guy who was in private practice, and everyone else is a former deputy this and assistant that and what not.

Now, these are people who don't know a thing in a great majority of cases, because the sure ticket to election to court in California,

which is a semi—it's really an appointed thing, but it has an elective element—is to identify yourself as being a prosecutor. So if you pick up your ballot when you get home, Jim, you'll find that every one of these bozos identifies himself as a criminal gang prosecutor. Because that's the road to wherever they want to get.

BURLING. The developers and criminal gangs are no different.

KANNER. That's right. You anticipate my next point. There's a tendency on the part of these guys almost involuntarily to believe that the people who are litigating against the government are really bad people, because if they weren't, they wouldn't be disagreeing with the good government that wants to govern them.

So, the bottom line of what I'm suggesting is that whatever wonderful system you come up with, it is going to have to take the form of and be reduced to a system of rules that is capable of being rationally administered by—pardon the expression—those Herman Wouk's idiots who sit on the bench and who have never seen a case like that in their career.

EPSTEIN. We are doomed. If that's true, then we're doomed.

KANNER. We are doomed.

EPSTEIN. To a steady rate of decline. Mediocrity will become the new American exceptionalism.

KANNER. Look, you can easily collect cases which contain some of the most outlandish absurdities. And if you were a practicing lawyer, since they don't fit into the grand scheme of things, you know about them, whereas the professors—pardon me—don't know about them.

AUDIENCE. We all want the same thing. . . .

KANNER. I will give you only one example, and I'm not making it up. There's a rule in eminent domain law that says that business losses, loss of goodwill, are noncompensable. If you trace it back to its origin, you'll find that it comes from Justice Oliver Wendell Holmes Jr.—the

very one—while he was still on the Massachusetts Supreme Court. And he justified it by saying that “business is so uncertain in its vicissitudes” that it plumb can’t be valued. That’s why we don’t do it.

EPSTEIN. On the other hand, it’s bought and sold every day.

KANNER. It’s bought and sold every day, it’s taxed, it’s divided in divorces, it’s valued in torts cases, and nevertheless, that is the black letter of the law. So you are out. Oliver Wendell Holmes was no dummy. He was very smart. But it is common among these guys to search for something to offer some rational-sounding reason for ruling this way or that way, and it’s become a judicial culture in this field that they sometimes reach for absurdities. So whatever system you come up with will have to be relatively easy to administer if it is to retain its rationality.

EAGLE. But Holmes was cynical, and he wrote in a letter to his friend Pollock that—the question at the end was, who’s going to be the grabber and who’s going to be the grabbee?

EPSTEIN. And on that principled note, we end.