

**TWILIGHT OF THE IDOLS:  
PHILOSOPHY AND THE CONSTITUTIONAL LAW OF TAKINGS**

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INTRODUCTION .....	202
I. THE VARIED APPEALS TO PHILOSOPHY .....	207
A. <i>Frank Michelman's</i> Property, Utility, and Fairness.....	209
B. <i>Ackerman's</i> Private Property and the Constitution.....	229
C. <i>Epstein's</i> Takings.....	246
D. <i>Conclusion</i> .....	275
II. THE JUDICIAL RESPONSE .....	277
III. WHY PHILOSOPHY CANNOT REFORM OUR TAKINGS LAW.....	317
CONCLUSION .....	344

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\* I am grateful to Richard Epstein for clarifying my understanding of the linearity argument with respect to the division of the surplus arising from the creation and operation of the state and to Bruce Ackerman for emphasizing some of the elements common to his early work on takings and his later analysis of constitutional flux. I benefited from comments and discussion when I presented an earlier version of this article at the Sixth Annual Constitutional Law Colloquium at Loyola University of Chicago and to comments from the late Jeff Greenblatt. Remaining errors are mine. © 2019 André LeDuc.

### ABSTRACT

The constitutional law of takings has been recognized to be in substantial disarray for more than half a century. The legal academy has repeatedly called out the manifold problems in the law and offered a number of competing, highly theoretical, and inconsistent approaches to reform our Takings Clause jurisprudence. The academy congratulates itself on the brilliance of its constitutional thinkers and the importance of their contributions. Still, the debate between competing theories of the Just Compensation Clause has remained unresolved and the law in disarray. This article resolves the apparent paradox in the conflict between the shining brilliance of the academy and the stubborn confusion of our law.

Frank Michelman and Bruce Ackerman argue for a theory of just compensation founded on a liberal political theory. Richard Epstein defends a radically different theory based upon a libertarian political theory. Neither foundational theory bears much resemblance to current just compensation law in the courts. The only thing the competing theorists agree on is that we need a foundation of political philosophy to construct our constitutional doctrine of the state's powers and obligations with respect to takings of private property. The courts have remained largely indifferent to academic theorists' claims and theories even as they have continued to struggle to decide the takings controversies they have faced. Takings cases have consistently fragmented the Court.

The premise shared among these renowned academic commentators that we must ground our constitutional takings jurisprudence on a political philosophy of property, justice, and fairness and a philosophical account of the power of the state is mistaken. No such foundation is necessary or possible. There is a path toward reforming our Takings Clause jurisprudence in the prosaic, canonical methods of constitutional argument and decision. This article shows why we should eschew the highfalutin theoretical gambits of the academy and how we may nevertheless make progress in reforming our takings jurisprudence.

### INTRODUCTION

Just about everybody agrees that the constitutional law of takings is (and has long been) in disarray.<sup>1</sup> Takings jurisprudence appears unpredictable,

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1. The law has not cleared up since Frank Michelman and Joseph Sax ventured into the swamp a half-century ago. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165,

unprincipled, replete with doctrinal anomalies, and infested with seemingly arbitrary distinctions.<sup>2</sup> For lawyers, this is some pretty serious disarray. By contrast,

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1170 (1967) [hereinafter Michelman, *Fairness and Utility*] (characterizing the takings case law as “replete with “jarring outcomes” and “salted with paradox”); Joseph Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter Sax, *Takings & Private Property*]; Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (“the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results”); see also Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 105–06 (1962). Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078–79 (1993). For a more recent assessment of the continuing disarray see RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* 1–8 (2008) [hereinafter EPSTEIN, *SUPREME NEGLECT*].

Bruce Ackerman argued that the apparent conflict and disarray in the takings jurisprudence could be rationalized by understanding that that law reflected a commitment to commonsense, ordinary language assumptions about the law with occasional nods toward conflicting utilitarian and deontological views of the law. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 87 (1977) [hereinafter ACKERMAN, *PRIVATE PROPERTY*] (asserting that “the present case law can be understood as a coherent whole”). Ackerman elsewhere characterized our contemporary takings jurisprudence as “a chaos of confused argument.” *Id.* at 8.

A few commentators argue that the constitutional law of takings is difficult and complex but not otherwise in disarray. See DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* (2002); MARGARET JANE RADIN, *Diagnosing the Takings Problem*, in REINTERPRETING PROPERTY 146 (1993) [hereinafter Radin, *Diagnosing the Takings Problem* and RADIN, REINTERPRETING PROPERTY]. Radin argues that the apparent disarray in contemporary Takings Clause jurisprudence and its resistance to reform reflect underlying tensions in our concept of property and the role of corrective justice.

2. These are traditional badges of disarray. Arbitrary distinctions and seemingly inconsistent lines of authority are two of the most obvious. In the context of takings, commentators have cited the importance of concepts of trespass in determining the application of the Fifth Amendment to military aircraft flights, pursuant to which compensation is owed if the military flights pass over a person’s land, but not if they do not while otherwise doing the same damage as an example of an arbitrary distinction. See Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 3 (1987) [hereinafter Epstein, *Descent and Resurrection*] (“[n]o matter how hard or often it tries the Supreme Court seems unable to develop any coherent principles”); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 50–51 (1985) [hereinafter EPSTEIN, *TAKINGS*] (arguing that takings analysis need look only to the question whether the governmental action impaired the rights of the landowner). Some have also suggested that the emphasis upon trespass concepts has resulted in a disproportionate emphasis on physical intrusion as a trigger for finding a taking and an entitlement to just compensation. See,

just about everybody within the legal academy seems to think that the problems of the Takings Clause have produced some of the most impressive constitutional scholarship of the past half-century.<sup>3</sup> I want to resolve this apparent paradox.

There would be no paradox, of course, if constitutional legal scholarship were wholly independent of the state and development of the substantive law. We can have brilliant string theory in physics even if entropy is increasing in the universe. This independence of subject and scholarship may even be the case in some areas of the law. For theoretical general jurisprudence, for example, sophisticated general theories of what law is may be advanced and defended independent of the state of the substantive, doctrinal law. If something like this independence obtained for our constitutional law and our constitutional scholarship, the triumphs of the academy could unfold independent of the disarray in the substantive constitutional law without paradox.

But I am rejecting such an account of the relationship of constitutional scholarship and constitutional law. At least as importantly, the legal scholars whose work I explore here reject such a strong claim of complete autonomy, too. Such a complete independence would leave legal scholars not just talking to each other but would require that their prescriptive constitutional claims be empty and their normative claims be wholly separate from the substantive constitutional law. Even those defending a truth-talking mission for the legal academy that must be properly distinguished from the functional, power constitutional discourse of Article III judges do not go this far.

The dominant strategy in the academic classics would repair the disarray by articulating the philosophical foundations of property, the Constitution, and the constitutional law of takings. Paradoxically, however, this resort to philosophy, conceptual analysis, and first principles has not brought clarity or consistency to the law of takings. The academics appear to disagree even more fundamentally about first principles<sup>4</sup> than about cases.

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*e.g.*, Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 155 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

The academic critics are right—the modern constitutional law of takings remains in disarray—as I will argue myself below. *See, e.g.*, Lynn E. Blais, *The Total Takings Myth*, 86 *FORDHAM L. REV.* 47 (2017) (arguing that the Court’s attempt to distinguish total takings from other regulatory takings has failed); Stephen S. Schwartz, *Horne v. USDA: An Exercise in Minimalism?*, 10 *N.Y.U. J. L. & LIB.* 777 (2016).

3. *See, e.g.*, Daniel A. Farber, *Public Choice and Just Compensation*, 9 *CONST. COMMENTARY* 279, 279 (1992) [hereinafter Farber, *Public Choice*] (“Few areas of law have spawned such a rich scholarly literature, with contributions by so many major thinkers, as the takings clause.”).
4. Here “first principles” means the more abstract or conceptual philosophical statements describing the law that subsume, justify, or explain more particular legal

The courts have paid scant attention to the conceptual and philosophical work that has been done in the academy.<sup>5</sup> Instead, the courts have focused largely on doctrinal arguments and occasionally, albeit more often in dissents, on the text and original understandings.<sup>6</sup> They have been unable to resolve the doctrinal disarray. The academy has merely introduced a new level of disagreement.

The orthodox academic view of philosophy's role in our Takings Clause jurisprudence is wrong about the nature of our Takings Clause jurisprudence, implicitly wrong about the nature of moral philosophy, and mistaken about the relationship between the two. First, the shared premise of constitutional theorists as substantively different as Frank Michelman,<sup>7</sup> Bruce Ackerman,<sup>8</sup> and Richard Epstein,<sup>9</sup> among others, is that the path to resolving the disarray in the law of takings lies in a strategy of theoretical, conceptual or philosophical analysis.<sup>10</sup> The American constitutional law of takings is no more to be put on a firm foundation with philosophy than the competing claims in the originalism debate are to be determined by such a substantive philosophical strategy.<sup>11</sup> The reason is that

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rules. They are not statements of the law, in the sense of authoritative legal texts that would be controlling in judicial decision-making.

5. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).
6. See, e.g., *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).
7. Michelman, *Fairness and Utility*, *supra* note 1.
8. ACKERMAN, PRIVATE PROPERTY, *supra* note 1.
9. RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993) [hereinafter EPSTEIN, BARGAINING]; EPSTEIN, TAKINGS, *supra* note 2.
10. These commentators' approaches to takings jurisprudence have dominated much of the academic debate. See generally ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 24 (judging Michelman to have made one of the two "most important contributions to compensation law"); Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 146 n.5. Second, these commentators are sophisticated and thoughtful—as well as renowned.

The legal academy's interest in, and attention to, the constitutional takings jurisprudence did not end in 1985. But the premise shared by Michelman, Ackerman, and Epstein that philosophical theory must play an important role in reforming our takings jurisprudence has remained unchallenged. See, e.g., GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012). The focus here on these three lines of analysis does not cover the field. Hegelian considerations (acknowledged in passing by Michelman and emphasized by Radin) and practical concerns relating to avoiding the so-called fiscal illusion are important parts of the theoretical landscape of takings, too.

11. In making this claim, I extend an argument I have made previously about the originalism debate. While this debate is grounded on philosophical and conceptual

philosophical arguments are not constitutional arguments.<sup>12</sup> The important distinction between such modes of argument has been lost in the abstract conceptual inquiry of the academy. We can resolve disarray in our constitutional jurisprudence only with better constitutional arguments and decisions.

The appeal to philosophical arguments to provide answers to our legal questions about the constitutional law of takings misunderstands the nature of constitutional argument. Philosophical argument is not an accepted form of constitutional argument, and it is not likely to become so—nor, I think, should it. One apparent objection to my claim is that philosophical theories have long addressed the protections properly accorded property by the state.<sup>13</sup> Why do such theories not serve as conceptual frameworks for our analysis of the American constitutional jurisprudence of takings? The simplest answer is that while such theories may explain our constitutional jurisprudence, they do not provide reasons for deciding cases one way or another. None of such theories figure as critical elements in arguments as to how particular constitutional cases should be decided in our constitutional practice.

Distinguishing philosophical and constitutional argument allows us to resolve the paradoxical disconnect between the constitutional decisional doctrine and the theoretical analysis of the academy. In this article, I examine some of the

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confusions, philosophy cannot offer us a substantive analysis that resolves the debate in favor of one position or another. André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J.L. & PUB. POL'Y 99 (2014) [hereinafter LeDuc, *Philosophy and Constitutional Interpretation*]; André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JUR. REV. 263 (2015) [hereinafter LeDuc, *Ontological Foundations*]; André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. ST. L. REV. 131 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*]; André LeDuc, *Political Philosophy and the Fruitless Quest for an Archimedean Stance in the Debate over Originalism*, 85 UMKC L. REV. 1 (2016); André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL OF RTS. L.J. 101 (2017) [hereinafter LeDuc, *Striding Out of Babel*].

Takings law generally pays little attention to the original understanding of and expectations for the relevant provision of the Fifth Amendment. See EPSTEIN, TAKINGS, *supra* note 2, at 28–29, 29 (“To my knowledge the Supreme Court has never resorted to historical sources to explain the relationship between the [E]minent [D]omain [C]lause and particular government action.”). *But see* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013) [hereinafter Baude, *Rethinking*]; Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S. CAR. L. REV. 531, 535–38, 538 (1995).

12. See *infra* pp. 324–28.

13. See generally ALEXANDER & PEÑALVER, *supra* note 10, at 19–79 (describing utilitarian, Lockean, Hegelian, and Kantian theories).

numerous sources of our doctrinal difficulties. They include the complexity of the issues presented, the high stakes, the absence of textual or historical guidance, and the continuing constitutional and extra-constitutional conflicts raised by contemporary cases. At a doctrinal level, they include disagreements about the proper level of deference to governmental action and the relationship between the requirement to pay just compensation and the permissible exercise of the state's police powers. The disarray is not, as the conventional wisdom of the academy tacitly claims, a result of the courts having ignored the appeals to first principles in the academy.<sup>14</sup> The disdain or disregard for that work reflects a tacit acknowledgment by the Court of the limits of philosophical argument in constitutional law.

Progress in our constitutional law of takings does not require a better mastery of political or moral philosophy. It requires a more sensitive and more realistic view of how we live and how property figures in our Republic and in our lives. For example, how trusting or suspicious we are of local government, either with respect to particularized permitting decisions or with respect to more general regulatory regimes, independent of the facts or record in any particular case, shapes the choice of a standard of review for public purpose or public use determinations. Progress also requires better constitutional judgments about traditional constitutional arguments and new arguments within the constraints of our constitutional practice of argument and decision. The appeal to philosophical argument in the academy is a wrong turn in our constitutional Takings Clause jurisprudence.

### I. THE VARIED APPEALS TO PHILOSOPHY

The dominant appeal to philosophy to solve the disarray of our Takings Clause jurisprudence can be first displayed and then analyzed by looking to three of the iconic works in our academic Takings Clause jurisprudence. Written over about a twenty-year span beginning a half-century ago, they have shaped our academic analysis of the Clause. The genealogy of the wrong turn in our Takings Clause theory begins with works by Frank Michelman, Bruce Ackerman, and Richard Epstein.<sup>15</sup> Their substantive differences mask a common methodological misstep.

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14. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding, in a 5–4 decision, the condemnation of private property for redevelopment by a private person as satisfying the public use requirement).

15. ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1; EPSTEIN, *TAKINGS*, *supra* note 2; Michelman, *Fairness and Utility*, *supra* note 1.

Two of the three—Michelman and Epstein—have repeatedly returned to the constitutional law of takings as the law has developed to refine and extend their analysis and arguments. I will address many of those later contributions in my analysis. Bruce Ackerman, by contrast, has not continued to focus on takings law, instead devoting substantial efforts to his project to articulate a historical account of the development of our constitutional law that captures the fundamental changes that have arisen in that law outside the formal process of amendment pursuant to Article V.<sup>16</sup> The relationship of Ackerman's later thinking to his earlier work on takings is less obvious than for the other two theorists focused upon here. Although the implications of that later work for Ackerman's analysis and approach to our constitutional takings jurisprudence are less obvious, they are worth exploring, precisely because some of the strengths of the later work reinforce some of the criticisms made here.<sup>17</sup> Moreover, in the context of that work Ackerman has more directly engaged the question of the relationship between academic analysis and constitutional adjudication.<sup>18</sup>

Another pair—Ackerman and Epstein—have been subject to two radically different criticisms of constitutional theorizing. Both have been singled out for criticism by Robert Bork, for rejecting the theoretical premises and commitments of originalism to the constitutional text,<sup>19</sup> and by Daniel Farber and Suzanna Sherry, for their ambition to articulate a comprehensive, foundational constitutional theory.<sup>20</sup> While my criticism of these theorists' use of philosophy

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16. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) [hereinafter ACKERMAN, *THE CIVIL RIGHTS REVOLUTION*] (arguing that the adoption of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 effected *de facto* fundamental changes to our constitutive law that should be treated as constitutional amendments).
  17. I am grateful to Bruce Ackerman for suggesting the common elements of his earlier and later work, even though my reading of the relationship is different than his.
  18. See Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L.J.* 2279, 2282, 2348–49 (1999) [hereinafter Ackerman, *Revolution on a Human Scale*] (asking “[i]s it a mistake to hope that [my theoretical constitutional scholarship] might ultimately change the way constitutional law is actually practiced in this country?”).
  19. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 229–30 (1990) [hereinafter BORK, *TEMPTING*].
  20. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 55–74, 97–121 (2002) (criticizing Epstein and Ackerman's respective constitutional theories). While Ackerman articulates and defends a comprehensive reformulation of our



share common themes with these earlier criticisms, I will also highlight the important differences that separate us.

A. *Frank Michelman's Property, Utility, and Fairness*

The dominant academic Takings Clause analysis asserts that philosophical analysis is necessary to understand our contemporary takings jurisprudence.<sup>21</sup> Frank Michelman wrote the groundbreaking article that sent the academy down this path. This article set the stage for the appeal to, and incorporation of, expressly philosophical concepts and argument in the constitutional law of takings.<sup>22</sup> Michelman offers a complex and rich analysis of a number of disparate strands of our takings law and constructs a complex account of the structure of that law in the courts and in the legislative arena.<sup>23</sup> He appears to believe that attention to and articulation of philosophical theory can give us direction in the adjudication of Takings Clause controversies and the formulation of Takings Clause doctrine.<sup>24</sup> But despite Michelman's express appeal to philosophical foundations,<sup>25</sup> he is not

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constitutional theory, he is aiming not at a foundational account but at an account that incorporates the richness of our constitutional practice, revisionary as well as normal. Farber and Sherry are right about Epstein: libertarian political philosophy provides the foundation for his constitutional theory. *See also* RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

21. *See, e.g.*, DANA & MERRILL, *supra* note 1, at 36; Michelman, *Fairness and Utility*, *supra* note 1, at 1171; ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1.
22. Michelman asserts that his proposed strategy to reform the law of takings “requires willingness to return as far as may be necessary to first principles in order to form a clear understanding of just what purposes society might be pursuing . . . .” Michelman, *Fairness and Utility*, *supra* note 1, at 1171. The context makes clear that these first principles are philosophical principles.
23. It is widely regarded as a legal classic by some discriminating observers. *See, e.g.*, Richard A. Posner, *The Decline of Law as an Autonomous Discipline*, 100 HARV. L. REV. 761, 772 (1987) [hereinafter Posner, *Autonomous*] (“A notable example besides those already mentioned is Frank Michelman’s article on just compensation, which used both philosophy and economics to examine legal doctrine in a more scientific spirit than had been traditional.”).
24. Michelman characterizes his analysis as properly belonging in a legal treatise about eminent domain in a chapter addressing “general principles” of what constitutes a taking. Michelman, *Fairness and Utility*, *supra* note 1, at 1165. He is writing to a legal audience about constitutional doctrine, not writing moral philosophy for academic philosophers.
25. *Id.* at 1202–13.

entirely clear as to the relationship of his philosophical premises and conclusions to his corresponding conclusions of constitutional law.<sup>26</sup>

Michelman makes certain foundational assumptions. His project assumes the existence of a state in a democratic constitutional republic similar to our own. He explores the purposes of collective action within that constraint.<sup>27</sup> The import of the ethical foundations that Michelman endorses for our constitutional argument and law remains obscure, because the nature of philosophical arguments is quite different from that of constitutional arguments.<sup>28</sup> This difference goes unacknowledged. For example, in our practice of constitutional law—but not philosophy—precedent plays an important role.<sup>29</sup>

Michelman articulates the principles that ought to underlie our constitutional takings jurisprudence.<sup>30</sup> He is not after the traditional principles that law professors have articulated in order to rationalize an area of the law and to which judges may appeal in deciding cases.<sup>31</sup> Michelman is after “first principles.”<sup>32</sup> By that Michelman means those principles “necessary . . . to form a clear understanding of just what purposes society might be pursuing when it decrees that compensation payments shall sometimes be made.”<sup>33</sup> In other words, Michelman proposes to look outside the law to political theory to find his principles.

Michelman’s first principles may be recognizably philosophical, but to understand his project—and its flaws—we need a more functional account of his approach. We need an account of the kinds of argument that figure in philosophy (philosophical arguments) and those that figure in constitutional decision

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26. *See id.*

27. *Id.* at 1172–83.

28. *See* LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11; *see also infra* pp. 324–28.

29. *See* CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (2004) [hereinafter FRIED, SAYING] (emphasizing the importance and autonomy of constitutional precedent and doctrine in shaping constitutional law).

30. Michelman, *Fairness and Utility*, *supra* note 1, at 1170–72.

31. *Id.* at 1171.

32. *Id.*

33. *Id.* Originalists and others focused upon the constitutional text will be struck by Michelman’s abstract and generalized formulation of the relevant provision of the Fifth Amendment.

(constitutional arguments). These two realms are different, and the philosophical argument is not logically prior to constitutional argument.<sup>34</sup>

According to Michelman, the test for the application of the Takings Clause is fairness: “is it fair to effectuate this social measure without granting this claim . . . for private loss thereby inflicted?”<sup>35</sup> That is obviously an abstract, conceptual way to put the question. Michelman asserts that the application of this first principle permits us to assess takings jurisprudence and to determine those cases and doctrines that are correct as well as those that warrant reconsideration.<sup>36</sup>

To answer this question, Michelman invokes, among other doctrines, the philosophy of Locke,<sup>37</sup> utilitarianism<sup>38</sup> and John Rawls’s more recent reworking of a Kantian, contractarian ethical theory.<sup>39</sup> Michelman believes that these theories provide an ethical foundation for the requirement of just compensation in our law.<sup>40</sup> Michelman endorses or assumes central tenets of Rawls’s liberal political philosophy.<sup>41</sup> For example, Michelman expressly assumes the merits of

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34. See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11; LeDuc, *Anti-Foundational Challenge*, *supra* note 11 (arguing that an anti-representational, inferentialist account of constitutional language that emphasizes our practice of constitutional argument and decision avoids many of the sterile controversies that inform the debate over originalism); André LeDuc, *Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics*, 31 *BYU J. PUB. L.* 111 (2016) [hereinafter LeDuc, *Making Constitutional Meaning Express*] (amplifying the anti-representational account of meaning). See also *infra* at 325–28.
35. Michelman, *Fairness and Utility*, *supra* note 1, at 1172.
36. *Id.*
37. *Id.* at 1203–05.
38. *Id.* at 1208–13.
39. Michelman repeatedly invokes the political and moral philosophy of John Rawls. See *id.* at 1219–21; JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *JUSTICE*]; John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958) (early statement of the central argument of *A Theory of Justice*); Michelman, *Fairness and Utility*, *supra* note 1, at 1219–24.
40. Michelman, *Fairness and Utility*, *supra* note 1, at 1208–13, 1219–24.
41. The term “liberal” is used very differently (and not, I think, polysemically) by the scholars whose work is explored here. What Michelman and Rawls would term “liberal”, Epstein refers to as “progressive.” Commitments to positive and negative liberty is tempered by commitments to distributional equality. Epstein, by contrast, restricts the term “liberal” to classical political philosophical stances that make negative and positive liberty fundamental, without much attention to distributional fairness or the practical force of the rights of liberty that are assured. This is the sense

redistribution that increases equality.<sup>42</sup> Given the fundamental differences between the two theories, which theory provides the foundation, and why?

Michelman incorporates both utilitarianism and Rawls's deontological theory into his account of the proper direction for the law of takings.<sup>43</sup> From utilitarianism Michelman takes two key claims. First, there is a measure of interpersonal utility that is sufficiently quantifiable and knowable such that it can form the basis of judgments—in Michelman's context, constitutional legal judgments.<sup>44</sup> While Michelman acknowledges the question whether the utility metric is adequate to play its assigned role, he notes only that there is a simple case in which everyone recognizes that they are better off in one of two situations, and that in that case, the concept of an ordering of the collective welfare holds.<sup>45</sup> Tacitly, Michelman assumes that these orderings are well behaved—transitive, more precisely. But Michelman never defends the claim that such comparisons may be made.

Second, Michelman introduces a concept of collective demoralization that results in certain cases if private property is taken without just compensation.<sup>46</sup> According to Michelman, the discrete action of state takings of private property can have profound implications for both individuals' investment decisions<sup>47</sup> and

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of the title of his *The Classical Liberal Constitution*. I will generally minimize my own use and, when I do employ it, try to make the meaning clear in context.

42. *Id.* at 1182 (asserting that redistributive programs of the state will “command general and intuitive agreement” only if leading to a more equal distribution of resources).
43. *Id.* While there have been some celebrated recent efforts at synthesis, most philosophers treat utilitarianism and deontological theories as incompatible alternatives. See 1 DEREK PARFIT, ON WHAT MATTERS (2011) (offering a synthesis of utilitarian and deontological ethical theories).
44. Michelman, *Fairness and Utility*, *supra* note 1, at 1173–74 (acknowledging the “vexing question” of whether it is intelligible to speak of maximizing welfare).
45. *Id.*
46. *Id.* at 1214. Michelman apparently later moved away from his characterization of this impact as a matter of psychological demoralization. See MARGARET JANE RADIN, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, in REINTERPRETING PROPERTY 120, 241 n.97 (1993) [hereinafter Radin, *Liberal Conception*] (suggesting that Michelman moved to characterize the harm not as demoralization but of corruption of public commitments). Such a move is away from the original, more philosophical frame toward more traditional, canonical constitutional argument.
47. Michelman, *Fairness and Utility*, *supra* note 1, at 1214 (“[T]he present capitalized dollar value of lost future production . . . caused by demoralization of uncompensated losers,

their sense of the legitimacy of the government.<sup>48</sup> To the extent that individuals are concerned that the government may take (or otherwise impair the value or productivity of) their property without fair compensation, they may be reluctant to make capital investments in or even to maintain such property. To the extent that individuals believe that they or others have been unfairly treated in government takings (or by other governmental actions), their confidence in and respect for the legitimacy of the state may be impaired.

Michelman argues that demoralization costs explain otherwise-puzzling features of our takings law. Takings law has attached particular importance to takings that are accompanied by physical invasions of property.<sup>49</sup> Michelman notes that such physical dimension of an impairment of property rights is sometimes freighted with particular psychological impact and a correlative power to demoralize.<sup>50</sup> But as Michelman notes, the general claim that all physical invasions are freighted with particular demoralization costs appears implausible.<sup>51</sup> By looking to property law concepts to determine whether a taking has occurred, the takings law has identified “physical invasions” without meaningful psychological impact. The decision that the installation of cable television wiring on a commercial building’s roof is a taking is a good example of such confusion because of its reliance on a trivial trespass.<sup>52</sup>

One concern with Michelman’s emphasis on demoralization costs is that such an expressive, psychological concept is informed by social and legal practices of a community. At least since Hegel, we have recognized that one’s assessment of one’s entitlements and whether one is being treated with respect is informed by the behavior of others and one’s community.<sup>53</sup> Such judgments are embedded in a

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their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment . . .”).

48. *Id.*

49. *Id.* at 1226–29. As Michelman notes, initially payment of just compensation required a physical invasion of property. *Id.* at 1169–70 (summarizing the Takings Clause analysis of over flight cases).

50. *Id.* at 1226–27. Moreover, the demoralization associated with such taking is not well correlated with the property interests taken. At will tenants without a cognizable property interest may be more demoralized by a taking than the absentee landlord owning the property but be entitled to little if any compensation.

51. *Id.* at 1226–29.

52. *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

53. *See generally* GEORG WILHELM FRIEDRICH HEGEL, *THE PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans, 1977) (1807); FREDERICK C. BEISER, *Hegel’s Historicism*, in *THE CAMBRIDGE COMPANION TO HEGEL* 270 (Frederick C. Beiser ed., 1993); AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF*

historical experience. It may therefore appear to be a will o' the wisp, unable to provide an adequate foundation for a determinative element—valuation—in our constitutional jurisprudence.

Michelman does not appear to acknowledge this potential concern with his concept as a central element of the determination of the value that must be captured in the determination of just compensation.<sup>54</sup> To the extent that he sources the feelings of demoralization in Hume's account of the emotions,<sup>55</sup> it would appear that the historicist, Hegelian recognition that many social emotions evolve with the changing social community is not part of the account.<sup>56</sup> If so, this appears a significant gap. The investment-chilling component of Michelman's demoralization cost measure, by contrast, would not appear to have such a subjective, unquantifiable, personal dimension. It would appear possible to measure this effect by measuring the increased yield that would be required to compensate investors for the perceived risk. The risk of an un- or under-compensated taking of capital would appear to be quantifiable and valued as a financial matter independent of any psychological dimension to the constitutional regime and its protections for private property.

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SOCIAL CONFLICTS (Joel Anderson trans., 1995) (exploring whether identity and autonomy arise socially through interaction with others or psychologically through one's own increasingly sophisticated self-consciousness).

54. Michelman, *Fairness and Utility*, *supra* note 1, at 1209–14. Hume's account is important because it treats emotions as the engines of action and as independent of beliefs. The power of emotions makes the costs of demoralization important.
55. *Id.* at 1209–11.
56. Indeed, Epstein apparently believes that his Humean account of value grounds an ahistorical account of property. See MARGARET JANE RADIN, *Problems for the Absolute Theory of Property*, in REINTERPRETING PROPERTY, *supra* note 1, at 103, 229 n.6 [hereinafter Radin, *Problems*] (reporting that while *Takings* appears to derive its account of property from Locke, Epstein has signaled in discussions of his work that his account of property is Humean). I should note expressly that elements of respect and recognition, albeit historically situated, are neither indeterminate nor too ephemeral to factor into our constitutional argument and decision, as Radin demonstrates. But when and to the extent that such arguments are made and entertained in our constitutional practice, they are translated into, or intermediated by, arguments cast into a canonical form of constitutional argument. Thus, for example, while Radin's distinction between fungible and non-fungible property is motivated by Hegelian sensitivity to what is needed for self-actualization, the distinction itself stands on its own. In constitutional terms, the distinction is supported by protections under the First Amendment for freedoms of association and of religion. Correspondingly, the distinction is not express or seemingly even implicit in the text of the Takings Clause, and Radin's arguments that rely on this distinction need to acknowledge the countervailing textual arguments.

While Michelman argues that demoralization costs ought to be minimized, he does not believe that such minimization is the only factor to be taken into account in assessing takings claims.<sup>57</sup> There is a cost incurred in a legal determination of the existence and amount of those demoralization costs and the state has an interest also in minimizing those legal and transaction costs.<sup>58</sup> Minimizing the transaction costs associated with governmental action explains important elements of takings law.<sup>59</sup> For example, the need to be able to identify whether a taking has occurred may explain the doctrine that has treated takings of an entire property interest as a takings paradigm.<sup>60</sup> Total takings can be more easily identified and therefore impose lower transaction costs.

Michelman has sometimes characterized his approach as if it provides a linear programming equation in which a potential taking generates an obligation to pay compensation if the demoralization costs exceed the legal transaction costs associated with determining the demoralization costs triggered by the government action.<sup>61</sup> Michelman notes that a purely utilitarian approach to takings “would have a quasi-mathematical structure.”<sup>62</sup> But this characterization is misleading; Michelman’s account is hardly so simple. He does not think that the answers to questions about whether a government action results in a taking for which due compensation is payable can be generated from the solution to a mathematical equation analogous to the Learned Hand formula for negligence.<sup>63</sup> There is an important role for judgment in assessing the relevant factors. Moreover, the utilitarian approach is not the only way to think about takings and, standing alone, is insufficient to understand the social purposes underlying our takings law.

Michelman makes clear that a utilitarian analysis is insufficient to conceptualize and assess the constitutional law of takings, stating: “there is no basis for concluding that the question of compensability is intelligible only when compensation is regarded as an instrument of utilitarian maximizing.”<sup>64</sup> By intelligible, Michelman likely means that the propositions stating the principles and structure of our constitutional takings jurisprudence can be derived only as

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57. Michelman, *Fairness and Utility*, *supra* note 1, at 1214–15.

58. *Id.* at 1215 (suggesting that from a utilitarian perspective, settlement or demoralization costs should be incurred, whichever are lower).

59. *Id.* at 1190.

60. *Id.* at 1229–34.

61. DANA & MERRILL, *supra* note 1, at 36.

62. Michelman, *Fairness and Utility*, *supra* note 1, at 1214.

63. *Id.* at 1216.

64. *Id.* at 1218–19.

inferences from the underlying, foundational propositions of such philosophical theory.

While his language is somewhat obscure, I think Michelman means not just to deny that takings law is intelligible only from a utilitarian stance but also to deny that such law is intelligible from such a stance alone, without additional theoretical structure. His preferred additional philosophical source is John Rawls.<sup>65</sup> For Michelman, the introduction of Rawlsian principles of justice—in particular, the difference principle—are intended to help derive particular legal conclusions about our Takings Clause jurisprudence. He offers the example of the taking of a remote fishing camp to protect a wilderness area for environmental reasons, arguing that Rawls's approach would require compensation because where a naked utilitarian calculation might not.<sup>66</sup>

Michelman therefore plunges into an exposition of Rawls's deontological theory and its implications for the law of takings.<sup>67</sup> Without attempting to summarize either Rawls's theory or Michelman's account, the fundamental concept Michelman wants to deploy is the difference principle: departures from an equal distribution of goods and welfare among individuals are only permissible if they result in a higher level of welfare for the least well-off members of the community.<sup>68</sup> According to Michelman, Rawls's theory is most easily understood as a framework for evaluating basic, constitutive social rules. Rawls's philosophical theory does not, however, provide guidance for determining when compensation ought to be paid in particular putative takings nor even to formulate a general rule with respect to Rawls's philosophical theory therefor.<sup>69</sup> But Michelman believes that Rawls's difference principle can help determine when compensation ought to be payable for government takings.<sup>70</sup>

But that is not how Michelman wants to apply the difference principle.<sup>71</sup> Instead, he wants to compare the two cases in which the state pursues the taking but does not compensate the property owner and the case in which the state, faced with a compensation requirement, abandons the taking and the perceived

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65. *See id.* at 1223–24. *See generally* RAWLS, JUSTICE, *supra* note 39 (articulating and defending a theory of justice founded on Kantian and social contract foundations).

66. Michelman, *Fairness and Utility*, *supra* note 1, at 1223–24 (suggesting that the case does not present a significant risk of non-trivial demoralization costs on a utilitarian analysis but that Rawlsian fairness concerns might support compensation).

67. *Id.* at 1219–24.

68. *See* RAWLS, JUSTICE, *supra* note 39, at 60–61.

69. Michelman, *Fairness and Utility*, *supra* note 1, at 1221.

70. *Id.*

71. *Id.* at 1221–23.



efficiency gains.<sup>72</sup> The task of the difference principle is to assess when the least well-off property owners will properly conclude that their aggregate share of efficiency gains from takings will outweigh their losses from uncompensated takings.<sup>73</sup> When Michelman puts the question that way, as he notes, it closely approximates the utilitarian calculation.<sup>74</sup>

Michelman's account of the implications of Rawls's difference principle for our takings jurisprudence raises a number of questions. First, why is the comparison to be made between the taking without compensation and no taking cases? Another possible comparison would be between the compensated and uncompensated taking cases.<sup>75</sup> Michelman picks the pair of alternatives he does because he wants to juxtapose the benefits of efficiency gains with the cost of compensation. By so doing, Michelman wants to highlight that imposing costs through payment of compensation (and imposing the transaction costs that accompany payment of such compensation) must reduce the efficient takings that may be made.

Second, there may appear to be a haze of unreality in Michelman's hypothetical, assuming that it is the least well-off who face the threat of a taking of their property. In most modern societies (including the United States) the uneven distribution of wealth ensures that the threat of taking of *property* is not a meaningful risk for the least well-off. They do not have any property for the state to take.<sup>76</sup> The difference principle—so stated—is not a particularly meaningful constraint on takings with respect to our contemporary society,<sup>77</sup> at least until the rights of the least well-off with respect to government entitlement programs are recognized as property entitled to protection. Even then, however, property regimes provide disproportionate direct benefits to the more well-off. In the late 1960s, of course, while the least well-off also had little property that was at risk of a

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72. *Id.* at 1222–23.

73. *Id.*

74. *Id.* at 1223.

75. The third possible comparison would be between taking with compensation and no taking.

76. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 291–95 (Arthur Goldhammer trans., 2014).

77. The recognition of this asymmetry is one of the insights underlying Charles Reich's analysis. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 778–86 (1964) [hereinafter Reich, *New Property*] (arguing that the modern social welfare state has created an array of forms of new property in its entitlement programs and that such rights should be protected by an array of constitutional as well as substantive and procedural law).

governmental taking,<sup>78</sup> the irrational optimism about the direction of American society may have led Michelman to miss the disconnect between economic reality and philosophical principles in his analysis. The least well-off may have contract rights, however, and they certainly have their persons, neither of which is protected against state takings by the Fifth Amendment. When and how the state should protect those interests falls outside Michelman's inquiry into "first principles."

Third, Michelman argues that the calculation under the difference principle is not to be made on a one-off basis but on an anticipated long run, aggregating net costs and benefits.<sup>79</sup> Why is that calculation made on such an aggregate, long-term basis? Why is each proposed taking not to be tested under the difference principle (and any other relevant moral standard)? Each individual taking may proceed, with or without compensation, independent of what is done in other cases.

With Michelman's two principal philosophical methodologies in mind, we may turn to the question of how the two inconsistent philosophical theories may be synthesized or harmonized, and how they are then to be deployed as constitutional argument in our constitutional takings jurisprudence. Michelman recognizes the potential for conflict between the two theories that he draws upon.<sup>80</sup> But having done so, he seems to think that the potential for conflict between utilitarian and deontological stances toward just compensation is largely illusory. Any apparent conflict is largely a creature of imperfect knowledge.<sup>81</sup> If the members of the community know the actions of the state, including whether governmental takings were accompanied by payment of just compensation, according to Michelman, the Rawlsian theory ought not to diverge significantly from a utilitarian calculation.<sup>82</sup> That is because each governmental action, including takings, will trigger the obligation to pay, as a part of the just compensation due, the full measure of any demoralization costs imposed by the taking. As a result, the utilitarian calculation will reflect such costs, resulting in a wider range of application for the requirement of payment of just compensation.

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78. PIKETTY, *supra* note 76, at 291–93.

79. Michelman, *Fairness and Utility*, *supra* note 1 at 1221–23.

80. *Id.* at 1223–24.

81. *Id.* at 1224 (concluding that if individuals have knowledge of outcomes "then the divergence between utility and fairness will narrow sharply.").

82. *Id.* at 1221–23, 1223. (discussing Rawls's theory, and explaining "[i]f we set about to make practical use of this approach, we shall find ourselves asking much of the same questions to determine whether a compensability decision is fair as were suggested by the utilitarian approach.").

Michelman's claimed reconciliation of the implications of utilitarian and Rawlsian principles in our takings jurisprudence is implausible.<sup>83</sup> The test for the morality of an act in utilitarianism is its consequences. Justice, in particular, is a matter of whether the consequences of a decision, in the case of act utilitarianism or a rule for decision, in the case of rule utilitarianism, increase aggregate welfare. For Rawls, justice is not a matter of aggregate welfare; distributional outcomes are of paramount importance, too, even when associated with lower aggregate welfare.<sup>84</sup> Michelman's reconciliation glosses over this profound difference. No amount of transparency or available information would eliminate this difference between Rawls's theory of justice and utilitarianism.<sup>85</sup>

Even more problematic, however, and less clearly articulated, is Michelman's apparent project to deploy these philosophical theories to generate arguments as constitutional arguments to help decide Takings Clause cases. One example of that strategy is with respect to the line of Takings Clause cases that have addressed physical invasion and elevated the concept of tortious interference with possession in a jurisprudence that finds a taking more readily when that occurs.<sup>86</sup> According to Michelman, while that doctrinal distinction is understandable because of the particularly acute demoralization costs often associated with such physical invasions, in the context of the Takings Clause borrowing such common law concepts provides only rough justice and alternative approaches can do better.<sup>87</sup> Thus, Michelman would employ his utilitarian analysis to reshape Takings Clause jurisprudence with respect to the significance of physical invasion. Physical invasion would matter if, and only if, associated with significant demoralization costs. The trespass in *Loretto* would not satisfy this test and thus would not *ceteris paribus*, result in a taking for which just compensation was owed.<sup>88</sup> At the least, this would result in reversing *Loretto*; that case epitomizes the

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83. Ackerman rejected Michelman's reconciliation in a lengthy footnote. See ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 227–28 n.33. Ackerman's rejection of Michelman's reconciliation is central to Ackerman's account because his is an account of the conflict between competing Scientific approaches and between Scientific and Ordinary approaches more generally.

84. See RAWLS, JUSTICE, *supra* note 39, at 4.

85. Ackerman demonstrated the tension between the two approaches. See ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 72–73.

86. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

87. Michelman, *Fairness and Utility*, *supra* note 1, at 1226–29.

88. The trespass in *Loretto* does not address demoralization costs with respect to physical invasion. Because the significance of any demoralization costs is not addressed for the trespass in *Loretto*, and the demoralization costs associated with that trespass appear, in Michelman's terms, "puny" that case would not satisfy the fairness test Michelman

power of common law trespass doctrine in triggering just compensation obligations. Instead, Michelman would presumably deny the plaintiff's claim for payment of just compensation on the basis that the relative value of the rights taken was *de minimis* in relation to the value of the property as a relevant whole. When the potential taking is characterized in the latter manner it may be assimilated to another line of cases that hold that there is a taking only if substantially all of the value of a property interest is taken.<sup>89</sup>

Michelman's analysis is admittedly substantively appealing in at least some of its outcomes. But Michelman's argument, if made directly from a utilitarian consequentialist stance, seems oddly out of place as a constitutional argument for two reasons. First, the complexity of the utilitarian theory and the extent to which that theory appears to impose obligations on us that go beyond a matter of leading a moral life<sup>90</sup> appears to prove too much. As a result, many of us would be reluctant to determine our constitutional rights and obligations on the basis of what utilitarian theory would justify. Second, that utilitarian philosophical theory does not acknowledge or engage the kinds of arguments that are made in authoritative constitutional argument in the courts. Historical, textual, structural, and doctrinal arguments are all beside the point in utilitarianism. The inability to recognize the force of those arguments leaves utilitarianism unable to engage with the substantive arguments that constitute our constitutional law in practice. My concept of *practice* here is not more precise or sophisticated than that employed in our ordinary language: a set of more or less accepted, more or less conscious and self-conscious social behaviors that are not expressly reducible to or ordinarily articulated as express rules or conventions. In particular, there are no foundational rules or conventions that justify practices in this sense, although rules and conventions can be invoked in our discourse explaining or assessing practice.

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sketches. Therefore, the trespass presented in that case would not result in a taking for which just compensation is owed. But the Court did not articulate its decision and reasoning in these terms. See *Loretto*, 458 U.S. 419 at 441 (“Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking . . . [t]he issue of the amount of compensation that is due . . . is a matter for the state courts to consider on remand.”).

89. This comparison is freighted with difficult (if not insuperable) challenges relating to the definition and calculation of the relevant fraction, but I ignore those difficulties here.
90. See GILBERT HARMAN, *THE NATURE OF MORALITY* 157–59 (1977) (noting the objection that the generalized principles of utilitarian moral theory do not have the granularity that other moral theories provide and that we generally employ in our moral reasoning). This concern would appear even more telling as we try to weave utilitarian arguments into our constitutional argument.

Moreover, if we try to translate Michelman's argument into the kinds of arguments that are generally made in our authoritative constitutional reasoning, that translation falls flat; the resulting arguments are unpersuasive. For example, when we translate Michelman's insight about the place of physical invasion in our Takings Clause jurisprudence into an argument we recognize, like the prudential mode of argument, we have something along the following lines. The requirement of just compensation in the Takings Clause was intended, expected, and understood to protect citizens' private property from the federal government because the uncompensated expropriation of private property by that government would harm the citizens. Harm would extend to the person from whom the property was taken, to those other persons who would be unsettled in their confidence in their ownership of their own property and to those persons who would be empathetic with the person from whom the property was taken.<sup>91</sup> Michelman must then argue for the utilitarian interpretation of the nature and measurement of the harm against which the Just Compensation Clause is directed. The notion that we can impute or interpret into that restatement of the just compensation clause a theory that was only invented half a century after the Fifth Amendment was adopted appears historically and constitutionally suspect. Such a utilitarian construction or reconstruction of the Just Compensation Clause brings it to a level of abstraction that is not inherent in the text.

Michelman may simply intend for the philosophical arguments to play a foundational role for his Takings Clause analysis, rather than figuring directly in the space of constitutional reasons for decision. What would be the nature of such a foundational role if it did not figure in the arguments for decision of cases? Why would we need or care about the foundations of such law if it did not shape our decision of cases? Michelman may want to have it both ways. He wants to assert the epistemological priority of his claims about the philosophical foundations of just compensation while at the same time pressing those arguments directly into service in constitutional argument. Michelman may introduce his analysis simply to motivate the decision of constitutional cases. This decision could be accompanied or justified by conventional arguments. But Michelman does not suggest this two-step approach. And neither utilitarian nor Rawlsian arguments fit easily into traditional modes of constitutional argument.

Largely missing from Michelman's analysis is a focus upon the linguistic meaning of the text of the relevant constitutional provision or the historical understanding of that text. Michelman's disregard for the constitutional text may be just another symptom of the state of constitutional law under the Warren Court

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91. See Michelman, *Fairness and Utility*, *supra* note 1, at 1214 (describing demoralization costs); Sax, *Takings & Private Property*, *supra* note 1, at 151–55.

that elicited Robert Bork's criticism and associated endorsement of originalism.<sup>92</sup> But while there may be some accuracy to that historical assessment, a more charitable judgment would acknowledge that Michelman understood his project to be distinct from a textual analysis.<sup>93</sup> His was a philosophical, conceptual analysis.<sup>94</sup> As such, it proceeded largely independent of the constitutional text. Michelman's methodology and his general disregard for the language of the constitutional text are appropriate for his exercise in practical reason. His general abstract characterization of what the Takings Clause says<sup>95</sup> and does is fully consistent with his abstract analysis of what society ought to be doing—and what the implications are for our contemporary takings from the fairness principles identified.

Michelman's method pays scant attention to the "public use" language of the Takings Clause. On its face, the public use requirement might appear to implicate the requirements of Rawls's difference principle. The public use requirement might appear to be one of the doctrinal bulwarks that assures that the least well-off—not merely the politically powerful—benefit when property is taken purportedly for the common good. When Michelman analyzes the first goal of efficiency, he does not distinguish between takings for private use and takings for public use.<sup>96</sup> Yet such a distinction—whatever its source and whatever its purpose—appears at least implicit in the constitutional text. An account of our constitutional takings jurisprudence must address the text's reference to public use, even if this requirement does not figure in our constitutional doctrine or precedent.

Michelman did not, in his doctrinal exegesis, emphasize the distinction between actual and regulatory takings.<sup>97</sup> He did not focus extensively on the particular problems for regulatory takings or attempt to tease out Holmes's concept of regulatory regimes that go "too far."<sup>98</sup> In light of the extent to which regulatory takings have dominated the Court's attention in the space of takings, that omission appears glaring in retrospect. Michelman's failure to explore the distinction between regulatory takings and the exercise of eminent domain is a corollary of his stance toward the Takings Clause more generally. He is particularly interested in collective social action to capture efficient allocations of resources and from this perspective regulation is not very different from other

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92. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

93. Michelman, *Fairness and Utility*, *supra* note 1, at 1166–71.

94. *Id.* at 1171.

95. *Id.* at 1172.

96. *Id.* at 1173.

97. See *id.* at 1224–45.

98. See *id.*

kinds of potential takings.<sup>99</sup> But while that is an important element in the analysis of the Takings Clause there are also important differences that warrant consideration. In the case of regulatory takings there are, as Radin has noted, often-tacit elements of corrective justice sounded when uses of property are characterized as creating harms or negative externalities for other individuals or for the society.<sup>100</sup>

One of the novel elements in Michelman's article is his focus on the processes of constitutional decision-making as well as the substantive constitutional law and its theoretical foundations.<sup>101</sup> In this respect Michelman's article was a creature of its time.<sup>102</sup> As a result of that focus on process Michelman endorsed a move away from judicial decision-making.<sup>103</sup> He proposed that the legislative branches of government ought to play a more active role in delineating the scope of the takings and just compensation requirements in place of the paramount role historically played by the judiciary.<sup>104</sup> Michelman argued that legislatures were institutionally better positioned than the courts to assess the trade-offs in takings claims.<sup>105</sup> That is because the first question that must be confronted is whether a

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99. *See id.* at 1172–76.

100. Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 147–53.

101. Michelman, *Fairness and Utility*, *supra* note 1, at 1171.

102. *See* HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge & Philip H. Frickey eds., 1995) (emphasizing the different institutional competency of legislatures, administrative agencies, and courts in making legal determinations and decisions in unpublished materials formalized in 1957); Note, *Toward New Modes of Tax Decisionmaking—The Debt-Equity Imbroglio and Dislocations in Tax Lawmaking Responsibility*, 83 HARV. L. REV. 1695 (1970) (enthusiastically endorsing the enactment of section 385 of the Internal Revenue Code of 1954 and (mistakenly) heralding the promulgation of regulations as the best method to solve recurring controversies about the distinction between debt and equity).

103. Michelman, *Fairness and Utility*, *supra* note 1, at 1166–67; *see* Dunham, *supra* note 1, at 105–06.

104. Michelman, *Fairness and Utility*, *supra* note 1, at 1167.

105. *Id.* at 1171–72. Michelman's argument is very different from Dworkin's claims about the nature of rights and the nature of judicial determinations of those rights because Michelman believed that democratic decision-making would be most likely to maximize fairness. Dworkin argues that principled arguments from principle would best lead to justice and that courts are best able to make and assess such arguments, not democratic legislatures. *See generally* RONALD M. DWORKIN, *LAW'S EMPIRE* (1986).

proposed taking will be efficient.<sup>106</sup> In the absence of an increase in efficiency from the reallocation of property by the government's taking the *status quo* ought simply to be preserved.<sup>107</sup>

Michelman's philosophical argument supports his procedural conclusion. If takings jurisprudence is to be shaped by utilitarian and Kantian considerations of utility and fairness, as Michelman argues, rather than by considerations of justice, *per se*, then courts do not have a claim of greater institutional competence.<sup>108</sup> Michelman's subordination of justice to fairness, while express, does not acknowledge its tension with Rawls's theory of justice. Michelman argues that just compensation may be payable only if and when the demoralization costs of not paying compensation exceed the cost of making payment.<sup>109</sup> This rule may maximize economic efficiency but it does not square with traditional approaches to fairness.<sup>110</sup> Yet Michelman believes that such a rule will result in expanding the protections of the Fifth Amendment and paying compensation more frequently than is done in our current law.<sup>111</sup> That is because the current takings jurisprudence has articulated a number of doctrinal exceptions and presumptions that determine whether there has been a taking and limit the payment of compensation. The requirement of a total taking is an example of such a limitation in the doctrine.<sup>112</sup> It will also be more generous than a takings jurisprudence grounded on fairness.<sup>113</sup> That is because the rationality inherent in the fairness model might not recognize the raw feels of demoralization as legitimate reasons for compensation.<sup>114</sup>

Michelman believes that he is engaged in a legal, constitutional analysis, not in philosophy. On this point he is admittedly a little equivocal. He hedges in the introduction of his essay "[i]t is debatable whether what follows is an essay in

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106. Michelman, *Fairness and Utility*, *supra* note 1, at 1214–15.

107. This efficiency constraint does nothing to distinguish takings for public use from takings for private use.

108. Michelman, *Fairness and Utility*, *supra* note 1, at 1171–72.

109. *Id.* at 1215.

110. It does not square with twenty-first century American senses of fairness because the claims of property owners to rights with respect to their property are not simply a function of how demoralized they and other observers become if those rights are violated by the state.

111. Michelman, *Fairness and Utility*, *supra* note 1, at 1226.

112. *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992).

113. Michelman, *Fairness and Utility*, *supra* note 1, at 1224.

114. *Id.*



constitutional law.”<sup>115</sup> Michelman acknowledges that his emphasis upon legislative and executive decision-making, rather than judicial decision-making, takes him away from more orthodox doctrinal analysis and argument.<sup>116</sup> Yet Michelman purports to analyze what the Constitution requires, so it remains somewhat puzzling how his essay could *not* be an essay in constitutional law. In the end, there can be no doubt that Michelman is speaking to law professors and to judges, not to philosophers.

Michelman argues that a philosophical analysis—rather than a closing reading of the cases and the articulation of a sophisticated statement of the implicit constitutional doctrine—is necessary because no implicit doctrinal statement can be articulated that offers both a plausible account of the various distinctions drawn by the case law and a compelling account of the results reached.<sup>117</sup> In Kuhnian terms, we should eschew the temptation to add one more Ptolemaic epicycle to our account and instead opt for a revolutionary approach to theory formation.<sup>118</sup> Michelman is right in his assessment of the disarray in our Takings Clause jurisprudence and that disarray remains as serious today as when he wrote over a half-century ago. But in his enthusiasm for the crystalline clarity for ethical and political philosophy Michelman missed the more prosaic strategies that might reform our Takings Clause law. In some ways, the enthusiasm for importing philosophical argument into our constitutional law was a product of the free-wheeling constitutional jurisprudence of the Warren Court, with its de-emphasis of textual and historical argument.<sup>119</sup>

Yet canonical constitutional arguments could have provided a more satisfactory Takings Clause law, without need for philosophical argument. The arguments ought to have given more weight to text and history, on the one hand, and structural arguments that recognize the risk of corruption (as broadly understood in classical republican theory). Although Michelman couches his analysis of the transaction costs incurred under alternative approaches to the determination of just compensation, ordinary canonical prudential arguments could support the same kinds of doctrinal limitations on the scope of the obligation to compensate all diminutions in the value of property.

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115. *Id.* at 1166.

116. *Id.* at 1167.

117. *Id.* at 1171–72.

118. See generally THOMAS S. KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (1962).

119. This was the same constitutional jurisprudential style that provided the impetus for originalism. See LeDuc, *Striding Out of Babel*, *supra* note 11, at 116 n.86 (citing a sample of the classical genealogical accounts).

Another revealing example is presented in the more recent *Kelo* case.<sup>120</sup> The conflict between Mrs. Kelo's property rights and the state's redevelopment project certainly could be analyzed in Michelman's utilitarian and Rawlsian terms. But the more natural analysis, as a matter of constitutional practice within the space of constitutional reason, is in terms of arguments about the constitutional text, its historical understanding, established doctrine and precedent, the demands imposed on constitutional doctrine as a matter of administrability (prudence) and, finally, but particularly important, the risk of corruption tacitly acknowledged in the structural features of our constitutional regime. To the extent that the arguments from doctrine and precedent and from prudential concerns to maintain the ability of government to act to advance the public interest are found most compelling, the state's action is likely to be upheld. By contrast, to the extent that concerns about the potential for corruption are found most powerful or the textual arguments found unanswered, the taking would appear likely to be beyond the government's power.

Michelman's claim that the question of when to compensate for takings is fundamentally a matter of fairness was mistaken as a matter of constitutional law then and remains mistaken today. Michelman's argument did not make the claim true as a matter of law and did not induce the Court to adopt the argument and so make the claim true. The courts have not adopted philosophical arguments expressly in their Takings Clause opinions.<sup>121</sup> Their decisions are not easily harmonized with liberal theories of justice. *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>122</sup> discussed above, is a good example of a case that did not present a significant risk of demoralization costs and therefore, on Michelman's account, should have found no taking giving rise to a claim for just compensation. More recently, *Horne v. Department of Agriculture*<sup>123</sup> found a taking for which the plaintiffs were entitled to just compensation when the federal government enforced an agricultural production regime that limited the terms upon which raisin grapes could be sold.<sup>124</sup> The plaintiffs were the economic beneficiary of the price supports provided by the regulatory regime but sought to avoid the quotas imposed by that

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120. *Kelo v. City of New London*, 545 U.S. 469 (2005).

121. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93–119 (1982) [hereinafter BOBBITT, *FATE*] (describing a limited mode of argument, exemplified by *Rochin* and *Moore v. City of East Cleveland*, that certain kinds of governmental actions are not acceptable, even if the prohibition on such activity is nowhere stated expressly).

122. 458 U.S. 419 (1982).

123. 135 S. Ct. 2419 (2015).

124. *Id.* at 2425.

same regime.<sup>125</sup> On Michelman's account, fairness would not support finding a taking, because compensating the Hornes would give them a disproportional economic advantage. The mistake in *Horne* is exacerbated, as Justice Breyer's dissent notes, by the failure to net the benefits that the Hornes received against any measure of the loss that they suffered.<sup>126</sup> Indeed, the record did not establish that the Horne's suffered any net loss against the potential benchmark of a free market without any particular regulatory regime.

One of the paradoxical features of Michelman's theory is that he argues that legislative decision-making offers a better context in which to satisfy the demands of ethical principle than does judicial decision-making, effectively standing Dworkin's argument about the nature of adjudication on its head.<sup>127</sup> Dworkin argued that adjudication did not stand in the shadow of legislation because in adjudication legal principles, in the first instance, and moral and political philosophy in the final analysis, are determinative in way that they are not in the practical policy world of legislation.<sup>128</sup> Michelman, by contrast, wants to assign more responsibility for constitutional decision-making with respect to the exercise of the power of eminent domain to the legislature because it will do a better job of taking ethical theory into account.<sup>129</sup> Michelman suggests that even the just compensation provided by the Constitution and protected by the courts cannot satisfy the principled demands of fairness.<sup>130</sup> That is because the market price reflected in the determination of just compensation cannot protect the full value of property that, in the hands of its owners, is not fungible.<sup>131</sup>

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125. *Id.* at 2432.

126. *Id.* at 2436 (Breyer, J., concurring in part and dissenting in part).

127. Compare Michelman, *Fairness and Utility*, *supra* note 1, at 1257 (arguing that a constitutionally informed administrative agency would recognize compensation claims that a court, under our current Takings Clause jurisprudence, could not adequately protect) with RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–31 (1977) [hereinafter *DWORKIN, TAKING RIGHTS SERIOUSLY*] (arguing that traditional positivist accounts of adjudication subordinate judicial decision-making to legislation, whereas judicial decision-making emphasizes legal principles rather than the policies paramount in legislation and administrative rulemaking).

128. See *DWORKIN, TAKING RIGHTS SERIOUSLY*, *supra* note 127, at 28–31.

129. Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

130. *Id.*

131. *Id.* Radin pursues a similar analysis in distinguishing fungible and nonfungible property. In doing so, she emphasizes that certain kinds of property have particular importance for us, and therefore may result in higher demoralization costs when

Michelman's claims for the potential for more fully principled democratic legislation arise from the confluence of two threads of his jurisprudence. Michelman wants to defend a powerful progressive liberal state. He wants the state to be able to take private property to advance collective goals.<sup>132</sup> But the existing doctrine of Takings Clause jurisprudence has not protected individuals from being called upon to sacrifice for the greater good. Implicit, but unstated in Michelman's account, is that the politically disempowered have been called upon to make disproportionately greater sacrifices.<sup>133</sup>

Michelman's conclusion raises three important questions. First, why does he believe that judicial decision-making cannot really do justice in providing compensation for takings? He argues that no doctrine of just compensation can achieve fairness when the state takes private property.<sup>134</sup> Put simply, that is because any measure of objective, market values cannot capture the full subjective value that some property owners may place on their property. There is no process available that would determine those subjective values without overcompensating property owners in many cases. Instead, Michelman argues, we need the legislative and administrative agencies to place the burden of takings as fairly as possible.

Second, why does he think that legislative decision-making can provide greater fairness for the polity as a whole? Even if the requirements of just compensation are inadequate to assure fairness when the state takes private property, why is the legislative branch better able to deliver that fairness? Michelman's argument is that the legislature can recognize the subjective values that are implicated and avoid takings where such values will be compromised.<sup>135</sup> There are two objections to that claim. First, some governmental projects will require such subjective values to be put at risk or lost. The government will have to choose. Second, it is naïve and unrealistic to think that the legislature will generally

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taken. See MARGARET JANE RADIN, *Introduction: Property and Pragmatism*, in REINTERPRETING PROPERTY 1, 11–18, *supra* note 1 [hereinafter Radin, *Introduction*].

132. Thus, for example, Michelman wants the state to secure minimum opportunity for its citizens under the Fourteenth Amendment. See Frank I. Michelman, Foreword: *On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *On Protecting the Poor*]. The suspicion—or judgment—that the politically disempowered have borne a disproportionately *larger* share of the costs of civilization—rather than the disproportionately *smaller* share that Rawls's difference principle would appear to require—is implicit in the hypothetical with which Michelman concludes his article. The hypothetical involves the construction of a new highway, one of the routes of which would devastate a lower income neighborhood. Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

133. Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

134. *Id.* at 1248–49.

135. *Id.* at 1257.

make its choice on the basis of fairness rather than on political grounds. In his example of how to select the route for a new highway, the disadvantaged will be called upon to sacrifice for the greater good in most cases.

Third, how does Michelman reconcile his account with Dworkin's jurisprudence? Dworkin, among others, argues that courts have a particular capacity to make principled decisions that protect minorities and others that may be disadvantaged in the political process.<sup>136</sup> In the case of takings, the task of adjudication requires a determination of value; the courts are not well-equipped to make such a determination, even if they are no worse at this task than legislative or administrative decision makers, on Michelman's account.<sup>137</sup> Dworkin's argument about the institutional superiority of courts in principled adjudication does not challenge Michelman's claim.

### B. *Ackerman's Private Property and the Constitution*

Bruce Ackerman has also made a celebrated contribution to the constitutional law of takings. His project is to build on Michelman's work "to refine and broaden the existing body of existing compensation theory *and thereby lay the basis for a body of compensation law that is both powerful and deeply grounded.*"<sup>138</sup> He, too, is committed to a central role for philosophy. Indeed, as he puts it, "Philosophy decides cases."<sup>139</sup>

Philosophy does not decide cases, of course; judges decide cases. Moreover, philosophers do not decide cases, either. What Ackerman is asserting, metaphorically, is that judges' decision of constitutional cases is determined by their philosophical commitments. Much of my argument explains why this fundamental claim is wrong, both *descriptively*, as a matter of our constitutional practice, and *prescriptively* as a matter of what our practice should be.

Ackerman came to the Takings Clause from the study of slum housing and legal theory.<sup>140</sup> While acknowledging a debt to Michelman, Ackerman believes

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136. See, e.g., DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 127, at 28–31; Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008) (arguing that the particular institutional competence of courts to protect rights is the strongest argument for judicial review).

137. Michelman, *Fairness and Utility*, *supra* note 1, at 1248.

138. ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1, at 24 (emphasis added).

139. *Id.* at 5.

140. See Bruce Ackerman, *More on Slum Housing and Redistribution Policy*, 82 YALE L.J. 1194 (1973); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

that he can advance our understanding of the law of takings.<sup>141</sup> To do so he constructs a complex conceptual structure for understanding law.<sup>142</sup> Ackerman uses this conceptual apparatus to describe a fundamental tension in the law of takings. According to Ackerman, while a Scientific Policymaking approach to the formulation of takings jurisprudence is compelling,<sup>143</sup> this stance has not yet been systematically adopted in adjudication, and the opposing ordinary language approach to the law remains strong.<sup>144</sup> As a result, the takings law exhibits fundamental tensions and inconsistencies.<sup>145</sup> This is the source of its contemporary disarray for Ackerman.

Ackerman wants to explain the disarray in takings jurisprudence. One insight into Ackerman's project comes from the apparent disconnect between the title of his book and its subject. The work is largely about the Takings Clause; the book's title suggests a more ambitious, expansive study of *private property* in the Constitution. The reconciliation lies in Ackerman's dichotomy between Scientific, comprehensive thinking and a commonsense approach.<sup>146</sup> Ackerman believes that there is a crisis of legitimacy in our contemporary law of takings.<sup>147</sup> According to Ackerman, we can no longer articulate and endorse the principles of the existing law, and the comprehensive theories that do resonate are not systematically

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141. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 49. It is not clear the extent to which *Private Property and the Constitution* reflects Ackerman's current views; unlike Michelman and Epstein, Ackerman has not returned to the swamp of our Takings Clause jurisprudence, despite the challenge Ackerman outlines at the end of *Private Property and the Constitution* calling for a systematic reformation of our constitutional Takings Clause jurisprudence.

142. *Id.* at 15–20.

143. *Id.* at 66.

144. *Id.*

145. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 66. For the intellectual historian, one question is the extent to which Charles Reich's radical, 1960's approach to property is the specter haunting Ackerman's perspective on private property and the Constitution and, indeed, his entire project. Ackerman may be understood as endeavoring to re-create foundations for a more orthodox theory of law in the face of Reich's radical communitarian project. *See generally* CHARLES A. REICH, THE GREENING OF AMERICA (1970); Reich, *New Property*, *supra* note 77. While Reich described the radical change that was occurring in our society and in our constitutional law of property, he never explained how the changes in our society and in our psychology related to the corresponding constitutional changes; Ackerman offers just such an account.

146. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 4–5.

147. *Id.* at 189.

reflected in the takings jurisprudence.<sup>148</sup> Ackerman's solution, then, is a systematic, philosophical reworking of our takings law.<sup>149</sup>

There is also a sense in which Ackerman's essay is neither about the Takings Clause nor property in the Constitution; at a more fundamental level the Takings Clause is only a concrete case for exploring the controversy or tension between Scientific or comprehensive thinking and Ordinary or commonsense approaches to law. It is this tension and the prospects of resolution, harmonization, or triumph that are of most interest to Ackerman.<sup>150</sup> In Ackerman's later work, his early focus on the theories underlying elite constitutional controversies among the elite decisionmakers shifted to the resolution of more fundamental constitutional crises at the Founding, Reconstruction, and the New Deal, among others.<sup>151</sup> With that shift his historical account of the resolution of those crises emphasized the discourse of legitimacy and the formation and expression of the democratic will, rather than the conflict among elite philosophical theories.

While Ackerman identifies the problem in our takings jurisprudence and proposes the solution, it is striking that he does not undertake to perform the cure himself.<sup>152</sup> The reason is that he does not really know how the cure goes, as he tacitly acknowledges.<sup>153</sup> It is hard to be confident that one has a correct prognosis for the treatment if one is unable to proceed further in the cure.

Ackerman is even more confident than Michelman that philosophical analysis is necessary for constitutional takings jurisprudence. Thus, he writes in the concluding sentence of his work: "law must become philosophical if it is to make sense of the demand for just compensation."<sup>154</sup> What he means by *philosophical* in

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148. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 189. Ackerman's confidence that the utilitarianism of law and economics resonates as strongly as he suggests may be misplaced.

149. *Id.*

150. *Id.* at 168–89.

151. Compare ACKERMAN, PRIVATE PROPERTY, *supra* note 1 (analyzing the theoretical foundations of the judicial doctrines of our Takings Clause jurisprudence) with ACKERMAN, TRANSFORMATIONS, *supra* note 16 (offering a historical account of the role of the democratic political process and movement politics in shaping the Reconstruction Constitution) and ACKERMAN, THE CIVIL RIGHTS REVOLUTION *supra* note 16 (describing the role of movement politics and mass protests in shaping the fundamental law of the United States).

152. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 175 (claiming that it is premature to pursue a resolution of the disarray in the takings jurisprudence).

153. *Id.* at 175–76 (characterizing his work as a *tour d'horizon*).

154. *Id.* at 189.

this context is that the propositions of classical philosophical theories like utilitarianism and Rawls's social contract theory must be accepted as premises or grounds in constitutional arguments and inferences, along with the associated philosophical arguments.<sup>155</sup> It is what great philosophers have done rather than what is described on some metaphilosophical account. Thus, for example, Ackerman argues that when we confront his hypothetical case of land use regulation that limits the Marshans' intended development of their wetlands property, our decision is informed by our choice between Scientific Policymaking and Ordinary observing.<sup>156</sup> Ackerman's appeal to philosophy also begins his work. After sketching the disarray in takings jurisprudence Ackerman asserts that we need to turn to contemporary (Anglophone) philosophy to solve the puzzles of our constitutional law.<sup>157</sup>

Ackerman asserts, however, that we do not need technical precision in our philosophical analysis.<sup>158</sup> How then does Ackerman propose to proceed philosophically? He wants to use the deontological Kantian theory only as a means and not as an end. The theory is a means to highlight the limitations inherent in a strategy to apply a comprehensive utilitarian theory to takings law.<sup>159</sup> The most charitable way to read Ackerman here is that he is accepting the claims of the anti-utilitarian, deontological theories, giving a marker that he will not try to redeem for the ultimate merits of those theories. This is clearest when he explains the limits of his analysis with respect to deontological theories and the rationale for those limits.<sup>160</sup>

Ackerman adopts a complex conceptual structure for presenting his conceptual analysis of the law of takings. That approach appears dated today.<sup>161</sup> At

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155. There are good reasons to doubt this claim. *See infra* pp. 324–28.

156. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 30–31.

157. *Id.* at 4. (“Not for the first time in our constitutional law, it will be impossible to resolve the legal issues without confronting, and resolving as best we can, our philosophical perplexities.”). *See generally id.* at 199–200 n.27.

158. *Id.* at 72 (“As constitutional lawyers, we are no more interested in the details of Kant’s particular theories in this chapter than we were concerned with an interpretation of Bentham’s writings in the last.”).

159. *Id.*

160. *Id.* at 84 (acknowledging the need to accept “the cost of some ambiguity as to the precise contours of the basic philosophical concepts.”). Ackerman treats philosophical argument solely as a means, not also as an end.

161. The approach appears dated because of Ackerman’s distinction between the ordinary and scientific approaches. As Rorty remarked not long after Ackerman’s work appeared, no one pretends to a science of law any more. *See* Richard M. Rorty, *The*



the center of his analysis is a two by two matrix that describes four archetypes of takings theorists, the Scientific and the Ordinary and the Observer and the Policymaker.<sup>162</sup> Epstein's distinction between the Ordinary and the Scientific is couched in terms of the nature of legal concepts employed and, even more fundamentally, the legal *language* each employs.<sup>163</sup> The Ordinary theorist holds that legal language and legal concepts incorporate the concepts and language of our Ordinary, lay practice.<sup>164</sup> The Scientific theorist endorses the view that law is a distinct, technical domain whose concepts and language are not common to ordinary speech.<sup>165</sup> Ackerman's legal scientist is not a scientist in the more ordinary usages. She is not committed to a scientific method, for example, or to replicable experiments or falsifiable or predictive hypotheses.

Ackerman assumes that the two perspectives are fundamentally inconsistent in important, foundational ways.<sup>166</sup> The different vocabularies that the scientists and ordinary language theorists employ in conceptualizing the law result in different concepts or conceptions of the law.<sup>167</sup> In the case of the Scientific and Ordinary, the distinction is between vocabularies of ordinary language and theory-

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*Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 91 (Michael Brint & William Weaver eds., 1991) [hereinafter Rorty, *Banality of Pragmatism*] ("Nobody wants to talk about a 'science of law' anymore."). The scientific approach that Rorty had in mind is likely a little different than the sense in which Ackerman characterizes his scientific policymaker; certainly, the law and economics theorists believe that theirs is a scientific method. *But see, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 3–4, 79 (2002) (arguing that neutral (scientific) economic welfare measures can replace all normative appeals to justice, fairness, and related concepts in the assessment and choice of legal regimes); Posner, *Autonomous*, *supra* note 23 (praising Michelman's work as "scientific"); Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1238 (1981) ("the scientific aspiration of [the interdisciplinary study of legal evolution] is . . . realistic").

162. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 15–20.

163. *Id.*

164. *Id.* at 10.

165. *Id.*

166. *But see* WILFRID SELLARS, *Philosophy and the Scientific Image of Man*, in SCIENCE, PERCEPTION AND REALITY 1 (1963) (arguing that the two perspectives can be harmonized).

167. For a general philosophical discussion of the power of vocabularies in our thinking, see ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 125–27 (1994) [hereinafter BRANDOM, MAKING IT EXPLICIT] (arguing that vocabularies carry inferential commitments that are not reducible to their traditional semantic denotations); ROBERT BRANDOM, ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM 69–71 (2000).

laden abstract and artificial terminology. One question that arises is whether the same dichotomy Ackerman articulates is tacitly replicated in the courts. Ackerman believes that the unresolved conflict between the Scientific utilitarian and Kantian perspectives, on the one hand, and the ordinary language, commonsensical approach to takings law on the other, accounts for the disarray in our contemporary takings law.<sup>168</sup>

The second heuristic axis distinguishes the Observer from the Policymaker.<sup>169</sup> The observer believes that the existing law is fundamentally sound, requiring, in Ackerman's words, only "interstitial" revision.<sup>170</sup> The Policymaker, by contrast, generally finds less fit between her conceptual account and current doctrine.<sup>171</sup> This scheme renders the Scientific Observer and the Ordinary Policymaker somewhat problematic types. Ackerman suggests such types exist, but his focus falls on the fundamental opposition of the Scientific Policymaker and the Ordinary Observer.<sup>172</sup>

Ackerman's Scientific Policymaker can adopt any of a number of competing Scientific accounts.<sup>173</sup> The dominant scientific theory, Ackerman presciently observed, is economic theory.<sup>174</sup> That is likely even more true today.<sup>175</sup> Thus, Ackerman begins his analysis of the adjudication of takings questions with a utilitarian Scientific Policymaker.<sup>176</sup> But, following Michelman, Ackerman does not believe that utilitarianism can give an adequate account of takings law.<sup>177</sup> Ackerman gives the example of a potential taking that is efficient—it increases the political community's aggregate well-being.<sup>178</sup> Utilitarianism would require that the taking be made. But, without compensation, it makes the property owners

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168. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 66.

169. *Id.* at 16–17.

170. *Id.* at 15.

171. *Id.* at 24–25.

172. *Id.* at 70.

173. *Id.*

174. *Id.* at 41–42.

175. *See, e.g.,* KAPLOW & SHAVELL, *supra* note 161 (asserting that maximizing welfare should be the exclusive goal of legal design and that considerations of fairness should be entirely disregarded).

176. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 41–70.

177. *Id.* at 86.

178. *Id.* at 72–73.

whose property has been taken worse off.<sup>179</sup> Whether those owners should be compensated turns on whether, taking into account the loss of utility associated with the transaction costs of determining and paying compensation, the increased utility of the owners is greater than the lost utilities of the citizens of the state. Moreover, Ackerman notes, the utilitarian calculus treats those owners merely as means to enhance the welfare of others.<sup>180</sup> The utilitarian would hold that compensation should be made only if the process costs of determining the compensation due are less than the harm suffered by the property owners from the taking of their property. Ackerman tacitly questions the intuitive appeal of the utilitarian analysis; it appears inconsistent with our ordinary judgments about owners' rights with respect to their property.<sup>181</sup> In modern democratic capitalist nations most of us think the owners are due compensation, even if it is costly to determine the amount due and to pay it.

With utilitarianism found inadequate, Ackerman acknowledges the pull of Rawls's and other Kantian deontological ethical theories as a basis on which to analyze and reformulate the law of takings.<sup>182</sup> Ackerman argues that Michelman misunderstands Rawls's theory, and that the difference principle does not apply to institutions like the constitutional takings regime.<sup>183</sup> Ackerman argues that Rawls abandoned the claim relied on by Michelman that his principles of justice could be applied with more granularity than with respect to the fundamental constitutive elements of a society.<sup>184</sup> In particular, according to Ackerman, the difference principle cannot be employed as Michelman purported to do to assess alternative regimes for providing compensation for takings of private property by the state.<sup>185</sup> Ackerman asserts that Rawls himself later clarified the limits of his theory of justice. It applies only to the fundamental elements of social organization.<sup>186</sup>

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179. *Id.* at 72.

180. *Id.* at 72–73. Perhaps more precisely, it treats the allocation of such persons' property as a means, without recognizing any privileged claims such persons may appear to have with respect to such property as owners.

181. *Id.* at 100–01 (describing the general formulation of the question whether there has been a constitutional taking according to our intuitive ordinary discourse).

182. *Id.* at 71–72 (lumping together a whole bunch of seemingly very different theorists).

183. *Id.* at 227–28 n.33.

184. *Id.*

185. *Id.*

186. See RAWLS, JUSTICE, *supra* note 39, at 7–11 (*cited at* ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 228 n.33).

Ackerman appears tacitly to assume that the rules of eminent domain and just compensation do not qualify as such fundamental social elements.<sup>187</sup>

Rawls does expressly limit the application of his principles of justice.<sup>188</sup> But it is less clear that Ackerman is right that the power of eminent domain and the obligation to provide just compensation when property is taken are not fundamental constitutive elements. Ackerman may believe that Michelman's analysis is about just compensation, not eminent domain. By choosing that narrower description of Michelman's subject, Ackerman makes it easier to assert that Michelman's analysis does not implicate fundamental social and political structures. But it is not clear that characterizing Michelman's use of the difference principle as limited to testing the just compensation due is fair. More fundamentally, Michelman also explores when private property may fairly be taken, and if so, from whom is it most fair to take property for the state's use.

Michelman's account addresses both such elements of the state's relationship to private property. When so characterized, such a feature of our social and political organization appears fundamental to our structures of ordered liberty. At least in late capitalist western democratic republics, when the state can take private property and how owners must be compensated are important questions. Even if one does not go so far as to endorse Epstein's argument<sup>189</sup> that the theory of forced exchanges by the state and the payment of just compensation provides the necessary final element in an account of the genealogy of the legitimate state, the centrality of such relations appears obvious.

Even if Michelman's account is characterized as an account of just compensation (and, like the text of the Takings Clause itself, not an account of the broader concept of the power of eminent domain), it is not clear that the requirement of just compensation is not a fundamental element in our social structure in Rawls's sense. Rawls articulates his concept of fundamental elements as "the way in which the major social institutions distribute fundamental rights and duties and *determine the division of advantages from social cooperation.*"<sup>190</sup> He expressly includes the protection of private property in the means of production within such major institutions.<sup>191</sup> Ackerman's confidence that the difference principle does not apply appears overstated.

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187. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 228 n.33.

188. RAWLS, JUSTICE, *supra* note 39, at 7.

189. EPSTEIN, TAKINGS, *supra* note 2, at 337–38.

190. RAWLS, JUSTICE, *supra* note 39, at 7 (emphasis added).

191. *Id.*

Ackerman acknowledges that the questions central to deontological theories are not the questions that inform our contemporary law of takings.<sup>192</sup> The bulk of Ackerman's efforts goes to analyzing the principles and structure of current law. According to Ackerman, current law "as presently construed" takes as fundamental a constitutional text that "requires the state to assess its manipulation of the economic environment not by a critical yardstick of its own devising but by one rooted in established social practice."<sup>193</sup> It is not clear how Ackerman believes law must be committed to the givenness of the constitutional text and its roots in established social practice—as presently construed. It does not appear that it is a necessary or a fixed commitment, however, or that Ackerman's project would collapse without such a commitment.

Like Michelman, Ackerman wants to press his philosophical theory into service to generate constitutional argument. That project is little more self-conscious or express for Ackerman than it is for Michelman. The steps of Ackerman's argument must be teased out. Ackerman's analysis does not give any significant attention to the constitutional text. With respect to the constitutional text that refers to takings "for public use" Ackerman has nothing to say,<sup>194</sup> tacitly accepting the conclusion of existing constitutional doctrine that any taking for a purported public purpose is a taking for public use.<sup>195</sup> It is not entirely clear why Ackerman dismisses the textual requirement of public use without discussion. The answer, I believe, is in the previous paragraph; Ackerman's account of the tools of construction give him the flexibility to construe the constitutional text in a variety of ways. The current grounding of our Takings Clause jurisprudence in our social practices is not necessary or fixed.

In the final chapter Ackerman turns to the jurisprudential issues that motivated his study of the Takings Clause.<sup>196</sup> That chapter is ambitiously—and ambiguously—titled, "On the Nature and Object of Legal Language,"<sup>197</sup> continuing Ackerman's emphasis on the role commitments to vocabularies and to accounts of language in theories of law. According to Ackerman, the nature of legal language has been characterized in two apparently inconsistent ways, in Ordinary or commonsense terms or in Scientific or comprehensive terms.<sup>198</sup> The

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192. ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1, at 85.

193. *Id.* at 189.

194. *Id.* at 190 n.5 (dismissively leaving to another the task of defending the claim that public use does not reduce to public purpose).

195. *Id.* at 3.

196. *Id.* at 169–89.

197. *Id.* at 168.

198. *Id.*

fundamental challenge facing the law and the legal academy in the late twentieth century, according to Ackerman, is to resolve the conflict between those two accounts.<sup>199</sup> Harmonization may be a matter of explaining—on terms that will be generally persuasive—why one theory is to be accepted and another rejected. Or it may require forging a synthesis of the two competing theories incorporating elements of each. Ackerman does not explain which path he thinks should be taken.

Ackerman's final chapter is also in some measure a celebration of the rise of Scientific Policymaking in the legal academy.<sup>200</sup> Ackerman claims that the disarray in our constitutional law of takings calls for a *philosophical* therapy.<sup>201</sup> It is not clear why Ackerman believes that philosophy is a *possible* therapy nor why he believes that it is a *necessary* therapy.<sup>202</sup> Likely, philosophy is a possible therapeutic strategy for Ackerman because he characterizes the stalemate in takings law as between alternative, competing accounts of what law is, the commonsensical and the Scientific or systematic.<sup>203</sup>

Ackerman invokes Wittgenstein's later philosophy, but the limited use to which he puts it and the reservations he expresses as to its implications, raise important questions about its role.<sup>204</sup> Ackerman seems to invoke Wittgenstein for his emphasis on ordinary language and its functional complexity, as well as for his therapeutic stance toward philosophical problems. Ackerman does not think that the conflict between Ordinary and Scientific adjudication is an example of a linguistic or conceptual confusion like those addressed by Wittgenstein.<sup>205</sup> The choice between those theories is, for Ackerman, real and important. Nor does he think that the Scientific, comprehensive approach to legal doctrine is compromised

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199. *Id.*

200. *Id.* at 188 (“sophisticated lawyers and judges of the present day . . . are increasingly inclined to think about the law in Scientific Policymaking terms.”).

201. *Id.* at 175–76 (claiming that the unhappy state of the law must drive us “to philosophy as the only available therapy.”).

202. It may be that Ackerman is simply echoing Michelman's claim that doctrinal disarray requires recourse to “first principles.”

203. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 15–20.

204. *Id.* at 177. *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953) (arguing against a systematic representational account of language and emphasizing the function of language in the context of a metaphilosophical stance emphasizing the quietist and therapeutic nature of philosophical argument).

205. *See, e.g.*, WITTGENSTEIN, *supra* note 204, § 350 (comparing a linguistic confusion to posing the question “When is it 5 o'clock on the sun?”).

by any anti-representational Wittgensteinian arguments. He makes that clear when he describes the further work that such theorists need to do.<sup>206</sup>

What, then, does Ackerman think the reference to Wittgenstein's methods brings to his project? Ackerman characterizes those arguments as made on behalf of Ordinary Observers' constitutional decision, but he suggests that such a stance can be rebutted as merely masking judges' subjective preferences.<sup>207</sup> At the least, Ackerman does not think the Wittgensteinian arguments are dispositive in the conflict between the Ordinary, common sense stance and the Scientific, comprehensive position.

Ackerman asserts that philosophy is the necessary, exclusive therapeutic strategy for our takings jurisprudence because the conflict between Ordinary and Scientific accounts of the Takings Clause cannot be resolved within the framework of those theories. An analytical stance outside those theories and the law—which Ackerman characterizes as philosophical—is necessary.<sup>208</sup>

Despite the triumph of so-called Scientific Policymaking in the academy, Ackerman recognizes that such methods have not been consistently incorporated into our takings jurisprudence.<sup>209</sup> Ackerman's thesis in this chapter is difficult to capture. On the one hand, Ackerman dismisses efforts to simply rehabilitate the dominant Ordinary, doctrinal takings law.<sup>210</sup> In particular, he appears to reject a metaphilosophical rehabilitation of that stance derived from Wittgenstein's later philosophy.<sup>211</sup> Because, in a style not unlike Dworkin's casual invocation of modern philosophy, Ackerman does not pause to explain how such an "apparent"

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206. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 178–83 (asserting that systematic projects by the competing approaches to constitutional law are called for).

207. *Id.* at 177–78.

208. *Id.* at 175–76.

209. *Id.* at 85. Those methods have achieved more purchase in other areas of our constitutional law. *See generally* ACKERMAN, THE CIVIL RIGHTS REVOLUTION, *supra* note 16, at 174–99. Ackerman has not, to my knowledge, had occasion to explore the limited force such quantitative methods have achieved in our Takings Clause law. It is likely, based on the analysis that Ackerman developed later, that regulatory takings and physical takings present different opportunities for statistical methods. That is because physical takings are easy to identify and measure; regulatory takings are less obvious in both respects. Moreover, to the extent that physical takings deliver benefits to the government, potentially without cost if the taking is not recognized under the Fifth Amendment, the potential for a negative feedback loop is greater than in the case of regulatory takings. *See* ACKERMAN, THE CIVIL RIGHTS REVOLUTION, *supra* note 16, at 194–99.

210. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 189.

211. *Id.* at 177–78.

argument would go.<sup>212</sup> While he acknowledges such arguments would go part of the way toward grounding such an approach, he apparently does not think they provide a dispositive rebuttal of the Scientific or comprehensive project.<sup>213</sup> Ackerman believes that the state has a function and legitimacy that goes beyond ordinary, currently accepted social norms.<sup>214</sup> Any acceptable theory of the state's power must recognize this independent source of legitimacy.<sup>215</sup> On the other hand, he recognizes the limitations of the dominant comprehensive views, the law and economics and Rawlsian deontological theories.<sup>216</sup> How Ackerman envisions the constitutional future to unfold and why he thinks the necessary work that must be done is philosophical remains unclear.<sup>217</sup>

More than defending substantive conclusions on takings jurisprudence, Ackerman focuses on two methodological strategies to forge the future synthesis of takings law. Of two principal conclusions, one appears a commonplace and the other appears puzzling and implausible. The first methodological conclusion is that the proponents of comprehensive and commonsense theories ought to speak to, and engage with, each other.<sup>218</sup> Ackerman is surely right in that recommendation, as well as in his assessment that there had been little engagement between the rival theoretical camps.<sup>219</sup> The conclusion seems obvious. Moreover, within the frameworks of those competing theories, it is not clear how a conversation or debate could go. What does a proponent of a commonsense

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212. *Id.* at 177. *See also* Ronald Dworkin, *Comment, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 117 n.6 (Amy Gutmann ed., 1997) (citing without explanation a handful of leading contemporary analytic philosophers of language).

213. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 180–81.

214. *Id.*

215. The contrast with Epstein's libertarian theory of the state under which the state can have only those powers that have been accorded it by the people could not be starker.

216. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 186.

217. Moreover, when Ackerman described a general theory of fundamental constitutional change in *We the People*, that process was democratic, political, and untheoretical. There is thus an apparently substantial difference between the suggested form of constitutional flux in *Private Property and the Constitution* and in Ackerman's later work. It may be, of course, that he is describing different kinds of constitutional change in the two contexts.

218. *See* ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 174–75 (calling for philosophy rather than theology).

219. *See id.*



account of our takings law say to Frank Michelman or Frank Michelman to Richard Epstein?

Ackerman's second procedural conclusion is that takings jurisprudence and its theory must become self-conscious.<sup>220</sup> Ackerman's brief discussion of the role of self-consciousness in our constitutional theory is, both as a descriptive and prescriptive account, one of his most cryptic passages. Ackerman describes the law and economics theory's methodology as self-conscious.<sup>221</sup> That is a puzzling characterization; it raises the question of the way in which such theories are self-conscious, because in many traditional respects, those theories appear unself-conscious and doctrinaire.<sup>222</sup>

The self-consciousness Ackerman calls for is *methodological* self-consciousness.<sup>223</sup> By methodological self-consciousness Ackerman means only that the theory of law is explicit in its assumptions about the nature of law and its methods. But Ackerman believes that the need for self-consciousness extends to contextualizing theory and placing it in the context of competing accounts.<sup>224</sup> But he never shows or explains what that would look like.

Originalism poses a challenge to Ackerman's theory beyond the puzzle about classification.<sup>225</sup> Originalism does not fit Ackerman's theoretical procrustean bed. The failure of fit arises from originalism's insistence on deciding cases by reference to the constitutional text and its original understanding; that approach is neither a theory of commonsense or ordinary language nor a Scientific,

220. *See id.* at 180–81.

221. *Id.* at 186 (characterizing the vocabulary of the scientific policymaker as “self-consciously technical”). It is not clear what form this self-consciousness takes beyond an awareness that the vocabulary employed is technical.

222. *See, e.g.,* KAPLOW & SHAVELL, *supra* note 161 (purporting to prove that the sole rational basis on which to assess legal and regulatory choices is welfare maximization without any self-consciousness of the philosophical improbability of such a claim being plausible).

223. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 168.

224. *Id.* at 169–75.

225. *See generally* BORK, TEMPTING, *supra* note 19, at 144 (describing the relevant original understanding as the general, public understanding, expressly contrasting it with any subjective understandings and implicitly contrasting it with any technical understandings); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–77 (2012) (articulating the Ordinary Meaning canon). Ackerman's later work, including *We the People* engages the claims of originalism and advances important arguments against the formalist claims of originalism. *See generally* ACKERMAN, THE CIVIL RIGHTS REVOLUTION, *supra* note 16, at 35–36.

comprehensive theory. Unlike the theories that Ackerman describes, originalism is more modest; it seeks to take the constitutional outcome as determined by the positivist facts about the constitutional text.<sup>226</sup> The activism of even Ackerman's modest theorists far exceeds what originalism holds possible.

Ackerman's failure to anticipate or address the potential for a libertarian analysis of the Takings Clause, like the reading defended by Richard Epstein (and earlier, at a more conceptual level, by Robert Nozick), is puzzling. While Epstein's analysis was articulated well after Ackerman's book appeared, Nozick's libertarian analysis certainly highlighted the potential line of analysis.<sup>227</sup> Since Ackerman's work appeared, not only has a libertarian analysis flourished in the academy,<sup>228</sup> but a more libertarian approach to the Takings Clause has also demonstrated some vitality in the courts. Justice Thomas's dissent in *Kelo*, for example, sounded classically libertarian and originalist themes when he reasserted the importance of the public use requirement and emphasized the potential threat to disadvantaged and insular minorities from a broader takings power in the state.<sup>229</sup> Thus, when the libertarian themes are sounded in the courts, they are naturally presented as structural arguments, based upon notions of limited government and democracy enhancement, or as historical or textual arguments. Correspondingly, of course, structural concerns about federalism that might speak in favor of respecting the exercise of state sovereignty are given limited weight by libertarian constitutional theorists.

It is helpful to contrast Ackerman's methodological stance in *Private Property and the Constitution* with his approach in his later, magisterial *We the People*. Takings jurisprudence is far from the focus of *We the People's* account of constitutional change; it figures only as a minor element in Ackerman's narrative of the decline of property rights in the constitutional jurisprudence that emerged from the New Deal.<sup>230</sup> To the extent that there is a doctrinal focus in Ackerman's account, it relates to very fundamental principles of federalism, states' rights, and the power of

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226. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (Amy Gutmann ed., 1997) [hereinafter SCALIA, INTERPRETATION].

227. See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (making a libertarian case for a very limited role for the state and a broad definition of individual autonomy, including expansive property rights).

228. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, LOST CONSTITUTION]; EPSTEIN, TAKINGS, *supra* note 2.

229. See *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) ("the Court has erased the Public Use Clause from our Constitution").

230. ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 362–75.

the national government. Nor is Ackerman particularly interested in the granular questions about constitutional adjudication of particular cases.

For my purposes, it is Ackerman's methodologies that matter most. The two methodologies are very different. In the richly historical account of *We the People* Ackerman eschews the theoreticity of his early work.<sup>231</sup> Ackerman still claims a philosophical dimension for his analysis, but what is most striking is the modesty in his claim: "There is lots of history in this book, some political science, a little philosophy . . ." <sup>232</sup> But the emphasis on philosophical argument and foundations is gone.<sup>233</sup> Whatever other objections may be made, the constitutional theory of Ackerman's later work is not vulnerable to the criticism made here of *Private Property and the Constitution*. In his later work, there is no suggestion that our constitutional narrative and analysis must be reformed principally through philosophical analysis.

Moreover, Ackerman offers in his defense of *We the People* an account of the relationship of academic constitutional scholarship to constitutional practice that seems far from that underlying *Private Property and the Constitution*.<sup>234</sup> In that account, he suggests that the influence and role of academic analysis in the development of constitutional theory are indirect and only generate effect in the practice of constitutional law—and thus in the constitutional law itself—over time as the students of academics mature and play decisional roles in that practice.<sup>235</sup> That is a very different role for theory than is defended in Ackerman's earlier work. While Ackerman's later description removes some of our ability to assess the import and influence of academic analysis because of the introduction of a substantial temporal separation between original academic scholarship and practical, it is consistent with my own experience in public service, at least in the realm of normal legislative activity.<sup>236</sup> But my experience involved articulating and

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231. *Id.* at 28 (emphasizing the historical, rather than philosophical, methods of his study).

232. *Id.*

233. Indeed, Ackerman pointedly criticizes efforts to explain the American Constitution on the basis of European political philosophy. ACKERMAN, FOUNDATIONS, *supra* note 16, at 3–4.

234. Ackerman, *Revolution on a Human Scale*, *supra* note 18, at 2348–49.

235. *Id.*

236. *See, e.g.*, I.R.C. § 311 (1988); STAFF OF SENATE COMM. ON FINANCE, 98TH CONG., 1ST SESS., THE REFORM AND SIMPLIFICATION OF THE INCOME TAXATION OF CORPORATIONS, (Comm. Print 1983); John André LeDuc, *Current Proposals to Restructure the Taxation of Corporate Acquisitions and Dispositions: Substance and Process*, 22 SAN DIEGO L. REV. 17 (1985) (describing corporate tax reform proposals originally championed by Professor William D. Andrews as reporter for the American Law Institute Federal Income Tax Project: Subchapter C); I.R.C. § 6662 (2018); John

acknowledging arguments that were part of the normative legislative discourse and then drafting legislation to reflect the implications of those arguments. The arguments that Ackerman and the other theorists explored here make are not arguments that have figured or, at least in our current constitutional decisional practice, can figure in our constitutional decisional argument. So, to make the account of cause and effect in the space of constitutional reasons we also need an account that translates the kinds of arguments that the academic theorists advance into the arguments of constitutional decision.

Three principal conclusions emerge from this exposition. First, Ackerman argues that the Scientific theories, whether those of law and economics or Rawlsian, deontological theories, have not yet been incorporated into the constitutional law of takings, despite the power they have displayed in other areas of the law.<sup>237</sup> Contemporary takings jurisprudence is committed to an ordinary language, commonsensical account of the limits of the state's power to take property without paying compensation. In making this claim, Ackerman is asserting that the untheoretical doctrinal constitutional law is neither expressly nor implicitly committed to utilitarian or Rawlsian or other deontological theory. This claim accurately described our takings law in 1977 and it continues to describe this law today. While the repudiation of *Lochner* is often described as a repudiation of the social and economic theory of the *laissez faire* constitutional jurisprudence of the late nineteenth and early twentieth centuries,<sup>238</sup> it also constituted a repudiation of according a decisional role to *any* substantive fundamental political or economic theory. Ackerman's evolution confirms my analysis below that the constitutional takings jurisprudence largely ignores the theoretical arguments of the academy.<sup>239</sup>

Second, Ackerman asserts that the theory informing our constitutional takings jurisprudence has been discredited by the rise of Scientific theories of law.<sup>240</sup> This claim is at once bolder and less plausible than his claim explored

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André LeDuc, *The Legislative Response of the 97th Congress to Tax Shelters, The Audit Lottery, and other Forms of Intentional or Reckless Noncompliance*, 18 TAX NOTES 363 (1983) (describing the arguments for imposing a lesser-fault penalty on taxpayers for aggressive tax positions that the author first encountered in a seminar with Professor Bernard Wolfman).

237. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 168–69.

238. ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 280.

239. *See infra* Part II.

240. Scientific, of course, only in Ackerman's idiosyncratic usage. In that usage, science is the project to construct broad, general theories based upon empirical social and physical science data. The sense of science that Ackerman employs is important for him because, much like Bentham before him, he wants to contrast a new preferred mode of legal analysis with the established foundational theory of the Constitution.

above. First, it implicitly requires that there be an informing theory for such law. That premise appears questionable.<sup>241</sup> Second, in what context have such Scientific theories discredited the contemporary constitutional jurisprudence, then or now? Certainly not in the courts, for either utilitarian or deontological theories.<sup>242</sup> Those theories do not provide direct arguments to reverse existing case law or to determine constitutional controversies in the courts. In the legal academy it is not clear that the competing theoretical structures have produced a winner. Thus, not only is it questionable that there is an informing theory in the sense that Ackerman's argument needs or that the new Scientific theories have discredited the theoretical commitments that do figure in our constitutional takings law.

Third, the project of advancing the law of takings and resolving the disarray is not simply a matter of applying the Scientific theories to reshape the constitutional law of takings. The reason for that is not the constitutional text. Only the present construction of that text commits us to an ordinary, commonsensical stance.

Ackerman's explanation invokes Hegel in a puzzling way, as if to suggest that there may be a yet to be fashioned synthesis of these disparate lines of our Takings Clause jurisprudence.<sup>243</sup> Ackerman appears to believe that the reformation of our constitutional law of takings is contingent upon—or hostage to—more fundamental social and political development. If my reading is right, the claim draws more upon the historical materialism of Marxist theory than the account of the conceptual development of self-consciousness central to Hegel. That is because Ackerman is focused upon the social and political realities of development. In this emphasis Ackerman foreshadows his later work defending the claim that fundamental political movements would create constitutional moments that effectively amend the Constitution outside the formal Article V process. If so, based upon the state of takings jurisprudence in the four decades since Ackerman wrote, however, that historical moment is still yet to arrive for the Takings Clause.

Ackerman's *We the People* tacitly acknowledges this stalemate, asserting that the only constitutional moment leading to a fundamental revision of our constitutional practice since the New Deal has been that extending civil rights to African Americans.<sup>244</sup> Generally, that fundamental change has not addressed the constitutional status of private property—and proved surprisingly ineffective at

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241. *See infra* Part II. *See generally* LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11 (arguing that philosophy does not provide a foundation for our constitutional argument and instead at most exposes conceptual or linguistic confusions underlying some of our controversies).

242. *See infra* Part II.

243. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 185–86.

244. *See generally* ACKERMAN, THE CIVIL RIGHTS REVOLUTION, *supra* note 16.

addressing the substantial and growing inequality, race-based and otherwise, in our society. It would appear therefore that in the absence of a moment addressing the constitutional status of property, on Ackerman's view, the social and political change necessary to support the revision of the fundamental elements of our takings jurisprudence cannot have occurred.

### C. *Epstein's Takings*

*Private Property and the Constitution* appeared as Epstein was undertaking his own analysis of the Takings Clause.<sup>245</sup> Ackerman's work was a substantive and methodological provocation for Epstein. Epstein was particularly critical of its philosophical argument.<sup>246</sup>

*Takings* may be understood as a fuller response to Ackerman's book. Epstein's analysis of takings is pursued at two principal levels. First, Epstein wants to articulate a theory that permits taking of private property only in limited circumstances and only when just compensation is paid. That is the theory of the Takings Clause that Epstein defends as the best reading of the Constitution.<sup>247</sup> Second, and more fundamentally, Epstein wants to employ that theory as a key element in his Lockean account of the legitimacy and limits of the state as a matter of political philosophy. Epstein argues that only with an account of how the state can compel individuals to accept forced exchanges can a complete account of the genealogy of the state be articulated.<sup>248</sup> Epstein's account of takings makes it more than a problem of our constitutional law; for him, it is central to understanding the political philosophy of a legitimate state.<sup>249</sup> But his focus is also intensely practical: how ought the state to handle the costs and benefits that accrue to individuals from its actions to advance the social interest so as to maximize the collective welfare.

While Epstein is equally committed to philosophical analysis in sorting out the disarray in the constitutional law of takings, the purposes to which he puts such analysis and the conclusions he draws from it are radically different. Epstein is more fundamentally engaged than Ackerman in a law reform project; he is less

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245. See generally EPSTEIN, TAKINGS, *supra* note 2, at xi.

246. Richard Epstein, *The Next Generation of Legal Scholarship*, 30 STAN. L. REV. 635, 636 n.6 (1978) (book review) (describing Ackerman's final chapter as containing "an utterly arid and abstruse discussion of, I suppose, the deeper philosophical issues"). Ackerman is not any more enthusiastic about Epstein's approach. ACKERMAN, FOUNDATIONS, *supra* note 16, at 325 n.13.

247. EPSTEIN, TAKINGS, *supra* note 2, at 281–82.

248. *Id.* at 331.

249. *Id.* at 5–6.

interested in trying to reconstruct the conceptual deep structure of existing takings jurisprudence. For Epstein, the constitutional text must be interpreted in the light of Lockean political theory including, in particular, Locke's theory of property and of the limits of the state.<sup>250</sup> Epstein believes that the state has only the authority that has been ceded to it by its citizens.<sup>251</sup> Epstein cares about these libertarian limitations less as a theoretical matter than as an instrumental matter; he believes that his account has important legal implications for the scope of legitimate state power with respect to private property generally and for the application of the Takings Clause in particular.<sup>252</sup> Epstein is more attentive to the constitutional text than Michelman or Ackerman. His attention is reflected in his insistence that the text's reference to public use be accorded meaning and in his statement of his own project. Nevertheless, there are substantial discontinuities between the constitutional text and Epstein's account.

Epstein defends a libertarian reading of Lockean theory<sup>253</sup> and a social contract theory of the state.<sup>254</sup> According to this theory, individuals hold certain rights, including property rights, as a matter of natural law. The state has only the powers necessary to enhance the well-being of those individuals who comprise the sovereign community.<sup>255</sup> In Epstein's state of nature, following Locke, what Epstein terms "property rights" have been created and defined by multiple private agreements.<sup>256</sup> Although there is no state that can protect such rights more generally, Epstein appears to think that the core of property concepts can be so created and maintained in equilibrium.<sup>257</sup> As Radin has pointed out,<sup>258</sup> Epstein never pauses to define carefully what property is, apparently believing the concept

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250. *Id.* at 7–18.

251. *Id.* at 12. *But see* ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 180–81.

252. EPSTEIN, TAKINGS, *supra* note 2, at 12–13.

253. EPSTEIN, TAKINGS, *supra* note 2, at 9–15. For a brief discussion of some of the anomalies in such an interpretation see ALEXANDER & PEÑALVER, *supra* note 10, at 55–56.

254. EPSTEIN, TAKINGS, *supra* note 2, at 9–15.

255. *Id.* at 12–13.

256. *Id.* at 10–11. I employ scare quotes here because in a state of nature, without a sovereign government, rights are far more vulnerable than under a state that protects them with a monopoly of legitimate force.

257. *Id.*

258. *See* Radin, *Problems*, *supra* note 56, at 100.

to be self-evident.<sup>259</sup> Nor, more fundamentally, does Epstein defend his claim that persons' entitlements with respect to the possession or use of things in the state of nature are analogous to the entitlements defined by the concept of property in a state governed by the rule of law. In the case of property rights arising for individuals living within a state, the state generally stands ready to protect these individuals' rights to retain their property absent their voluntary choice to part with their property.<sup>260</sup> There is no analogue in the state of nature; all protection is only by private contract (which, in the state of nature, is not entirely like private contract in a state with the rule of law). Moreover, according to Epstein, any increase in the well-being of the community arising from the introduction of the state must be distributed in proportion to the original wealth of the constitutive members.<sup>261</sup>

Epstein's theory is best understood in light of Robert Nozick's earlier efforts to construct a libertarian, social contract theory of justice and the state<sup>262</sup> and as a response to Ackerman. Nozick was concerned to offer a libertarian response to Rawls's theory as a matter of moral and political philosophy.<sup>263</sup> But as he articulated the relationship between private property and the state he addressed the question of when the state could properly take or otherwise impair private property rights.<sup>264</sup> According to Nozick, the state could take or limit private property without payment of compensation only if that property were being employed in a manner that actually or potentially harms others, roughly.<sup>265</sup>

Although Epstein reaches similar, libertarian conclusions about the scope of state power, he criticizes Nozick's genealogical theory.<sup>266</sup> Epstein draws radical and far-reaching conclusions from his argument, applying not only in the traditional realm of eminent domain and regulatory regimes but also in the context

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259. EPSTEIN, TAKINGS, *supra* note 2, at 23–24, 23 (“Blackstone’s account of private property explains what the term means in the eminent domain clause.”).

260. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (emphasizing that a property entitlement is not limited by the state to the value inherent in that right and cannot lawfully be taken away by another with compensation for what has been taken).

261. *Id.* at 3–4.

262. *See generally* NOZICK, *supra* note 227.

263. *Id.* at 183–231.

264. *Id.*

265. *Id.* at 78–87.

266. EPSTEIN, TAKINGS, *supra* note 2, at 334–38. The critical arguments that Epstein advances need not be explored here.



of taxation and welfare rights.<sup>267</sup> Epstein's argument with respect to the limitations on the power of the state with respect to private property has two principal steps. First, he argues for a principle of just compensation that adopts a particularly generous valuation principle and broad scope.<sup>268</sup> Second, he argues that even the payment of just compensation, based upon a property's market value, is inadequate by itself.<sup>269</sup> The market reflects the negotiation strategies of the players in a non-cooperative game. The amount of the share of the surplus created by the redeployment of an asset into public use by the state or state-like entity is not determinate. The obligation of payment of the market price of an asset as just compensation must be supplemented by an additional payment under a distributional principle that allocates the social surplus created by governmental action in accordance with the prior allocation of wealth.

Epstein asserts that property rights in a state of nature must be mapped or projected into a governed world by a linear function.<sup>270</sup> He extends this argument to claim that such a mapping is required for the allocation of the social surplus arising from any governmental action in a legitimate limited state.<sup>271</sup> His first argument for such a linear function appears to be only a conclusion: "The implicit normative limit upon the use of political power is that it should preserve the relative entitlements among the members of the group."<sup>272</sup> It is not clear why this slogan is manifestly fairer than a mantra like "The implicit normative limit upon the use of political power is that it should take from each according to her abilities and distribute to each according to her needs."<sup>273</sup> Epstein constructs a complex argument for his claim. Epstein understands this principle to determine just

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267. *Id.* at 283–329 (expanding his Takings Clause analysis to taxation and welfare rights).

Epstein argues that transfer and other welfare payments are unconstitutional transfers from one person to another.

268. *See id.* at 35–56.

269. EPSTEIN, BARGAINING, *supra* note 9, at 90–98.

270. EPSTEIN, TAKINGS, *supra* note 2, at 4.

271. EPSTEIN, BARGAINING, *supra* note 9, at 90–98.

272. *Id.* For a thoughtful analysis and criticism of Epstein's argument, see Barbara H. Fried, *Proportionate Taxation as a Fair Division of the Social Surplus: The Strange Career of an Idea*, 19 *ECON. & PHIL.* 211 (2003); Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 *CHAPMAN L. REV.* 157, 172–79 (1999) [hereinafter Fried, *Puzzling Case*]. Epstein's argument thus expressly rejects the redistributivist premises of Michelman and Rawls.

273. *See generally* KARL MARX, *CRITIQUE OF THE GOTHA PROGRAM* (1875) (describing the distributive requirements of communism) *reprinted in* THE PORTABLE KARL MARX 533, 541 (Eugene Kamenka ed., 1983).

compensation.<sup>274</sup> If the taking of private property is, on balance, socially valuable, then compensating the person whose property has been taken for the full value of that property should be possible. But full value here is a concept freighted with an important implicit claim. In the context of just compensation, fair market value reflects the value to the buyer who can achieve the highest use for the property, not the value to the seller.<sup>275</sup> According to Epstein, only that higher price delivers the higher social value to the existing owner who is entitled to it.<sup>276</sup>

Epstein's valuation method for determining is not only inconsistent with the traditional market value approach of established takings law but requires a determination that is far more difficult than current law requires, as Epstein recognizes.<sup>277</sup> Market value is relatively easy to determine for fungible property because there are often active markets for such types of property. But even for nonfungible property there are valuation methodologies that allow at least rough determinations of value.<sup>278</sup> Epstein requires just compensation to be paid on the basis of the value that the owner places upon property.<sup>279</sup> Because that value is a personal, subjective value, its determination is difficult. Epstein believes that a higher subjective value must ordinarily be protected in the determination of the just compensation due because property often has a use value in excess of its exchange, because of customization or the idiosyncratic preferences of an owner.<sup>280</sup>

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274. EPSTEIN, BARGAINING, *supra* note 9, at 92–98.

275. *Id.*

276. *Id.* See also Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation is Efficient?*, 20 SUP. CT. ECON. REV. 35, 49–50 (2013); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783 (2006) (proposing a premium over fair market value for owner occupied housing condemned).

277. EPSTEIN, BARGAINING, *supra* note 9, at 87–89.

278. Replacement cost, capitalized income value, and comparable sales are all established methods used to value assets.

279. EPSTEIN, BARGAINING, *supra* note 9, at 82.

280. EPSTEIN, TAKINGS, *supra* note 2, at 182–83. It is unclear whether subjective value could ever be less than fair market value. If my estranged uncle gives me a valuable painting by Picasso but I do not like or value modern painting, my subjective value of the painting would be less than the market value. Epstein might argue that I would never rationally value the painting at less than the market value, because my value of the proceeds of sale would equal the market price. But while there is no reason to suppose that I would sell the painting for less than its fair market value, that value would not appear to be my subjective value. It does not appear that Epstein means to suggest that just compensation could be less than fair market value in the case that the owner's subjective value is lower.

Epstein argues that just compensation must be paid whenever any property is taken or reduced in value by regulation except where the use of the property prevented by the state action is tortious.<sup>281</sup> The test for tortious use is limited, Epstein argues, to use that so qualifies under common law.<sup>282</sup> It is not within the legitimate power of the state to create new torts or expand existing torts and thereby create a more expansive foundation for the powers of eminent domain and regulation. All other uses fall within the rights of the property owner. Epstein would compensate the governmental taking of any quantum of property unless the government is acting to prevent or mitigate tortious conduct, as defined in the common law. It is not clear, as critics have noted,<sup>283</sup> how Epstein would define property interests entitled to protection. Reich's New Property, for example, would not necessarily be protected from taking without compensation. Most fundamentally, that is because Epstein believes that such transfer payments are improper exercises of government power.<sup>284</sup>

Epstein appears to concede that his requirements for just compensation cannot be satisfied directly. The practical, administrative costs are too high.<sup>285</sup> So he proposes to use a proxy for the calculation of the just compensation. That proxy is the requirement for a linear function that preserves the relative wealth of the members of the polity before and after government action. When the government acts to create social surplus, the surplus created is subject to a mathematical limitation according to Epstein. The surplus must be divided in compliance with a constraint that may be expressed as a linear function that maps existing entitlements onto the entitlements that result from the greater wealth and utility arising from effective government action.<sup>286</sup> Epstein believes that this is a practicable way to ensure that just compensation is paid with respect to regulatory regimes that have broad but disparate impacts on numerous members of the polity. When we consider how small the acorn of property-like entitlements is in

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281. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 352–54 (2014) [hereinafter EPSTEIN, *LIBERAL CONSTITUTION*].

282. *Id.*

283. Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 148–50.

284. *Id.* at 306–29.

285. EPSTEIN, *BARGAINING*, *supra* note 9, at 87–88. Epstein's argument about the transaction costs is not the technical utilitarian argument that Ackerman explored but the intuitive argument that the kinds of individualized assessments that must be made of comprehensive regulatory regimes present manifestly insuperable valuation challenges.

286. EPSTEIN, *TAKINGS*, *supra* note 2, at 4–5.

anything like the state of nature, before the rise of the night-watchman or the modern states compared to the giant distributive oak that government and further social cooperation creates, this proposed restrictive derivation must be recognized as surprising if not entirely puzzling.<sup>287</sup> This direct proxy argument is the first argument for the linearity function.

Epstein has to establish, at the least, that the linearity function provides an adequate proxy for the actual valuation and payment of just compensation and that allocating the social surplus created according to the linearity function is practicable. Epstein's argument that the linearity constraint is a fair proxy for just compensation is startlingly terse. The requirement of uniformity of impact imposed by the linearity constraint insures that the anticipated winners who pursue and effect the governmental action compensate any reluctant or recalcitrant losers in the same relative manner as they themselves benefit.

Epstein's argument for the greater practicability of the linearity function gets a strong boost from the manifest impracticability of measuring the subject valuation of property impacted by governmental action. But establishing that we can hope, except in the most conceptual or abstract sense, compare shares of property *ex ante* and *ex post* never gets much of a defense. Without a more complete description of that method or a defense of a practicability, it is both hard to assess Epstein's claim—or to have much confidence in the practicability of the standard generated by the linearity function.

Epstein's arguments for his theory of just compensation face three important challenges. The first reply challenges the claim that the common law of torts provides a unique, adequate measure of improper conduct sufficient to define the limit between government regulatory regimes that may impact property rights but require no compensation to the impacted property owners and those regulatory regimes that require compensation. Epstein must establish both the adequacy and the uniqueness of the lines drawn by the common law of torts. Both the *adequacy* and the *uniqueness* claims may be challenged.

The claim that the common law of property and torts is adequate or sufficient to determine those cases in which governmental regulation or expropriation requires payment of just compensation raises an immediate question for intangible property. Intangible property is largely created by the state; it is not principally a creature of the state of nature or the common law.<sup>288</sup> Nevertheless, Epstein wants to graft comparable protections for intangible property like goodwill

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287. See Fried, *Puzzling Case*, *supra* note 272, at 175–77.

288. See generally ALEXANDER & PEÑALVER, *supra* note 10, at 183–203 (arguing that the key elements of positive law intellectual property may be harmonized with philosophical theories of tangible property). The creation of new kinds of private property, which is permissible under Epstein's theory, and the creation of new kinds of torts, which is not, created a puzzling asymmetry that Epstein never explains or defends.

onto his common law-based takings theory for tangible property.<sup>289</sup> Epstein argues that the common law-based protections should be extended to intangible property on the basis that such intangible property is sufficiently like tangible property that it, too, should be protected. The entitlements of the state of nature thus appear to cast a wide penumbra into our stated world.

The claim that the historic common law of property and tort is the unique regime that can determine which takings ought to be subject to a requirement that just compensation be paid has been heavily criticized.<sup>290</sup> Epstein does not adequately acknowledge this line of criticism. Michelman articulated the opposing view in his original discussion of the place of tort theory in the law of takings<sup>291</sup> and developed his analysis in subsequent articles.<sup>292</sup> Michelman argues that reliance on unrelated tort theory in the takings jurisprudence has resulted in arbitrary distinctions and unpersuasive decisions.<sup>293</sup> Radin has also criticized the derivation of takings analysis from tort forcefully.<sup>294</sup> In a real sense, the arguments that Michelman and Radin make on one side and that made by Epstein on the other simply do not engage. Epstein's argument is an argument from natural rights as to how our constitutional law should be; Michelman and Radin make an argument from our legal intuitions against or, at least, critical of, existing constitutional doctrine.

At least as importantly, the takings cases that derive their conclusions from tort analysis are sometimes quite unpersuasive. *Loretto* is a good example.<sup>295</sup> *Loretto* emphasized the element of common law trespass in the laying of television cable

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289. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 324–25; EPSTEIN, TAKINGS, *supra* note 2, at 80–84.

290. *See, e.g.*, Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 148–50.

291. Michelman, *Fairness and Utility*, *supra* note 1, at 1169–71 (characterizing the courts' mistake as a matter of searching for legal principles in the decision and articulation of takings cases rather than squarely confronting questions of fairness and policy).

292. *Id.*; Frank I. Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1625–29, (1988) [hereinafter Michelman, *Takings*, 1987] (concluding that the invocation of classical common law concepts of property has proved attractive to the Court in its takings decisions).

293. Michelman, *Fairness and Utility*, *supra* note 1, at 1196–200.

294. Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 148–50, 150 (arguing that a simplistic doctrinal recourse to tort theory in our takings jurisprudence creates a “concealed justice issue [that] tends to block any general solution to the takings problem”).

295. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

on an apartment building's roof to support its finding of a taking.<sup>296</sup> That seemingly trivial trespass seems an unpersuasive basis on which to find a taking. Similarly, the cases that decide whether aircraft over flights give rise to a taking on the basis of an analysis whether trespass has occurred are also good examples of an unpersuasive use of the distinction between tortious and non-tortious behavior determine whether a taking has occurred.<sup>297</sup> Tort law has not played a persuasive basis on which to define takings entitled to just compensation and there is not an obvious way to reformulate tort law as the standard by which to determine the scope of the Just Compensation Clause. It would seem surprising if the common law of tort also works as the standard by which to measure the limits of the state's power to take property without compensation. The two doctrines have different functions and different genealogies; why would they be congruent?

Second, Epstein's argument that protected property rights taken by all governmental coercion must be compensated for by just compensation would appear to generate inconsistent, contradictory results when it confronts the question of slavery and the Thirteenth Amendment. If we treat the existence of slavery as an accepted part of the law of property at the time of the founding, then the property rights of the slave owners are entitled to protection and the freeing of the slaves triggers a claim for just compensation. If, on the contrary, we treat the existence of slavery as improper and the property rights of the slave owners as not giving rise to a claim for just compensation, then the question arises whether their enslavement gives rise to a claim for just compensation with respect to their lost service income on the part of the enslaved persons. Neither slave nor slave owner in fact received compensation for the taking by the government. What ought to have been done with respect to each of these two questions on Epstein's account?

Epstein is clear that he believes that slavery should be prohibited and that this prohibition is consistent with his libertarian theory.<sup>298</sup> But that was not the law of the antebellum South or even the law of much of the United States as a whole at the Founding of the Republic.<sup>299</sup> If slavery is treated as properly prohibited as a legal matter, on some natural law or philosophical argument, in the face of the established positive law, then slave owners would not be entitled to compensation when their slaves are freed. But Epstein does not go so far as to claim that slavery

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296. *Id.* at 433–36.

297. *See* *Laird v. Nelms*, 406 U.S. 797 (1972). *See* Michelman, *Fairness and Utility*, *supra* note 1, at 1169–70.

298. EPSTEIN, *TAKINGS*, *supra* note 2, at 335 n.7.

299. *See generally* MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981) (describing the complex problems arising with respect to legal responsibility and associated liability as a matter of private and public law when persons were classified as property).

must be prohibited under his theory. If slavery is not prohibited, then compensation would appear to be due when property was taken by the state on emancipation.<sup>300</sup> This is not a conclusion that Epstein or we would likely want to endorse.

Third and finally, because the linear function compensates member of society only by reference to the wealth in property each holds *ex ante*, the formula would not appear to do justice to those members least able to sacrifice for the greater good. Consider Michelman's example of the choice among potential disruptive routes for a new highway.<sup>301</sup> If the decision is to maintain the wealth allocation of the status *quo ante*, choosing to route the highway through the less valuable real estate of the disadvantaged neighborhood would minimize the compensation needed. The bulk of the suffering would seem to be imposed on the least advantaged and the bulk of the benefit, corresponding to the greater share of wealth, would redound to the benefit of the more well-off. For how many of us does this outcome track our intuitions?

The second step of Epstein's argument for the linearity function does not rely so much on a direct defense of the requirement as the best practicable means of insuring that just compensation is paid. Instead, it is an argument for how Kaldor-Hicks optimal government actions, when repeated over time, satisfy, in aggregate, the more stringent Pareto optimality test.<sup>302</sup> Epstein appears to argue that even if the full amount of just compensation is otherwise paid, the obligation to make this payment imposes an inadequate constraint on the division of the social surplus generated by government action. That surplus must be allocated among the citizens by reference to their relative entitlements *ex ante*. The requirement for so allocating the social surplus is thus defended on an instrumental basis by Epstein.<sup>303</sup> The linearity function is not required simply as a matter of providing an administrable regime for protecting the property rights that persons hold *ex ante* or as a matter of fairness. It is required to prevent waste and injustice on the part of the state with respect to the projects that the state identifies and pursues.

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300. An argument might be made that property was destroyed rather than taken when the slaves were freed and, therefore, that just compensation is not payable in the absence of taking and use by the federal government. See Rubinfeld, *supra* note 1. An argument could also be made that because the Thirteenth Amendment was adopted before the Fourteenth Amendment, there was no requirement for the payment of just compensation applicable to the federal government at the time that the slaves were freed. But it is not clear that Epstein would make these arguments.

301. Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

302. EPSTEIN, BARGAINING, *supra* note 9, at 83.

303. EPSTEIN, TAKINGS, *supra* note 2, at 4–5.

Epstein's instrumental argument for a linear function that preserves the relative wealth of each member of society rests on three premises about human behavior. First is the problem of faction: Epstein asserts that in political action, persons are willing to form factions who coordinate their behavior so as to disadvantage or exploit others.<sup>304</sup> Factions have the potential to seek and, if unrestrained, to capture, economic advantage—economic rents—from minorities. Here Epstein simply appears to translate the political argument of the *Federalist Papers* into an economic argument.<sup>305</sup> Epstein's solution to this problem, effectively, is to require that government actions maintain the status quo of the *ex ante* relative positions of all persons.<sup>306</sup> With government action so constrained, no economic rents can be delivered to factions. With the path to capturing economic rents foreclosed, two benefits result. First, potentially uneconomic governmental actions that produce net social loss rather than social benefit but which may produce economic rents to some faction are no longer possible. Thus, governmental actions will be limited to those that produce social surplus. Second, factions will lose the incentive to engage in unproductive political machinations in pursuit of the now foreclosed economic rents.

Second is the problem of corruption: government officials are inadequate fiduciaries and often act in their personal self-interest rather than in the interest of the polity as a whole.<sup>307</sup> The primacy of human self-interest and the absence of an exception from the pursuit of self-interest by those individuals vested with governmental authority and power is a classical theme of Western political philosophy from Niccolò Machiavelli through Thomas Hobbes, Adam Smith, and John Locke.<sup>308</sup> Here Epstein draws on the modern articulation of these challenges made by social choice theory to highlight the significant potential for self-interested

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304. EPSTEIN, BARGAINING, *supra* note 9, at 82.

305. THE FEDERALIST No. 10 (James Madison).

306. EPSTEIN, BARGAINING, *supra* note 9, at 82, 84–85.

307. *Id.*

308. See generally J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 41–53 (discussing Hobbes's account of self-interest and the state of nature) (Samuel Freeman ed., 2008); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992); THE FEDERALIST NO. 47 (James Madison); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Peter Laslett ed., 1967) (1690); Lisa Hill, *Adam Smith and the Theme of Corruption*, 68 R. OF POL. 636 (2006); Adrian Blau, *Hobbes on Corruption*, 30 HIST. OF POL. THOUGHT 596 (2009).



behavior by government officials.<sup>309</sup> Again, as with factions, Epstein's solution is to require that government actions maintain the relative status quo.<sup>310</sup> Self-interested acts by government officials can thus capture no economic rents. As in the case of Epstein's analysis of the problem of factions, foreclosing the potential for economic rents to corrupt governmental officials will channel government action into productive paths and reduce the distraction and scheming of governmental officials.

The arguments from faction and corruption are at the heart of Epstein's claim that the status quo must be maintained in the division of the social surplus created by government coercion. Yet these arguments invite a number of challenges and replies.<sup>311</sup> The most fundamental objections highlight unstated premises in the argument about the two pies.

The third behavioral premise underlying Epstein's argument is based upon the nature of the transaction costs that arise in administering a system of providing just compensation for the taking of private property. Valuing property and determining the relative claims of persons to social surplus created by the exercise of the government's power of coercion is a complex, uncertain, and costly undertaking.<sup>312</sup> Judicial proceedings to determine the amount of compensation due under the Fifth Amendment certainly satisfy this assessment, even when the obligation to pay just compensation is uncontested. As Epstein points out, correctly I think, identifying and, *a fortiori*, measuring the surplus created for the participants by even private, bilateral exchanges is difficult.<sup>313</sup> This uncertainty arises, not just for an external observer, but even for the parties to the exchange.<sup>314</sup> Ordinarily, as in the field of income taxation, it is ignored, with the fiction of the arm's length exchange that treats the exchange as creating no value for either party.<sup>315</sup> Yet,

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309. *See, e.g.*, PHILIP FRICKEY & DANIEL A. FARBER, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

310. EPSTEIN, BARGAINING, *supra* note 9, at 82, 85.

311. Fried, *Puzzling Case*, *supra* note 272, at 174–79.

312. EPSTEIN, BARGAINING, *supra* note 9, at 87 (asserting that the cost of precise measurement is so high that a proxy for that process must be found).

313. *Id.* at 90–91 (describing how the law largely ignores the problem of the division of the social surplus arising from private, bilateral transactions and that “[e]ven the parties to the [private] transaction will often be unaware of the precise extent of their own surplus from the transactions that they have made.”).

314. *Id.* at 91.

315. *Id.* In the United States federal income tax system, the legal definition of income does not include any gain recognized by purchasers who secure a bargain in an arm's length transaction. In non-arm's length transactions between business affiliates, as in

according to Epstein, if the government action creates a social surplus, as it will ordinarily be expected to do, then the surplus must be allocated based upon the simplest rule: maintain the status quo.<sup>316</sup> But it is unclear how even this simplest rule avoids all of the problems Epstein describes. To maintain the status quo requires identifying and measuring the disparate effects of the governmental action. At a minimum, that identification and measurement project will often be complex and uncertain. Still, Epstein may argue, dispensing with additional degrees of freedom associated with negotiating an allocation of those gains among the citizens substantially simplifies the state's task and reduces the potential for disagreement and the transaction costs associated with the attendant controversies.

From these premises Epstein makes his instrumental argument for the linearity function or principle. At the outset, Epstein appears to assume that a linear function that maps the relative economic wealth of individuals before the exercise of the state's power onto their relative wealth *ex post* is well defined.<sup>317</sup> He does so even as he concedes the inherent difficulty of determining the amount of social surplus created by the exercise of the state's power.<sup>318</sup>

In arguing for the linearity principle, Epstein invokes the Rawlsian concepts of the veil of ignorance and the original position.<sup>319</sup> Epstein thus departs substantially from Nozick's libertarian strategy. While Nozick constructed his argument for a minimal state from an analysis of a hypothetical state of nature, he criticized much of Rawls's argument from the original position and his concept of the veil of ignorance.<sup>320</sup> Although Nozick's argument proceeds from the state of nature, it does not ask us to imagine what we would believe fair if we designed a political distribution of wealth and opportunity from behind a veil of ignorance. Instead, Epstein asks us to consider what would maximize collective output. He believes that, from behind a veil of ignorance, rational actors would choose the output-maximizing regime, as it increases the likelihood that they would be better off.

Epstein thus uses the concepts of the original position and the veil of ignorance in ways that are radically different from their use by Rawls, however. Rawls focuses upon the claims of fairness; central to his account is the difference

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the international context, or more generally between related natural persons who are not dealing at arm's length, identifying and measuring the gain inherent in such transactions has proved an almost insuperable task as a practical matter.

316. *Id.* at 93.

317. See EPSTEIN, TAKINGS, *supra* note 2, at 3–4.

318. EPSTEIN, BARGAINING, *supra* note 9, at 83.

319. See generally RAWLS, JUSTICE, *supra* note 39, at 17–22, 136–42.

320. See NOZICK, *supra* note 227, at 189–204.

principle, asserting that we would accept inequality only to the extent that it improves the position of the least well-off members of society.<sup>321</sup> Epstein asserts that from the original position we would choose the legal regime that simply maximizes aggregate output.<sup>322</sup> Rawls's minimax and difference principles are discarded.<sup>323</sup> Epstein does not expressly explain why, but the explanation appears to lie in his disagreement with the Rawlsian claim that agreements that would be made in the original position behind the veil of ignorance are enough to subvert the claims of individuals to the wealth that they otherwise find themselves entitled to in our world.<sup>324</sup> To the extent that such wealth arises from individuals' natural ability, diligence, luck, or astute exchanges, Epstein does not want to empower the state to redistribute it.

It may appear that Epstein has simply incorporated the conclusion of his arguments from faction, corruption, and waste that the uncompensated taking of private property by the state invites inefficiency and net social cost. But Epstein makes a subtle and complex independent argument for his claim that wealth maximization would be chosen from the original position.<sup>325</sup> That argument proceeds from a claim about the number and nature of government action. According to Epstein, governmental actions in the modern state will be repeated and numerous.<sup>326</sup> They will also be randomly distributed.<sup>327</sup> In aggregate, over time, the benefits of governmental action will be evenly distributed, without any need for compensation. As Epstein puts it, somewhat abstractly, the resulting distribution will approach the original relative distribution asymptotically.<sup>328</sup>

Epstein's argument proceeds with a number of hypothetical assumptions about government action. He assumes that governmental action is neutral—not targeted to benefit or harm particular persons except as a correlative effect of pursuing the public good—and substantial. It does not appear to be a minimal night watchman state.<sup>329</sup> Epstein claims that on these assumptions the multiple, repeated actions by the government will, in aggregate, balance, such that costs and

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321. RAWLS, JUSTICE, *supra* note 39, at 60–65.

322. EPSTEIN, BARGAINING, *supra* note 9, at 82.

323. RAWLS, JUSTICE, *supra* note 39, at 60–65; EPSTEIN, BARGAINING, *supra* note 9, at 82.

324. EPSTEIN, BARGAINING, *supra* note 9, at 81–82.

325. *Id.*

326. *Id.* at 83.

327. *Id.*

328. *Id.*; see also Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989).

329. EPSTEIN, BARGAINING, *supra* note 9, at 83.

benefits will be evenly distributed over the population.<sup>330</sup> As we saw in the case of Ms. Kelo, however, many individuals may face governmental action and interventions that have profound adverse impacts upon them that will never be matched by offsetting benefits. Epstein appears to have been deceived here by looking to average impacts and common regulatory actions that do not have substantial, disproportionate impacts on particular individuals.

Whatever the limitations of Rawls's approach, Epstein's alternative is not particularly plausible. From the original position, Epstein's implicit claim that I would be concerned only to maximize aggregate output or welfare, without regard to distribution, is unpersuasive. If I do not know where I will find myself when the veil of ignorance is lifted, Rawls's claim that distribution should matter seems more plausible. I could be Ms. Kelo. But if we were to choose the output-maximizing regime, Epstein argues that this choice would entail that surplus created by government action be allocated by the linearity function.<sup>331</sup> Any other function would impose significant dead weight costs of political decision—and with create the specter of losses arising from corruption and the rent-seeking strategies of factions. But making these arguments, Epstein relies upon his premise that we can avoid political choice by operation of the complete mechanical rules of tort and property common law.<sup>332</sup> Without this premise, the argument from the original position appears to fail.

But even if the common law could play the role Epstein seeks, it is unclear why he thinks that we can accept the results of that system by default without making the political choice to accept that as our default outcome. If we could have chosen a different outcome, choosing the common law outcomes by default would appear to be a choice, too. Choosing not to change those results is a choice, too.

Epstein may think that the requirement that we adopt a linear function to allocate social surplus created by government action follows from his theory of natural rights.<sup>333</sup> Natural rights theories argue that men and women have inalienable rights that arise from God or, in their more secular versions, from consideration of the nature of persons and the ways that enable our capabilities to be realized and for us to flourish.<sup>334</sup> While a natural rights theory would appear to require that such rights not be abridged by the state, it is not clear why the benefit

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330. *Id.*

331. EPSTEIN, TAKINGS, *supra* note 2, at 4–5; EPSTEIN, BARGAINING, *supra* note 9, at 79–87.

332. EPSTEIN, BARGAINING, *supra* note 9, at 32–34, 82–87.

333. EPSTEIN, TAKINGS, *supra* note 2, at 5.

334. *Id.* at 10. *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (classic modern statement of natural law theory for an Anglophone audience).

of the state must be distributed proportionately to pre-existing property rights (subject to common law tort rules) and Epstein does not explain clearly why such a constraint applies. It appears that Epstein believes that if the initial property owner does not capture her proportionate share (by reference to property) of the incremental welfare gains arising from the creation or operation of the state, then a portion of her property is being taken from her for the use of another. But it is hardly clear that Epstein's characterization of a disproportionate distribution of the gains from the creation or operation of the state is right. Moreover, if Epstein can support his defense of the linearity function only with a foundational natural law account, then his project of offering an ecumenical theory of the limited state fails.

Three arguments suggest why Epstein's linearity function claim is implausible. First, as hinted above, there is reason to question whether we can hope to construct anything like a well-defined linear function to allocate surplus arising out of governmental action. Epstein thinks that the common law of tort and property gives us that function.<sup>335</sup> The property rights that an individual holds are determined by the common law of tort and property. If any of those rights are taken by the government's action, then payment owed is by the state. But that argument faces serious objections. First, the notion that the common law of tort and property is enough to define how property should be allocated after government action appears implausible. For example, intangible property, largely created by governmental action (with exceptions like know-how and going concern value), cannot be protected by appeal to property common law.<sup>336</sup> Even with respect to tangible property, however, it's not clear that the common law can provide the range and granularity to define how social surplus ought to be allocated from governmental action. Moreover, as noted above in the discussion of Michelman's example of the problem of designing the route for a new highway,<sup>337</sup> the linearity function does not deliver results easily reconciled with our intuitions about fairness. If the highway is routed through the residential neighborhoods of the disadvantaged, allocation of the surplus created by the highway based upon prior property rights would appear to leave those most hurt by the government's action with inadequate compensation.

Seemingly as an alternative, Epstein explores whether the full value required must compensate the owners of the property taken for the value of the

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335. EPSTEIN, BARGAINING, *supra* note 9, at 33–35.

336. *But see* EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 324–25 (arguing that intangible property is sufficiently like tangible property as a matter of natural rights and economics that it, too, should be brought within our takings rules and just compensation paid when the state diminishes an owner's rights therein).

337. *See supra* notes 125–33 and accompanying text.

property in the hands of the state.<sup>338</sup> Yet if the full value of the property in the hands of the state is paid to the historic owner, the compensation would be too great as determined under the linearity rule. With this valuation formula, Epstein cannot claim to have maintained the wealth allocations of the status quo. In an extreme case, all of the surplus will be diverted to one person, whose property has been taken. There is, thus, some internal tension (if not actual inconsistency) between Epstein's claim that governmental actions (accompanied, as necessary, by the payment of just compensation) must preserve the status quo and the claim that just compensation must pay the owner of the property taken the value to the state of the property taken. Again, Epstein appears to believe that in the modern administrative state multiple government interventions will balance out in aggregate, but the truth of this claim is not demonstrated.

Second, the foundational claim for the inherent fairness of a linear function is questionable. Consider the case of a person in the state of nature with no property or with negative interests in property—someone, for example, whose liabilities exceed her assets.<sup>339</sup> In the state of nature, as Epstein describes it, this could arise with an individual incurring a debt obligation to another that exceeded the amount of the value of the obligor's other assets.<sup>340</sup> Even if such an obligation were not recognized by a state, it would appear to constitute a good enough obligation that it could give rise to an effective negative net worth. In the state of nature, moreover, there would be no bankruptcy law that could provide the debtor relief. On Epstein's account, such a person would be entitled to no benefit from the formation of the state; all of the benefits would need to go to the property owners. (Epstein nowhere suggests that the linearity function would require negative net worth individuals to be allocated additional liabilities so as to preserve relative entitlements in the *ex ante* and *ex post* worlds.) This case shows that individuals in the state of nature bring more to the formation of the state than their property. A powerful fairness argument may be made that the benefits from the formation of the state can and should reflect those multiple types of contribution.

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338. EPSTEIN, TAKINGS, *supra* note 2, at 164–65 (analogizing the requirement of just compensation to remedies for tortious misappropriation of private property); EPSTEIN, BARGAINING, *supra* note 9, at 94–95.

339. It may be argued that the negative net worth case cannot plausibly arise in the state of nature, where no state stands ready to enforce obligations, but private agreements may be sufficient to create the possibility. In a world that recognizes moral obligations (not the state of nature, classically) such obligations could arise without government. *See generally* NATHAN OMAN, THE DIGNITY OF COMMERCE (2016) (describing the structures of early modern international commerce in a world without practically enforceable legal obligations). Moreover, the case of the person without property, surely can arise in the state of nature.

340. *See* EPSTEIN, TAKINGS, *supra* note 2, at 10–11.

Third, certain costs of the state may most naturally be borne per capita, without regard to the distribution of property entitlements. Thus, for example, when a protective association is formed to provide for the common self-defense, absent special allocations of responsibility, the burden of such agreement will be borne equally over the members of such political society on a per capita basis. That is because in many situations we may contribute only ourselves—our labor or services—to the common project. When the obligation to contribute of personal services carries with it risk of personal injury or death, as may happen in the case of drafts by protective agencies or states, those obligations fall most naturally per capita. In the draft, our contributions are made per capita, without taking much account of our wealth.<sup>341</sup> Monetizing the obligation, while possible, changes it materially.

Similarly, the benefits of the formation or operation of a protective association may arise in proportion to property held. Thus, when a protective association extends its mission of self-defense to the protection of the property (or property-like rights) of its members, the wealthy members of such an association will naturally capture a disproportionate share of the benefits of such an expanded mission, again absent special allocations. In light of such potential disparities in the costs and benefits associated with the creation and operation of the state, it is unclear why Epstein believes that there is a unique legitimate formula for allocating benefits from the state to property owners.<sup>342</sup>

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341. Independent of the corrosive questions of public morality raised by the de facto wealth-based deferment systems of the Vietnam War, the principal contributions made to the state by those drafted is the assumption of the risk to their lives by their service. I have hedged my characterization in the text only to recognize the ancillary differences that different draftees may face as a matter of the opportunity costs that the mandatory draft imposes.

342. Epstein also argues that only a linear function that distributes the benefits of government proportionately to the pre-existing wealth of the political community is legitimate in the context of his attack on progressive income taxation—a taxing regime that imposes disproportionately higher taxes on persons with more income through a progressive tax rate structure, threshold exemptions, or otherwise. Although we ordinarily think of a progressive income tax as achieving progressivity through a progressive rate structure, Ed Kleinbard reminds us that other techniques may instead be employed. EDWARD KLEINBARD, *WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY* 341–42 (2014). Epstein argues that such an income tax system violates the Constitution because a progressive income tax constitutes an impermissible taking of private property because it takes property without providing an offsetting proportional benefit. EPSTEIN, *TAKINGS*, *supra* note 2, at 283–303. He further argues that the Sixteenth Amendment expressly amending the Constitution to authorize an income tax does not extend to a progressive income tax, even though that was contemplated at the time of the adoption of the Sixteenth

We see, therefore, why the linear function is so important for Epstein's account of takings and the relationship of the state to private property. Without it, the ability of the state to capture and redistribute efficiency gains from the creation and operation of the state permits something much more like the current law of takings and federal income taxation. The linearity argument is central to Epstein's argument that redistribution of wealth by the state, whether through takings, distributions, or progressive levies, is impermissible.<sup>343</sup>

A final judgment on the merits of Epstein's complex and sophisticated arguments and his critics' objections is, fortunately, unnecessary for my purpose here. As this brief introduction shows, Epstein's argument is subtle and complex, but it is not uncontroversial. It is enough to note two conclusions. First, the sophisticated arguments that Epstein makes are highly controversial; they are neither self-evident nor uncontroversial. The ongoing controversy over his claims and arguments makes them a problematic foundation for our constitutional law and practice of takings. Without agreement on Epstein's theoretical premises, we cannot hope for agreement on the inferences that he would draw from them. Second, and more importantly, the kinds of economic and theoretical arguments that Epstein offers for his claims for the linearity function to allocate social surplus from governmental action do not look like canonical forms of constitutional argument made by advocates before the Court or by the Court itself in deciding constitutional cases. They could not be made to or by the Court in defending and explaining a decision. Even if true and uncontroversial, these arguments do not figure as canonical types of constitutional arguments. Some might be appropriate arguments to a federal or state legislature considering public projects or regulatory legislation. They are not, however, authoritative constitutional arguments. These two objections may explain why Epstein's argument—whatever else it may be—does not offer us persuasive, authoritative arguments for how the Court ought to decide constitutional takings cases.

Unlike Michelman and Ackerman, whose analysis of takings jurisprudence has only the relatively modest mission of explaining the law, resolving its inherent doctrinal contradictions, and putting the regulatory roles of the modern, liberal administrative state on a firm foundation, Epstein challenges the fundamentals of the existing takings doctrine and jurisprudence—and the administrative law creations of the modern, liberal, regulatory state.<sup>344</sup> His analysis, if incorporated

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Amendment, because that amendment was directly addressing only the prior judicial determination that an income tax violated the constitutional apportionment clause. *See id.* at 296 n.42.

343. *See generally* EPSTEIN, TAKINGS, *supra* note 2 (advancing libertarian arguments against the modern regulatory state); EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281 (same).

344. *See generally* EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281.



into our constitutional law, would work a fundamental revolution of the role and function of the federal government. It would also curtail the power of the states even more severely. That is because many of the states, unlike the federal government, are not sovereigns with expressly limited, enumerated powers. Epstein's argument does not proceed from the enumeration of such powers but from fundamental considerations of philosophical analysis. Those considerations, according to Epstein's argument, obviate much of the need for the express limitation of a sovereign's powers and override any claims to legitimate powers in excess of the narrow limits that Epstein describes.<sup>345</sup>

The radical force of Epstein's analysis can be captured by highlighting three implications of his constitutional theory. First, private property can only be taken for public use.<sup>346</sup> As a result, many of the urban renewal strategies currently permitted (with payment of just compensation) would be flatly prohibited as beyond the authority of the state.<sup>347</sup> These strategies rely extensively on private developers, often transferring property that has been condemned from private owners to third party developers. Second, Epstein would fundamentally revise the calculation of just compensation on the basis that current market valuations fail to deliver to the property owner the share of the benefit of state action to which she is entitled.<sup>348</sup> To capture that value, Epstein's measure of the just compensation due on a taking would require payment of an amount such that an owner is indifferent between holding the property taken or accepting the payment on a forced transfer to the state.<sup>349</sup> But Epstein has substantial difficulty explaining what the formula for that amount is in light of the absence of necessary information—and the incentive property owners have to engage in strategic bargaining.<sup>350</sup> He acknowledges that an arbitrary premium over fair market value is only rough justice.<sup>351</sup> Third, taxes and regulatory actions are generally subject to the Takings Clause.<sup>352</sup> Thus, for example, Epstein argues that the progressive income tax violates the Takings Clause of the Fifth Amendment, even after adoption of the

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345. EPSTEIN, TAKINGS, *supra* note 2, at 7–18.

346. *Id.* at 162.

347. *Id.* at 178–80.

348. *Id.* at 182–84.

349. *Id.* at 183.

350. *Id.*

351. *Id.* at 184 (“The case on the constitutional insistence upon bonuses is very close indeed.”).

352. *Id.* at 95.

Sixteenth Amendment.<sup>353</sup> There is no realistic manner in which a progressive income tax could deliver proportional benefits; indeed, the purpose underlying the tax is often to fund government social programs that are redistributive.<sup>354</sup> Thus, for Epstein, the progressive federal income tax is unconstitutional.<sup>355</sup> There is little left of our current takings jurisprudence when Epstein is done.

Epstein argues that philosophical analysis yields constitutional arguments that may decide Takings Clause cases or, at least, allow us to decide such cases. In *Bargaining*, Epstein uses his philosophical analysis to offer two arguments for how *Nollan* ought to have been decided.<sup>356</sup> First, Epstein assimilates *Nollan* to the unconstitutional conditions jurisprudence while acknowledging that neither the Court nor the dissenting opinions expressly analyzed the case on that basis.<sup>357</sup> Epstein argues first that the police power claimed by California to regulate as a matter of zoning the footprint and height of private residences (not rising to the level of nuisance) is itself invalid.<sup>358</sup> Without the power to prohibit the Nollans' proposed expansion, the state's denial of a building permit would fall directly.<sup>359</sup>

Second, Epstein argues that even if the precedential doctrine respecting California's asserted police power is accepted as controlling, the exercise of that power by conditioning the zoning permit on the grant of an easement was invalid.<sup>360</sup> He argues that imposing such a condition is impermissible because it is an unconstitutional condition.<sup>361</sup> He supports his conclusion that it is an unconstitutional condition with two arguments. The first considers the case in which the state wants a lateral easement from multiple landowners, some of which have completed their construction projects and some of which need zoning

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353. *Id.* at 283–303.

354. *See* KLEINBARD, *supra* note 342, at 339–46.

355. Epstein's argument raises the question whether a *regressive* income tax would be constitutionally permissible. To the extent that such a tax would be less invasive of the rights of property owners than a proportional tax, a regressive income tax would not appear to constitute a taking under Epstein's theory. Property owners would receive a disproportionate benefit in relation to their ownership interest under such a regime. Epstein confines his criticism to progressive taxes, however, so this implication goes unstated. *See* EPSTEIN, TAKINGS, *supra* note 2, at 297–300.

356. EPSTEIN, BARGAINING, *supra* note 9, at 179–84.

357. *Id.* at 179.

358. *Id.* at 181.

359. *Id.*

360. *Id.* at 181–84.

361. EPSTEIN, BARGAINING, *supra* note 9, at 181.

approvals. For the first group, the state would be required to purchase the easement; for the latter group it could acquire the easement without cost as condition to the zoning approval.<sup>362</sup> Epstein asserts that such disproportionate impact with respect to the creation of state surplus demonstrates the “social unfairness,” a flaw that makes the linkage impermissible.<sup>363</sup> Second, in his principal argument, Epstein argues that the proposed linkage in the bargaining between the state and the Nollans could result in net social losses.<sup>364</sup> Preventing those potential social losses by constraining the bargaining is the core of Epstein’s account of how Takings Clause cases ought to be decided.

Epstein asserts that potential losses may arise because the state’s linkage of the easement to the permission to build larger and higher allows that forced exchange to proceed without a determination of the parties’ respective pricing of the two sides of the exchange.<sup>365</sup> Without such pricing, we do not know that the easement obtained by the state is worth more to the state (and to its constituents) than it is to the Nollans. We know only that the Nollans value their development right more than the easement.<sup>366</sup> We do not know how the state values the two sides of the forced exchange because the linkage in the exercise of its purported police powers makes the cost to the state of the easement is effectively zero (ignoring here the transaction costs associated with imposing the condition). As a result, the state may in this manner acquire an easement that is worth less to it than such easement is worth to the Nollans. The result is a loss of utility or value in the system. Epstein endorses the doctrine of unconstitutional conditions, which prohibits the state from imposing conditions on actions in lieu of exercising its power of eminent domain—with its attendant obligation to provide compensation.<sup>367</sup> Epstein concedes that the doctrine of unconstitutional conditions delivers only a second best solution to the problems of state action he has identified.<sup>368</sup> The best solution, directly restricting the exercise of the state’s power, Epstein concedes, is likely unavailable as a result of the development of our Takings Clause jurisprudence.

On its face, Epstein’s argument appears a powerful argument that the decision in *Nollan* reached a good result, even if the perfect result would have been

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362. *Id.* at 181–82.

363. *Id.* at 182.

364. *Id.*

365. *Id.* at 182–83.

366. EPSTEIN, BARGAINING, *supra* note 9, at 182.

367. *Id.* at 183–84.

368. *Id.* at 184.

to hold that the state entirely lacked the land use regulatory power that it asserted. Is his argument a good constitutional argument? We might begin with the question whether, presented with Epstein's analysis, Justice Scalia, who wrote for the Court, or Justice Brennan, who wrote a strong dissent, would choose to adopt its reasoning in their opinion and, in the case of Justice Brennan, with his vote. In each case, I think not. The reason that Epstein's argument would not replace—and has not replaced—the kinds of arguments that were made in those cases turns on the conventions or grammar of constitutional argument.<sup>369</sup>

Neither the Court nor the lower courts have taken up Epstein's approach. They have instead continued to employ the kinds of arguments traditionally employed in Takings Clause cases. The conceptual elegance of Epstein's account of the Takings Clause lies in its consistency, simplicity, and comprehensiveness; even its critics recognize that elegance.<sup>370</sup> But these features are also those that preclude it from serving as a foundation for our Takings Clause constitutional practice. Our constitutional takings practice remains a matter of argument as well as decision. The ability of Epstein's theory to provide a framework by which to assess competing constitutional claims and to resolve them tacitly disqualifies the other accepted forms of constitutional argument, including text, history, doctrine, and prudence. That modal disenfranchisement is not permissible within our current practice of constitutional law, which incorporates all such other modes of argument.<sup>371</sup>

Nevertheless, the doctrine of unconstitutional conditions has been reinvigorated in recent years. It is helpful to explore how that doctrine has evolved and to compare that evolution with the state of Takings Clause jurisprudence. Epstein's initial analysis of the Takings Clause did not emphasize the doctrine of unconstitutional conditions.<sup>372</sup> Epstein came to endorse and defend the doctrine of unconstitutional conditions as a second best solution, in the wake of resistance to his more fundamental libertarian approach to limiting state power.<sup>373</sup> In that

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369. See generally BOBBITT, FATE, *supra* note 121, at 4–8; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter BOBBITT, INTERPRETATION]; Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994) (arguing that Bobbitt's project of describing the grammar of our social practice of constitutional argument often tacitly asserts normative judgments about the practice Bobbitt purports merely to describe).

370. Michelman, *Takings, 1987*, *supra* note 292, at 1625–26.

371. See BOBBITT, INTERPRETATION, *supra* note 369; LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11.

372. EPSTEIN, TAKINGS, *supra* note 2.

373. Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) [hereinafter Epstein,

approach the state was put to the hard choice of foregoing intrusion into the sphere of private rights or providing the private persons full compensation for the rights infringed. In the best case the state would forego action; in the worst case the individuals would be compensated for the state's action—and any incentive on the part of the state to capture an economic surplus from the taking would be eliminated.<sup>374</sup>

By contrast, Sullivan eschews Epstein's libertarian premises. She argues that the requirement that the landowner grant an easement to allow the public passage to the beach as a condition to the issuance of a building permit in *Nollan* should be permissible.<sup>375</sup> The landowner's acceptance of the permit establishes that the compensation provided for the permit is adequate.<sup>376</sup> There is no need to scrutinize or further test the condition imposed. Here Sullivan's argument seems to fail to address the argument Epstein offers. Epstein has argued that the government ought not to be able to claim the surplus created by the forced exchange; Sullivan tacitly asserts that the state can claim virtually this entire surplus, so long as at least a smidgen is left for the private person forced into the exchange.<sup>377</sup> Sullivan never explains why that allocation of the shares of the pie is fair—or even permissible. Moreover, when the state takes the property interest by imposing an unconstitutional condition, it avoids any accounting for the costs and benefits of its actions. The costs become hidden negative externalities. Sullivan never acknowledges Epstein's fundamental concern with this risk.

If Sullivan's analysis thus appears in places somewhat incomplete, it nevertheless looks much more like canonical constitutional argument than do most of the academic theorists' arguments with respect to the Takings Clause explored in this article. It is not surprising, therefore, that the calls for an expansion of the unconstitutional conditions doctrine bore fruit, even if some of that expansion was in directions that the academic commentators would not have endorsed.

Epstein's radical reading of the Takings Clause has provoked vigorous debate and strong objections.<sup>378</sup> I have previously canvassed the arguments against Epstein's central linearity function thesis. I want to turn back from the implications of Epstein's arguments to focus on Epstein's arguments and theory themselves, to

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*Foreword: Unconstitutional Conditions*]; EPSTEIN, BARGAINING, *supra* note 9, at 98–103; Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1418 (1989).

374. EPSTEIN, BARGAINING, *supra* note 9, at 84–87.

375. Sullivan, *supra* note 373, at 1419 n.18.

376. *Id.* at 1505 (“Acceptance by the homeowner of the trade constitutes the best evidence that the compensation is adequate.”).

377. *Id.* at 1505.

378. See generally Symposium, *Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986).

explore three additional arguments that may be made against central tenets in Epstein's theory, and to sketch briefly the criticisms and alternative pragmatic account of our takings jurisprudence that have been defended by Mary Jane Radin and others.<sup>379</sup> Of the three principal arguments against Epstein's account advanced below, two are arguments against the claims Epstein makes; one is an argument that Epstein's are not legal or constitutional arguments.

First, Epstein's libertarian theory of the Takings Clause is radical, as he himself recognizes.<sup>380</sup> The result of his theory would include invalidating federal progressive income taxes and striking down most land use regulation that extends beyond the regulation of traditional common law nuisances. In light of that radicalism, does Epstein really believe that he is defending an account of *constitutional law* (rather than a program of radical political action, for example)? I think Epstein does believe that his analysis and argument proceeds as a matter of constitutional legal theory, but he is mistaken.

Part of his confidence that his arguments are compelling as a matter of constitutional law arises from his argument that his analysis builds on the traditional republican concern with state power.<sup>381</sup> There is thus a characterization of Epstein's argument as a traditional, canonical structural argument. Bork challenges Epstein's account as noncongruent with the historical understanding of the constitutional text.<sup>382</sup> Bork's claim can be reformulated in a more compelling way. Epstein's arguments are not made within the existing modalities of constitutional argument and are not made as mode of argument in a pluralist account of constitutional argument and decision.<sup>383</sup> Epstein thinks his theoretical, philosophical argument is dispositive.<sup>384</sup> The political philosophical argument he advances may be powerful or persuasive as a matter of moral philosophy or political theory, but it does not sound within the space of constitutional reasons and argument. We cannot make Epstein's argument as textual, historical,

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379. See Radin, *Problems*, *supra* note 56, at 98; Radin, *Diagnosing the Takings Problem*, *supra* note 1.

380. EPSTEIN, TAKINGS, *supra* note 2, at 306–07 (acknowledging that “simple invalidation [of federal welfare programs found unconstitutional under Epstein's theory] is virtually impossible”).

381. *Id.* at 84.

382. BORK, TEMPTING, *supra* note 19, at 230.

383. See generally BOBBITT, FATE, *supra* note 121 (articulating a pluralist theory of constitutional law that asserts that the law is constituted by the practice of particular modalities of constitutional argument).

384. See EPSTEIN, TAKINGS, *supra* note 2, at 161–94.

prudential, structural, or ethical argument.<sup>385</sup> We cannot make it as a doctrinal argument either. That is why Epstein's argument (along with those of Michelman and Ackerman) have generally not been directly influential in the Court's approach to contemporary cases in our constitutional takings jurisprudence.<sup>386</sup>

The failure of the Court to take Epstein's libertarian account of the Takings Clause seriously as a constitutional argument raises the question whether it is possible to state (or translate) Epstein's reading of the Constitution into a recognizable constitutional argument. There are three forms of argument that suggest themselves as candidates: historical, structural, and ethical. Much of Epstein's initial presentation, drawing on Locke and expressly and repeatedly referencing Blackstone,<sup>387</sup> suggests that the historical mode of argument is a natural way to put his claims. But given the highly conceptual way that Epstein makes his case and the breadth of application he claims for his libertarian principles, how would such a historical argument be stated? It might assert, first, that the historical understanding of the Takings Clause was informed by the principles of Lockean and Hobbesian political philosophy. Thus, second, when the Takings Clause provides for just compensation for private property taken for public use, it was tacitly understood that takings for private use were prohibited. Third, moreover, the private property to be protected was common law property, subject to common law rules permitting prohibition of nuisance. On that historical argument the constitutional text is only the tip of the relevant positive law iceberg.

The originalists' response to Epstein's Takings Clause account reveals the weakness of such a historical account. Generally, the originalists have rejected Epstein's claims as historical arguments.<sup>388</sup> They have done so, I think, because the theoretical structure that Epstein constructs to articulate his libertarian reading of the Takings Clause compromises the positivism of the dominant branch of originalism.<sup>389</sup> Epstein's historical account of Lockean property rights is a natural

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385. Epstein's emphasis upon the natural law foundations of his argument for a limited state power is closest to a structural argument. *See text infra* at notes 389–90.

386. *See infra* Part II.

387. EPSTEIN, TAKINGS, *supra* note 2, at 23, 29.

388. *See* BORK, TEMPTING, *supra* note 19, at 229–30 (characterizing Epstein as a leading critic of originalism on the right).

389. *See* H. L. A. HART, THE CONCEPT OF LAW 185–212 (2d ed. 1994) (contrasting his positivist account of law with natural law theories); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 104–05 (2001) (stating the separability thesis that the content of law is based upon authoritative sources other than moral principle). *See generally* André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate over Originalism*, 42 OHIO N. U. L. REV. 613 (2016) [hereinafter LeDuc, *Paradoxes of Positivism and Pragmatism*] (exploring the

law, natural rights theory. The mainstream positive law originalists do not want to endorse a natural law theory.<sup>390</sup> There is a second line of objection to Epstein's argument, however, that emphasizes the limited contribution of the understanding of the constitutional text as text and the much greater role attributed to background, philosophical understandings. Without regard to whether those privileged sources were positive law consistent with legal positivist originalism, Epstein's account ranges much further beyond the text than the historical and textual originalists are prepared to go.

A second strategy would be to cast Epstein's argument as a structural argument from the nature of the limited federal government.<sup>391</sup> The concept of the federal government as limited, even after the adoption of the Reconstruction Amendments, is central to federalism and to the nature of the federal government itself. Epstein sometimes seems to characterize his argument this way. His argument might be put: The federal government can be legitimate only if it is a government of limited powers and respects citizens' rights with respect to their private property. Respect for the inherent rights of private property that must underlie any legitimate sovereign precludes the federal government from asserting broader powers. The Constitution should be interpreted and applied in light of this understanding. So characterized, Epstein's account of the limited powers of the federal government is, in form, a structural account.<sup>392</sup>

As a structural argument, Epstein's radical theory would recast the relationship of the federal government to individuals and, to a lesser extent, the states, recast the allocation of power between the legislative and judicial branches of the federal government, and fundamentally reverse the rise of the administrative state in the Progressive Era and the New Deal. That is a weight that a structural argument cannot carry. It cannot carry that weight because, in a pluralist account of constitutional argument and decision, structural argument stands only equal among a number of other modes of argument that may often militate in favor of different decisions. While Epstein's argument bears a facial resemblance to our

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limited significance of the positivist/natural law divide in the substantive constitutional doctrine endorsed by the distinct natural law and positivist law branches of originalism in the debate over constitutional originalism).

390. While there is a natural law branch of originalism that would find Epstein's natural law theory more engaging, that is a minority strand in contemporary originalism that is itself held at arm's length by many mainstream originalists. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (making a positivist defense of the necessity of originalism). *See generally* LeDuc, *Paradoxes of Positivism and Pragmatism*, *supra* note 389 (exploring the differences and tension between the two branches of originalism).

391. *See generally* BOBBITT, FATE, *supra* note 121, at 74–92.

392. *Id.*



structural arguments, it is fundamentally different and cannot be reconciled with our modal, pluralist constitutional practice. A radical reformulation of our fundamental constitutional law would, in our established canonical practice, face insuperable objections from those other kinds of arguments. Thus, Epstein's theory, even when cast in a structural form, is also unpersuasive, as a matter of the contemporary constitutional practice that constitutes our constitutional law.

Finally, Epstein's argument can be couched as an ethical argument. Most simply, it would assert that we would not be the country we aspire to be if private property rights were not respected by the state. The argument perhaps appeared more powerful when Epstein articulated his theory in the waning days of the Cold War, before the collapse of the Soviet Union, as an implicit contrast of American exceptionalism with Soviet communism and with socialism.<sup>393</sup> But today, the argument does not have much force for two reasons. First, because Epstein's radical theory protects property rights that have never been protected before, it is hard to assert that such expanded protection is an inherent and critical part of our American identity. Bobbitt's ethical arguments are not customarily deployed to effect radical restatement of long-established areas of constitutional law.<sup>394</sup> Second, ethical arguments appear typically to have a powerful intuitive or visceral component; Epstein's abstract, philosophical, libertarian arguments do not have that force for most Americans. While Epstein's argument could be cast as an ethical argument, it's not persuasive when cast in that form. In sum, Epstein's central libertarian philosophical arguments are not easily or convincingly cast as constitutional arguments in our current constitutional practice.

The second argument against Epstein's theory is that it fails to accord adequate respect to the constitutional text. Epstein emphasizes, for example, the language of the Fifth Amendment that refers to taking *for public use*. If private property could be taken by the state for the use by another then the surplus in value associated with such property could be thereby transferred to the third party in violation of Epstein's principle that such surplus arising from state action must belong to the owner of such property.<sup>395</sup> Indeed, Epstein devotes an early chapter to his account of constitutional interpretation.<sup>396</sup> But Epstein systematically glosses his reading of the constitutional text and of its meaning and force with his libertarian reading of Lockean property theory. The just compensation due on a

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393. *Id.* at 6 (discussing Orwell's description of practically empty formal legal rights in 1984).

394. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (proposed zoning exclusion of traditional, but non-nuclear family); *Rochin v. California*, 342 U.S. 165 (1952) (physical invasion of a suspect's body by police).

395. EPSTEIN, *TAKINGS*, *supra* note 2, at 4.

396. *Id.* at 19–31.

taking, for Epstein, is that determined under such an account of property. More importantly, the determination whether there has been a taking is also made under that theory.<sup>397</sup> While the text of the Fifth Amendment is spare, there is nothing in the Fifth Amendment or in the Constitution and the Bill of Rights that makes any express commitment to a Lockean theory of limited government.<sup>398</sup> There is no textual foundation for the linearity function. No text expressly defines the limits of state regulatory authority in the common law of tort and property as of 1789 or 1791. Epstein's account glosses over this textual silence in silence.

The third objection to Epstein's libertarian theory of the Fifth Amendment is that it fails to adequately account for the impact of Reconstruction on the import of the Amendment.<sup>399</sup> This second argument derives from an apparent textual puzzle: given Epstein's arguments for the centrality of the protection of property rights by the Fifth Amendment, why were such provisions originally limited to protections against the federal government? Prior to the adoption of the Fourteenth Amendment, the Constitution neither limited the condemnation power of the states nor required that just compensation be paid.<sup>400</sup> Not until the Fourteenth Amendment was deemed to incorporate certain substantive rights under other provisions of the Constitution were such protections applied against the states.<sup>401</sup> The protections against abridging the rights of contracts, by contrast, were from the Founding made applicable to the states.<sup>402</sup> If Lockean property rights were so central to the model of government adopted by the Constitution and the federal government the paramount sovereign, why were the Fifth Amendment takings limitations and just compensation requirements so limited? It would appear paradoxical that mere contracts were better protected against the states than property rights.

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397. *Id.* at 35–36.

398. *See id.* at 20 (arguing that the constitutional meaning “comes of necessity from outside the text”).

399. *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (articulating an analysis of the structure and substance of the Bill of Rights before and after Reconstruction). A parallel objection arises with respect to Epstein's discussion of the interpretation of the Sixteenth Amendment and his failure to give an adequate account of the progressive constitutional amendments.

400. *See Barron v. Balt.*, 32 U.S. 243, 250–51 (1833) (“[T]he provision in the fifth amendment . . . declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”).

401. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

402. U.S. CONST. art. I, § 10.

The potential for improper takings by the states would not have been dismissed or minimized by the Founders and other relevant actors. The inclusion of the Abridgement of Contracts Clause puts paid to that argument. If the states were understood to pose a potential threat to contracts, the Founders would not have assumed property rights to be safe. While an argument might be made that states would not consider violating the more fundamental rights of *property*, the literature describes no historical evidence of such an argument<sup>403</sup> and, balanced against the decision to protect individuals against the violation of those rights by the federal government, such an argument is weak. The failure to protect private property against takings by the states appears to be a powerful argument against Epstein's argument for the priority of property rights under the Constitution.

These three arguments, together with the prior argument made against Epstein's linearity thesis, go to the heart of Epstein's theory and his constitutional claims. Epstein's theory is dramatic and impressive, but it is not persuasive. Some of the weaknesses arise from apparent tensions among the disparate claims made; some arise from a failure to consider potential counterarguments. Some arise from a mistaken theory of the nature of constitutional argument and law.

#### D. Conclusion

Epstein's libertarian assessment of the threat of overreaching state action is fundamentally different from Michelman's more activist liberal view of government. Both Michelman and Epstein acknowledge that the state's power of eminent domain can be misused, even when just compensation is paid.<sup>404</sup> But Michelman appears to have more confidence (perhaps even overconfidence) that the state will, in a democratic republic, act fairly, at least to the extent that legislatures and administrative agencies consider their constitutional obligations.<sup>405</sup> Epstein, his views informed by public choice theory and libertarian political

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403. See, e.g., Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 362 (1996) (advancing "seven arguments (with many permutations) why the right to property is not simply important but rather *the most important* right in a liberal constitutional order"). I have not independently explored whether such arguments may have been made.

404. See EPSTEIN, BARGAINING, *supra* note 9, at 87–89 (describing the problem of subjective utilities in determining just compensation); Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

405. Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

philosophy, has no such confidence.<sup>406</sup> He asserts that the state, acting through interested politicians, will frequently act in ways other than in the public interest.<sup>407</sup> The difference in their assessment of the nature of the threat of state action informs their responses to it and to the application of the Takings Clause. Michelman trusts the democratic political institutions of the state to do the right thing.<sup>408</sup> Epstein does not.<sup>409</sup> Epstein does not believe that the state, left to its own devices, will consistently act for the public good.<sup>410</sup> In such a world, democratic decision-making cannot be counted on to protect individuals' interests; only a limitation on power can protect the people.

Is there a way to resolve or even to score this disagreement? One reason to be skeptical about that possibility is that political philosophy has not resolved for itself the proper scope of state action. This disagreement lies at the heart of the conflict between Rawls's liberal theory and Nozick's libertarian defense of a more limited state.<sup>411</sup> Nearly half a century after the publication of *A Theory of Justice* the controversy has not moved appreciably closer to resolution. But the conflict does not stop there. Anarchists argue for a more limited state, if any, and Marxists and socialists defend a state that even more fundamentally challenges the rights to private property that Rawls's theory respects.<sup>412</sup> There is no reason, in the context of a constitutional theory that privileges political philosophy, that a resolution among these competing political philosophical theories should be at hand.<sup>413</sup> When we tacitly limit the scope of the political philosophy that figures in our constitutional analysis, we are making a judgment based upon our constitutional practice, not upon a purely reasoned analysis of the arguments advanced for the respective theories.

While the strategies proposed by Michelman, Ackerman, and Epstein were fundamentally different, each offered a new philosophical theory for the

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406. See EPSTEIN, BARGAINING, *supra* note 9, at 92–94 (noting the problem of state rent-seeking behavior in capturing social surplus from government action).

407. *Id.*

408. Michelman, *Fairness and Utility*, *supra* note 1, at 1257.

409. See EPSTEIN, BARGAINING, *supra* note 9, at 90–103.

410. *Id.*

411. See RAWLS, JUSTICE, *supra* note 39; NOZICK, *supra* note 227.

412. See RAWLS, JUSTICE, *supra* note 39; MARX, *supra* note 273.

413. On this point Justice Scalia was right to be skeptical. See SCALIA, INTERPRETATION, *supra* note 226, at 45 (mocking the potential of political philosophy to provide authoritative guidance for constitutional decision).

constitutional jurisprudence of takings.<sup>414</sup> Because the mission of each theorist was so different in his analysis of eminent domain, the state, and requirement of just compensation, there has been less direct engagement than might have been hoped for. Michelman assumed the existence of a state. He sought to outline the ethical foundations of a coherent takings jurisprudence that reflected the then new work in law and economics and justice theory, as well as the less recent legal process theory about institutional competences.<sup>415</sup> Ackerman addressed takings jurisprudence as an important case study in the theory of law.<sup>416</sup> Takings jurisprudence had generally resisted comprehensive or Scientific theory. Ackerman purported both to explain why and to map a path forward.<sup>417</sup> Epstein was the boldest of the lot, giving takings theory a central, necessary place in his libertarian account of the genealogy of the legitimate, minimal state—as well as offering a radical reconstruction of our own constitutional’ takings jurisprudence.<sup>418</sup>

## II. THE JUDICIAL RESPONSE

Some have argued that the lush growth of academic takings theory has had an important, discernible influence on the developing case law.<sup>419</sup> That appears largely to be wishful academic thinking. The academic theory’s impact may be tested in at least two ways. First, directly, to determine whether the courts have adopted the academic, philosophical theory in the arguments they make in their opinions. Second, more subtly, we need to examine whether the direction that the decisional Takings Clause jurisprudence has moved has been that endorsed by the academic theorists. Neither form of influence appears significant over the past half century—a period providing a sufficient sample to permit us to assess the impact of the rich theoretical work.

The courts have consistently ignored or rejected the central role for philosophical analysis and argument claimed by the academy. The Supreme Court has declined repeatedly to revisit fundamental questions of takings jurisprudence in the decades. It has ignored these legal scholars’ arguments for philosophy to be

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414. See Farber, *Public Choice*, *supra* note 3, at 306 n.83 (1992) (arguing that the search for a unified theory of the Takings Clause may be a mistake).

415. See Michelman, *Fairness and Utility*, *supra* note 1, at 1245–50; HART & SACKS, *supra* note 102.

416. See ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1, at 175–89.

417. See *id.*

418. EPSTEIN, *TAKINGS*, *supra* note 2.

419. *Id.* at 26; DANA & MERRILL, *supra* note 1, at 26.

accorded pride of place in a radically revised constitutional analysis.<sup>420</sup> While the Court has engaged a number of important controversies generated by the Takings Clause and articulated its decisional takings jurisprudence expressly, the Court has also consistently declined the academy's invitation to articulate a more theoretical, conceptual, and philosophical approach to takings law. Takings case law fits Bobbitt's pluralist model fairly well, with the Justices making historical, textual, prudential, structural, doctrinal, and, very occasionally, ethical arguments.

It is not easy to summarize the current takings jurisprudence, and I will not do so here. Instead, I focus on five recent, well-known cases and three principal issues. The first issue is the requirement in the text that property be taken for public use.<sup>421</sup> The second is the distinction between takings and the mere exercise of police power regulatory authority.<sup>422</sup> The third is the requisite nexus between the public purpose and the property potentially taken.<sup>423</sup> These three questions have accounted for several of the hard takings cases the Court has confronted since the academic theorists explored above sought to reconceptualize contemporary takings law.

The Constitution does not expressly provide the power of eminent domain for the federal government. Indeed, in the early years of the Republic the federal government relied upon the states' power of eminent domain to take the property it needed.<sup>424</sup> But that was a different time, before the rise of the administrative state and the accompanying rise of the federal government, when the needs of the federal government were for post offices and the occasional fort, customhouse, lighthouse, or road.<sup>425</sup> In the modern social administrative welfare state, the state's need for real property is far greater. Its regulatory ambitions are far greater, too. Eliminating the federal power of eminent domain would be a revolutionary change in our Republic. Not only would it substantially restrict the scope of what the federal government may do, but it would also make performing the remaining permissible governmental functions more difficult and expensive.

William Baude has argued that the original understanding was that there was no federal power of eminent domain. But he does not suggest that the original

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420. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

421. U.S. CONST. amend. V.

422. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

423. *See Nollan*, 483 U.S. at 836–37.

424. *See Baude, Rethinking*, *supra* note 11.

425. *See id.* at 1762–68.

understanding should be turned to today to deny the federal government a power of eminent domain.<sup>426</sup> That appears akin to lashing for Justice Scalia, an originalist bridge too far.<sup>427</sup> Instead, Baude thinks the history of the original understanding a cautionary tale of the vitality of federalism and the limited powers of the federal government.<sup>428</sup>

The text of the Fifth Amendment requires that takings be for public use.<sup>429</sup> This requirement has been reduced in long-standing takings doctrine to a requirement that a public purpose be stated for the taking.<sup>430</sup> The relevant text of the Fifth Amendment does not address the relationship of the Amendment to the regulatory or other police powers of the state, including the limited powers of the federal government. The Court's doctrine and precedents have nevertheless long recognized that there must be such a line.<sup>431</sup> The state does not need to compensate every wrongdoer for the ill-gotten gains that the exercise of the state's police powers prevents.<sup>432</sup> Three elements make drawing that line in contemporary constitutional law difficult. First is the absence of any express textual guidance. The text of the Constitution does not expressly address the relationship of the Takings Clause and federal police powers. Second are the adoption of the Reconstruction Amendments and the apparent extension of the protections of the Fifth Amendment to actions by the states.<sup>433</sup> The states, after all, generally are not

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426. *Id.* at 1824–25.

427. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

428. *Id.*

429. *See* *Berman v. Parker*, 348 U.S. 26 (1954).

430. *Id.* at 32; *Kelo v. City of New London*, 545 U.S. 469 (2005). Indicative of the extent to which the public use requirement has been excised from constitutional doctrine, the first edition of Laurence Tribe's *American Constitutional Law* did not even remark the doctrinal disregard of those terms of the relevant provision of the Fifth Amendment in its brief discussion of takings law. *See* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 458–59 (1st ed. 1978).

431. *See, e.g.*, *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding a prohibition on operating a brick factory within a residential area as within the police power of a state).

432. *See, e.g.*, ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1, at 2 (“[I]t is only the morally obtuse who can seriously ask whether a rapist should be compensated for the frustration of his expectations.”).

433. *See* *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233–35 (1897). The Court did not consider how different the scope of the protections of the Fifth Amendment is when applied to the often-plenary powers of the states in comparison to the limited powers of the federal government.

sovereigns with only the limited powers of the federal government.<sup>434</sup> As a result, the potential for conflict between the exercise of police powers and the protections of the Takings Clause is far greater. The third is the creation and substantial expansion of the regulatory and administrative state with its associated exercise of regulatory power.<sup>435</sup> These three features make drawing the line more important as well as more difficult; the expansion of the regulatory regime of the modern state means the potential boundary between takings and the exercise of police and other state power is much longer. It is worth noting that of these three sources of controversy, none is textual in any ordinary sense (because there is no relevant text to interpret or construe). All three implicate substantive questions of state power, the scope of rights in private property, the potential for corruption, and federalism.

Moreover, because the text of the Fifth Amendment does not state a standard for the relationship between the potential taking of private property and the governmental purpose served, the courts must articulate the constitutional standard. In the simpler world where private property or interests in private property were simply taken for use by the government or for a governmental purpose, the issue did not arise. Where regulatory regimes restrict property use or require the dedication of interests toward the regulatory purposes, the application of the Fifth Amendment to the imposition of regulatory costs on property becomes important.

In *Pennsylvania Coal Co. v. Mahon*,<sup>436</sup> the Court confronted a challenge to a regulatory statute. That law prohibited coal mining conducted in a manner that caused subsidence in the land surface above the mine that would damage personal residences.<sup>437</sup> The Court, in a celebrated opinion by Justice Holmes, struck down the statute as an impermissible taking.<sup>438</sup> The Court reasoned that the enactment of the far-reaching regulatory rules for coal mining effected a taking of the private property of the coal mine owners.<sup>439</sup> The Court found a taking on the basis of an

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434. For a comparison of the powers of the sovereign states and the limited power of the federal government, see William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

435. See generally DANIEL R. ERNST, *TOQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014) (describing the rise of the administrative social welfare state).

436. 260 U.S. at 393.

437. *Id.* at 412–13. By confining the scope of the statutory protection to subsidence that damaged personal residences, the legislature was attentive to the higher demoralization costs associated with damage to such structures. *Id.*

438. *Id.* at 414.

439. *Id.* at 414–15.



analysis of the respective property interests of the parties. The plaintiff held an interest in only the land surface, which it had purchased from the owner of the fee, which had reserved the rights to the subsurface minerals and right to mine them. The Court reasoned that the bargain between the parties entitled the defendant to mine the underlying coal and that the state regulation would entirely destroy the value of the defendant's retained interest.<sup>440</sup> As Justice Holmes put it, without providing further guidance, if an otherwise valid regulation "goes too far" then it constitutes a taking.<sup>441</sup> Delineating the metric for measuring whether a regulation goes too far and making that determination has bedeviled the Court over the past century.<sup>442</sup>

The Court again confronted the requirement of public use in *Kelo v. City of New London*.<sup>443</sup> The Court confronted the question of how far the reduction of "public use" to public purpose could be taken. In *Kelo*, much like *Berman v. Parker*, the private property taken was promptly transferred to a private developer in support of its development project, which was part of a community redevelopment plan.<sup>444</sup> In *Kelo*, however, the private properties taken were personal residences.<sup>445</sup> The stated public purpose was economic revitalization of a distressed urban neighborhood with an anticipated attendant increase in employment and tax revenue for the city.<sup>446</sup>

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440. *Id.*

441. *Id.* at 415.

442. *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) ("[O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment.").

443. 545 U.S. 469 (2005).

444. *Id.* at 475.

445. *Id.* Radin has suggested that the nature of the property taken ought to be taken into account in takings jurisprudence, but there is no support for that approach in *Kelo*. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) reprinted in RADIN, REINTERPRETING PROPERTY, *supra* note 1, at 35 [hereinafter Radin, *Property and Personhood*] (arguing that property that plays a more important role in the realization of a person deserves more protection against taking by the state than fungible or financial assets).

446. 545 U.S. at 472. As conservative critics have delighted in pointing out, the taken property remained undeveloped a decade after the eviction of the residents. ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (2016) (describing the tortured history of the *Kelo* case, the redevelopment project that generated the case, and its aftermath, which left Mrs. Kelo's property undeveloped a decade after the city took it).

The Court noted that certiorari had been granted to determine whether taking for redevelopment by another private party satisfies the public use requirement.<sup>447</sup> The Court held the reduction apparently absolute. The Court upheld the power of the state sovereign over strong dissents by Justices O'Connor and Thomas.<sup>448</sup> In a modal, pluralist account of the Court's argument, it employed doctrinal and prudential arguments to follow the Court's established precedents<sup>449</sup> and prudential considerations that governments be given sufficient power to advance the public good.<sup>450</sup>

Justice O'Connor challenged that reductive interpretation of the Fifth Amendment.<sup>451</sup> Justice O'Connor argued first that the Court misread its own precedents.<sup>452</sup> She argued that the public use requirement had been found satisfied in two simpler lines of authority: takings for use by a governmental entity (as for a road) and takings for use by a common carrier whose facilities were available to the public.<sup>453</sup> The public use requirement had also been satisfied, according to Justice O'Connor, in cases in which the public purpose was to take property the holding of which had resulted in a harm that was within the power of the relevant government to seek to end or mitigate.<sup>454</sup> By contrast, the goal of economic development—in the absence of the urban blight found in *Berman*—does not satisfy the public use requirement.<sup>455</sup> Second, she argued that the Court's holding put all private property at risk for taking by the government, contrary to the importance in our Republic of individuals' rights in the property they own.<sup>456</sup>

Justice Thomas's dissent went further. He argued that the requirement of public use could not be reduced to a test for public purpose.<sup>457</sup> His argument was simply that the requirement that a taking be for a public use must not be entirely disregarded but must instead be given meaning.<sup>458</sup> Any meaning given would seem

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447. *Id.*

448. *Id.* at 494 (O'Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting).

449. *Id.* at 480–83 (Stevens, J.).

450. *Id.* at 483–89.

451. *Id.* at 496–500 (O'Connor, J., dissenting).

452. *Id.* at 500–02.

453. *Id.* at 497–500.

454. *Id.* at 498–99.

455. *Id.* at 500–01.

456. *Id.* at 502–05.

457. *Id.* at 506 (“the Court has erased the Public Use Clause from our Constitution”).

458. *Id.* at 507–10.

to preclude takings for the benefit and use by private persons. Justice Thomas correctly noted that disregarding such a public use requirement was embedded in long-standing precedent, but such precedents were inconsistent with the constitutional text and its original understanding, and he forthrightly called for that precedent to be overturned.<sup>459</sup>

The Court engaged Justice Thomas's criticism and defended its conclusion on the basis that there was no principled way to distinguish the purpose of economic development from other permissible public purposes that often benefited private purposes.<sup>460</sup> But the Court did not explain how the Takings Clause text referring to taking for public use has morphed into a requirement only that the taking be for a public purpose.

The academic theorists explored in the prior part of this article would likely have approached *Kelo* in different ways. Epstein's position is clearest because express: his libertarian account of the power of state does not find the taking in *Kelo* to be a legitimate exercise of state power.<sup>461</sup> Any purported exercise of the power of eminent domain for the benefit of a private developer was *ultra vires*. Ms. Kelo's home was safe. The question of just compensation would never be reached.

Michelman and Ackerman would have no issue with the taking as a legitimate exercise of the federal government's power. Michelman would likely fervently hope that the legislature would make a compassionate judgment about the psychological costs imposed by evicting Ms. Kelo and choose not to condemn her property. The case is a good object lesson in the realities of political power for Professor Michelman. The implications of Michelman's analysis are less clear with respect to the determination of just compensation. Rawls's difference principle, if it is applicable, would make it very hard—if not impossible—to justify the taking. Ms. Kelo was unlikely to be made net better off by any economic development that accompanied the loss of her home. But Michelman recognizes the difficulties inherent in compensating Ms. Kelo for the subjective value of her home.<sup>462</sup> Payment of the fair market value price, while undercompensating Ms. Kelo, is all that is apparently required as a constitutional matter.

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459. *Id.* at 519–21.

460. *Id.* at 484–85.

461. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 78, 358. *See generally* EPSTEIN, SUPREME NEGLECT, *supra* note 1.

462. *See* Michelman, *Fairness and Utility*, *supra* note 1, at 1249–50. Epstein recognizes the distinction between fair market value and the particular value an individual may assign to her property but also recognizes that just compensation will not compensate for the loss of any such higher value. EPSTEIN, TAKINGS, *supra* note 2, at 182–83.

Similarly, it is unclear how Ackerman's complex theory would apply in the determination of the just compensation due Ms. Kelo. It is not clear whether either Scientific or Ordinary Observers would decide *Kelo* differently than the Court in the determination of the amount of just compensation due.

Neither the Court nor the dissenters addressed the arguments made by the academics. The Court made arguments from precedent and from deference to the state determination under the principles of federalism the linchpin of its decision to uphold the State's action under a rational basis review.<sup>463</sup> It did not find it necessary to go beyond those canonical forms of constitutional argument.<sup>464</sup> It did not consider the demoralization costs for the individuals whose long-held private residences were condemned or the potential for such individuals to lose confidence in their government. The Court, despite the invitation from Justice O'Connor, did not explore the implications of the extension of existing Takings Clause precedent. With the extension, the government was permitted to take private property from its citizens not because the citizens had the misfortune to live in a "blighted" neighborhood but simply because the local government thought it could do better with their "distressed" neighborhood.<sup>465</sup> The Court did not assess the division between the current owners and Pfizer, the transferee from the governmental entity, of the economic surplus from the taken land, as Epstein would insist be done to protect the current owners' interest. Justice Thomas's dissent argued from the text of the Takings Clause and the original understanding of the Public Use Clause thereof.<sup>466</sup> Justice Thomas did not need the philosophical sophistication of Epstein's argument and did not invoke that argument. To the extent that Justice Thomas continues to read the Constitution in light of the natural law theories of the Founders, Epstein's natural theory of the Takings Clause would be a natural fit, but it was hardly necessary for Justice Thomas to dispose of the case.

Coastal land regulation has spurred recurring litigation over the scope of the protections of the Fifth Amendment Takings Clause.<sup>467</sup> That is because of the regulatory priority attached to coastal development, the passions that are associated with personal residences and, in the case of beachfront properties, the enormous wealth with which landowners may indulge such passions, and the enormous value associated with much coastline property, which makes paying just

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463. *Kelo*, 545 U.S. at 483–89.

464. See BOBBITT, FATE, *supra* note 121, at 7–8.

465. *Kelo*, 545 U.S. at 469.

466. *Id.* at 507–14.

467. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

compensation for any such private property taken very expensive. Two important cases have reached the Supreme Court.<sup>468</sup>

In *Nollan*, a local zoning authority sought to condition approving a residential building permit on the owner granting an easement to permit the public beachfront access.<sup>469</sup> The regulatory authority argued that the new, larger residence would block sightlines to the beach. It did not, however, explain expressly how that consequence of the proposed building was relevant to the proposed easement requirement.<sup>470</sup> The Court and Justice Brennan, in dissent, reconstructed the potential argument in very different ways. While it was clear that simply condemning such an easement would give rise to a taking, it was not clear that imposing the condition that an easement be granted also constituted a taking in light of the highly discretionary standard applicable to the relevant zoning process.

The Court rejected the imposition of such a condition. It characterizes the requirement as an impermissible taking requiring payment of just compensation.<sup>471</sup> The sharply divided Court spoke in an opinion by Justice Scalia.<sup>472</sup> Justice Scalia did not consider whether the State had the power to condemn an easement for the benefit of the public; he took that power for granted. He began his analysis with a counterfactual: if the California Coastal Commission had condemned a public easement, there would have been a taking.<sup>473</sup> He emphasized that point to distinguish the Taking Clause's protection of the full rights of ownership—including the right to exclude others—rather than merely the economic value of property.<sup>474</sup> For Justice Scalia, the central issue in the case was the scope of the state's regulatory power and the required nexus between the regulatory power exercised and the property interest taken.

Justice Scalia argued that the requirement that an easement be granted to the public failed to satisfy the requisite nexus to the stated zoning concerns.<sup>475</sup> Not granting the zoning permit or restricting the height of the proposed residence would have addressed the stated public concern, but requiring a public easement would not do so. Justice Scalia discounted the sightline argument Justice Brennan

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468. *Lucas*, 505 U.S. at 1003; *Nollan*, 483 U.S. at 825.

469. *Nollan*, 483 U.S. at 828.

470. *Id.* at 838.

471. *Id.* at 841–42.

472. The Court split 5–4, with Justice Brennan writing the dissent.

473. *Nollan*, 483 U.S. at 831.

474. *Id.* at 831–32.

475. *Id.* at 837.

offered and dismissed the argument that grand new construction would chill public access.<sup>476</sup> In so holding, the Court imposed a level of scrutiny that it had traditionally eschewed in testing potential regulatory takings.<sup>477</sup> Instead of imposing the traditional requirement that there be a reasonable relationship between the public purpose and the property rights taken or restricted, the Court required that there be an essential nexus between the public purpose and the governmental action and that the impairment of private property rights substantially advance the government interest.<sup>478</sup>

The Court rejected the dissent's construction of a rationale for such a finding on the basis of beach views and psychological barriers associated with walking past a much larger and much newer private residence.<sup>479</sup> The Court's reasoning can be understood not in the doctrinal and prudential modes of arguments that Justice Stevens invoked in *Kelo* nor in textual or historical terms; the arguments are structural arguments about the exercise of governmental power (and the temptations of rent-seeking).<sup>480</sup> The Court expressly found "a heightened risk" that the government was acting to circumvent the requirement to pay just compensation when a property right is required to be surrendered as a condition to the granting of a regulatory permit.<sup>481</sup> The finding of a heightened risk was seemingly found on the basis of taking judicial notice that the government would be tempted by the prospect of advancing its policy agenda without cost. There was also perhaps an implicit ethical argument about the nature of our property rights and a requirement that the government act honestly with its citizens when it requires that they surrender property interests that they own.<sup>482</sup>

*Nollan* is problematic for Michelman. Upholding the action of the state and requiring the landowner to grant a public easement would appear to risk significant, difficult to quantify demoralization costs on the landowner. Persons owning coastal beachfront in California rarely are enthusiastic about encouraging more public access to the proximate beach.<sup>483</sup> While we may decry that

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476. *Id.* at 840–41.

477. The Brennan dissent accused the Court returning to a standard of scrutiny that had long been abandoned by the Court. *Id.* at 843–44 (Brennan, J., dissenting).

478. *Id.* at 837.

479. *Id.* at 838.

480. *Id.* at 840–41.

481. *Id.* at 841.

482. *Id.* at 840–41.

483. See, e.g., Paul Balmer, *Martin's Beach Litigation and Eroding Public Access Rights to the California Coast*, 45 *ECOLOGY L.Q.* 427, 428–29 (2018).

perspective from a communitarian perspective, we can hardly deny it. But rejecting the grant of the easement without attendant compensation would also appear to violate Rawlsian justice principles. Denying the easement makes the less well-off less well-off and the more well-off more well-off. Moreover, to the extent Michelman is unconcerned with the risk that the state would circumvent the requirements for just compensation by imposing conditions on state regulatory approval, he would likely have upheld the state's action without finding a taking. It is difficult to predict, however, because of the abstraction with which Michelman expresses his analysis.<sup>484</sup>

It is harder to tease out how Ackerman's approach—or more precisely, various approaches—would apply to the question presented in *Nollan*. The abstraction of Ackerman's analysis makes application difficult. Ackerman's Ordinary Observer would not find in the imposition of the condition to the approval of the building plan a taking. Most simply, that is not what we mean when we talk about takings in our ordinary language. The strict scrutiny of the state's action would not appear to be required. The Scientific Policymaker's response to the controversy presented in *Nollan* is harder to predict. To the extent utilitarian, the Scientific Policymaker ought to uphold the state's conditioned approval, unless the demoralization costs for the landowner (and for others aware of the action) outweighs the value of the permit to the landowner and the easement to the public. By contrast, if the Scientific Policymaker adopts Epstein's libertarian account of limited government, a taking should be found and compensation required.

*Nollan*, like many other recent takings cases, split the Court. Three justices wrote separately to dissent.<sup>485</sup> Justice Brennan, joined by Justice Marshall, criticized the standard announced by the Court for the requisite nexus between the private action restricted and the governmental purposes pursued.<sup>486</sup> To Justice Brennan, the Court appeared unimaginative and insensitive to the practical realities of public beach etiquette and use. Thus, for example, most members of the public respect a spatial area of privacy surrounding private dwelling. In

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484. Michelman explored *Nollan* in depth in Michelman, *Takings*, 1987, *supra* note 292, at 1605–14. There, he emphasized the ways in which that case departed from prior law with respect to the standard of scrutiny applied to governmental action with respect to private property, in the case's articulation of a new standard of heightened scrutiny and in its obvious potential implication that a wide swath of land use regulation “might be destined for doom at the hands of lower federal courts.” *Id.* at 1608. He accompanied that implicit criticism with an effort to cabin the potential implications of the decision.

485. *Nollan*, 483 U.S. at 842 (Brennan, J., dissenting); 865 (Blackmun, J., dissenting); 866 (Stevens, J., dissenting).

486. *Id.* at 843–44.

constrained spaces along ocean beaches, this may lead the public to avoid public spaces that are, legally, open to it.<sup>487</sup> Justice Brennan asserted that the Court had applied a novel and stricter standard for reviewing the exercise of a police power by a state.<sup>488</sup> According to him, the exercise of such a power was to be sustained if the state could rationally have chosen the legislative or administrative action.<sup>489</sup> He argued that result was supported not only by precedent but by fundamental considerations of federalism.<sup>490</sup> Justice Brennan would have upheld the State's action. In modal terms, he applied a prudential argument to assert that the local government needed to be able to exercise the power that it claimed, without running afoul of the Takings Clause, in order to effectively exercise its police powers.

Justice Blackmun also dissented on the grounds that there was no taking.<sup>491</sup> He argued that there was no taking because the state acted within the scope of its police powers and no investment-backed expectations were defeated.<sup>492</sup> In reaching his conclusion, Justice Blackmun's argument was largely prudential: he was focused upon what was needed for the state to regulate the public lands. He argued that a robust regulatory authority that includes substantial discretion with respect to the power to condition regulatory approvals on landowners' actions.<sup>493</sup> Finally, Justice Stevens wrote a separate dissent. He began by noting the uncertainty in the Court's takings jurisprudence.<sup>494</sup> Focusing on the need of the States to apply that jurisprudence in the regulatory arena, Justice Stevens

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487. *Id.* at 849 (Brennan, J., dissenting) (“It requires no exceptional imaginative powers to find plausible the Commission’s point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants’ new home, is likely to conclude that this particular portion of the shore is not open to the public.”).

488. *Id.* at 842.

489. *Id.*

490. *Id.* at 846 (“To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government.”).

491. *Id.* at 865 (Blackmun, J., dissenting).

492. *Id.* at 865–66.

493. *Id.* at 849–56.

494. *Id.* at 866 (Stevens, J., dissenting) (noting that “[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”).



highlighted the cost that uncertainty imposes.<sup>495</sup> He argued that the imposition of such costs by the federal government was inconsistent with the structure of our federal system.<sup>496</sup> In Bobbitt's terminology, Justice Stevens made prudential and structural arguments to uphold the state's regulatory action, although the precise structural argument he made was different from that offered by Justice Brennan.<sup>497</sup>

Compare the various arguments of the Court and the dissents to the analysis that Epstein offered. Epstein defends the outcome in *Nollan*, but his reasoning bears little resemblance to that of the Court, despite his modest attempt to emphasize the common elements.<sup>498</sup> Epstein analyzes *Nollan* in the context of his theory of constraints on bargaining with the state and the doctrine of unconstitutional conditions. Epstein argues first that the police power asserted by the state to deny the Nollans a building permit on the basis of the size and height of the proposed home is itself unconstitutional.<sup>499</sup> Second, he argued that even if the state had such power, the linkage between the public easement required and the building permit offered is itself impermissible.<sup>500</sup> The easement in *Nollan* was an unconstitutional condition, according to Epstein.<sup>501</sup> It was unconstitutional because it forced an exchange without requiring the valuation of the easement required or providing compensation equal to that value to the Nollans. The dissents not only ignored Epstein's argument but reached a contrary result as well.

None of the opinions appear to have explicitly addressed the kinds of theoretical, philosophical arguments that the academic theorists have made. It might be that the increasingly strict limits imposed on state action by *Nollan* (and reinforced by *Dolan*) reflects a tacit acceptance of Epstein's libertarian arguments. Certainly, the essential nexus test reflects skepticism about governmental action that appears to sound themes defended by Epstein. But Epstein's theory would go much further than the rationale articulated by the Court. Even if we ignore Epstein's more fundamental argument that the comprehensive land use regulation in *Nollan* that went far beyond preventing tortious use was impermissible, Epstein would require just compensation to be paid in *Nollan* unless the landowner received

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495. *Id.* at 866.

496. *Id.*

497. Compare *Nollan*, 483 U.S. at 866–67 (Stevens, J., dissenting) with *Nollan*, 483 U.S. at 842–64 (Brennan, J., dissenting).

498. EPSTEIN, BARGAINING, *supra* note 9, at 179–84, 180 (“Justice Scalia . . . invoked (in all but name) the doctrine of unconstitutional conditions”).

499. *Id.*

500. For a more detailed discussion of these arguments, see *supra* text accompanying notes 354–66.

501. EPSTEIN, BARGAINING, *supra* note 9, at 179–84.

commensurate benefit from the regulatory rule. Where that rule had a disproportionate adverse impact on the landowner, Epstein would find a taking that requires payment of just compensation.<sup>502</sup> The exceptions to a potential state obligation to pay compensation (beyond that for tortious use) do not figure in Epstein's account.

Others have urged a reinvigoration (indeed, almost a resurrection) of the doctrine of unconstitutional conditions, beginning with Charles Reich.<sup>503</sup> Reich argued that individuals should be treated as having rights to government welfare payments as other entitlements and suggested that the loss of such rights should perhaps even be accompanied by payment of just compensation.<sup>504</sup> Under such a rule, conditions that made the sacrifice or waiver of constitutional rights a prerequisite for receipt of the government benefit would be impermissible.

Richard Epstein came to emphasize the place of unconstitutional conditions only after he had first grappled with the problem of takings and reached, at least at a practical level, some insurmountable objections to his arguments.<sup>505</sup> In turning to the doctrine of unconstitutional conditions, he found a practical solution to the problem of inadequately constrained state power. By prohibiting conditions that burden classes disproportionately, Epstein was able to articulate a limitation on the exercise of state power that promised to prevent much of the potential rent seeking and corruption.<sup>506</sup> In the context of land use regulation, the approach was not as radical a departure from existing constitutional doctrine as his initial approach to the Takings Clause. It was not as radical because it required only that the state provide just compensation for rights impaired or taken by the imposition of unconstitutional conditions. While such a rule would limit government action substantially, it was still less radical than an argument that asserted the conclusion that the state had no legitimate power that it might exercise.

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502. EPSTEIN, TAKINGS, *supra* note 2, at 204–09.

503. Epstein, *Foreword: Unconstitutional Conditions*, *supra* note 373, at 4; Reich, *New Property*, *supra* note 77, at 780 (arguing for a broad prohibition on conditions for government entitlements that implicate constitutional rights as “a revival of the old but neglected rule against unconstitutional conditions.”); Sullivan, *supra* note 373.

504. Reich, *New Property*, *supra* note 77, at 785 (“perhaps payment of just compensation would be appropriate.”).

505. Epstein, *Foreword: Unconstitutional Conditions*, *supra* note 373, at 61 (characterizing the argument that the government lacks the legitimate power to regulate land use beyond abating nuisance as the “first line of defense”).

506. EPSTEIN, BARGAINING, *supra* note 9, at 101–03.

Kathleen Sullivan elaborated and defended an analysis of the doctrine of unconstitutional conditions a quarter of a century later.<sup>507</sup> She rejected Epstein's account of unconstitutional conditions as a second-best doctrine and instead argued that the doctrine can be better understood as protecting the enjoyment of constitutional rights across the entire polity.<sup>508</sup> The legislative use of unconstitutional conditions threatens that broad, equal distribution.<sup>509</sup> Unconstitutional conditions threaten that distribution because the distribution of government entitlements and privileges is not congruent with the much broader distribution of constitutional rights. Generally, the less advantaged—who rely disproportionately upon need-based government programs and payments—would not enjoy the full constitutional rights enjoyed by others.

The Court addressed the implications of the *Nollan* essential nexus requirement in *Dolan v. City of Tigard*.<sup>510</sup> *Dolan* addressed the application of comprehensive land use and drainage plans to a storeowner's proposed expansion plan.<sup>511</sup> The responsible administrative agency would have required the landowner to dedicate a portion of her land to the construction of a bicycle path along a creek that ran alongside the landowner's property, in order to reduce automobile congestion in the community's central business district.<sup>512</sup> The Court acknowledged that the governmental entity had made a stronger case for the condition that it had imposed in exercising its land-use regulatory power than had the state in *Nollan*.<sup>513</sup> But the evidence and resulting finding for such a reduction were only tentative.<sup>514</sup> In an opinion by Chief Justice Rehnquist, the Court held that such evidence and the resulting finding that the required dedication of a portion of the plaintiff's land did not satisfy the requisite nexus under *Nollan*.<sup>515</sup> The Court framed that test as requiring a finding of "rough proportionality" between the public purpose and the potential taking.<sup>516</sup>

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507. Sullivan, *supra* note 373.

508. *Id.* at 1421.

509. *See id.*

510. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

511. *Id.* at 377–80.

512. *Id.* at 380.

513. *Id.* at 387 (characterizing the state's rationale for its action as "gimmickry" in *Nollan*).

514. *Id.* at 381–82 (the Commission made a finding that the creation of a bicycle path "could" help reduce traffic congestion).

515. *Id.* at 394–95.

516. *Id.* at 391.

Proportionality is an ambiguous term. When modified by “rough” it becomes even more so. Proportionality can be a mathematical concept, referring to the relationship of two numbers or, in the vernacular, it can mean simply that two things bear a relationship that is understandable or explainable. When used in that sense, the requisite relationship is not precisely defined. What the concept meant in this context was that the governmental claim to private property must satisfy more than a rationality test and less than strict scrutiny; the Court had to be independently satisfied that the state’s rationale for the taking of the owner’s property substantially advanced the government’s policy. The Court required “an “individualized determination that the required dedication is related both in nature and extent” to the activity regulated.<sup>517</sup> When the Court applied that stricter standard, the government action failed. The condition to issuing the building permit was held unconstitutional.

One of the issues raised in *Dolan* is the relationship of the standard of review of regulatory regimes that may rise to the level of takings and the standard of review applied in cases that raise due process and equal protection questions.<sup>518</sup> The Court held that the rights protected by the Takings Clause ought not to be treated as “a poor relation”<sup>519</sup> of the other rights protected by the Bill of Rights. That perspective appeared to inform and, for the Court, justify the standard of review imposed. Mapped onto a modal account constitutional argument, the Court’s decision followed *Nollan* by relying on principally on a structural argument.<sup>520</sup> The Court, following the dissent in the Oregon Supreme Court decision overturned, implicitly expressed skepticism about the good faith of the local government’s particular zoning decision.<sup>521</sup> Again, as in *Nollan* there was perhaps a subtle sounding of an ethical argument: the state government must satisfy a minimum standard of good faith in its dealings with its citizens.<sup>522</sup>

The Court’s opinion drew two sharp dissents.<sup>523</sup> Justice Stevens argued that the rationale and decision of the Court “run contrary to the traditional

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517. *Id.*

518. *See id.* at 391–92.

519. *Id.* at 392.

520. *Id.* at 386–97.

521. *Id.* at 396–97, 396 (characterizing the finding of fact that the imposition “could” achieve the legislative goal as a “far cry” from a finding that it “will, or is *likely to*” achieve the goal).

522. *Id.*

523. *Id.* at 396 (Stevens, J., dissenting); *id.* at 411 (Souter, J., dissenting).

treatment of these cases and break considerable and unpropitious new ground.”<sup>524</sup> Justice Stevens focused his criticism on the developing standard for the required nexus between the public purpose and the governmental action against the property holder’s interest. He argued that the standard imposed by the Court was a significant departure from the Court’s existing precedent and doctrine.<sup>525</sup> According to Justice Stevens, the Court had traditionally only tested the governmental action as a rational choice to implement a governmental policy or purpose.<sup>526</sup>

Justice Souter also dissented, confining his criticism to the nexus test and the relationship of the nexus required to the reasoning of the case and the facts it presented.<sup>527</sup> Moreover, he noted, the failure cited by the Court turned on one word: the finding that the required concession by the landowner “could” rather than “would” advance the permissible governmental policy.<sup>528</sup> Such a standard of review for state regulatory actions created a heavy burden for governmental authorities and an active and intrusive role for the courts. Both dissents thus highlighted the suspicion or skepticism that the Court brought to the government’s zoning enforcement. Fear of corruption and government subterfuge was central to the Court’s reasoning and never far from the surface of its argument. But neither the Court’s argument nor the dissents’ response require a philosophical foundation or express philosophical arguments to articulate their positions.

*Dolan* would appear to exemplify the kinds of anomalies that have haunted contemporary takings jurisprudence. The Court’s opinion sought to impose a meaningful constraint on state regulatory schemes by insisting that property or property rights taken must advance the regulatory regime rather than another governmental purpose or goal.<sup>529</sup> In so doing, the changed context of post-Reconstruction, post-administrative-state Takings Clause jurisprudence entailed that there was neither text nor history that could provide compelling guidance as to how to test exercise of police powers against the requirements of the Fifth Amendment. As a result, the Court crafted a standard by which to measure and review the legislative and regulatory regime. In so doing, it went beyond a traditional rationality test and insisted on a much closer fit between the government action and the property rights impaired.

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524. *Id.* at 397 (Stevens, J., dissenting).

525. *Id.* at 397–99.

526. *Id.* at 397–98.

527. *Id.* at 411 (Souter, J., dissenting).

528. *Id.* at 413.

529. *Id.* at 391 (majority opinion).

The dissents, by contrast, focused upon structural and doctrinal arguments. They argued against the new direction for takings jurisprudence as a matter of precedent and against the direction on the basis that it was insufficiently deferential to the policy choices of the sovereign states.<sup>530</sup> There is thus a fundamental difference between the two general approaches to regulatory takings.

In more recent takings cases like *Nollan*, *Dolan*, and *Lucas*, the Court has given structural concerns drawn from concepts of federalism and concerns about an overly intrusive role for the courts less weight.<sup>531</sup> Concerns with holding states to a more restrictive standard of responsible action when private property is taken from its owners or rights therein are impaired have been accorded more weight than in the historic post-New Deal Takings Clause jurisprudence.<sup>532</sup> But while this split in emphasis explains the recurring division between left and right on the Court, it cannot alone explain the anomalies in contemporary takings jurisprudence.

There is also a tension between commitment to formal rules of law and willingness to sacrifice general principles in the pursuit of justice in the case at hand. Thus, in *Nollan*, the dissenter articulated and relied on psychological concepts of how the public would respond to the construction of a large, expensive private residence in its judgment whether there was public access to the beach.<sup>533</sup> That was admittedly a novel, somewhat speculative analysis (however persuasive many might find it), and the Court refused to extend its analysis of the righteousness of the property rights claimed to reflect consideration of such a factor.<sup>534</sup> So the lines of fracture in the decision and reasoning with respect to takings are several.

Neither the Court nor the dissenters couched their arguments in the terms of the arguments and analysis of Michelman, Ackerman, and Epstein. Utilitarian, Lockean, and Rawlsian theory was never invoked, whether to support, justify, or even to explain the decision made or the decision advocated, in the case of the dissenters, or the arguments offered in support of either thereof. The only academic theorists cited in the opinions were a student note author<sup>535</sup> and John

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530. Compare *id.*, with *id.* at 397–98, 411 (Stevens, J., dissenting).

531. *Id.* (majority opinion); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

532. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954).

533. *Nollan*, 483 U.S. at 849 (Brennan, J., dissenting).

534. See *id.* at 840.

535. See Nicholas V. Morosoff, Note, “‘Take’ My Beach Please!”: *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823 (1989).

Johnston with respect to a very narrow technical article.<sup>536</sup> Nor does it appear that the theories defended in the academic analysis of the Takings Clause figured tacitly or implicitly in the opinions of the Court and the dissenters. In the case of the Court, the analysis and argument focused upon the nature and application of the required nexus between the legitimate governmental policy and the private property expropriated.<sup>537</sup> There was no discussion of the foundation of such a requirement, the social benefit of a stricter or looser test, or the fairness of alternative decisions. Is there anything in the Court's opinion that reveals a tacit acceptance of such a framework—or a commitment to Epstein's Lockean libertarianism? I cannot identify any such threads. It may be that Justice Rehnquist's solicitude for the rights of the property owner and skepticism about the governmental action is rooted in a concern for demoralization costs in unbridled regulatory regimes or Lockean commitments to a robust protection of private property rights. But any such foundations are never apparent—or defended—in the Court's opinion. In the case of the dissents by Justice Stevens and Souter, the focus was upon the Court's established takings doctrine and the structural considerations of federalism.<sup>538</sup> The underlying republican or Lockean original contract foundations for the structural argument did not figure in the dissenters' argument. Thus, neither the Court nor the dissenting opinions engaged the more theoretical arguments of the academy.

*Lucas*<sup>539</sup> has been characterized as the most important takings case decided by the Rehnquist Court.<sup>540</sup> Its importance lies in the Court's willingness to articulate a broad principle and, at least according to some commentators, to ignore the original public understanding of the Takings Clause.<sup>541</sup> The Court's reasoning appears to tacitly incorporate some of the insights of public choice theory.<sup>542</sup>

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536. See John D. Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967).

537. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

538. *Id.* at 409–11 (Stevens, J., dissenting); *id.* at 413 (Souter, J., dissenting).

539. *Lucas* 505 U.S. at 1005.

540. *DANA & MERRILL*, *supra* note 1, at 8 n.12.

541. *Id.* at 8.

542. Expressly, the Court's opinion is highly formal, imposing a stricter standard of scrutiny where there has been a taking of the entire economic value of property by regulation. But seemingly mentioned only in passing was the disproportionate impact that the plaintiff suffered at the hands of the regulatory regime. *Id.* at 1031. See generally Farber, *Public Choice*, *supra* note 3.

In *Lucas*, the Court confronted an individual landowner whose plans of building his beach dream house were blocked by the enactment of a state regulatory regime barring the construction of any permanent structure on the individual's beachfront land.<sup>543</sup> Thus, while leaving title in the landowner, the state regulatory statute eliminated virtually all of the economic value of such property, as there was no economically significant alternative use for the property other than as a residential building site.<sup>544</sup> The Court did not hesitate in characterizing the statute as effecting a taking.<sup>545</sup>

It remanded the case for a determination whether the State could demonstrate that the owner's proposed construction constituted a common law nuisance.<sup>546</sup> In an opinion by Justice Scalia, the Court took the opportunity to revisit its takings jurisprudence in some depth. He continued by questioning the requirement established by precedents that the protection of the Fifth Amendment extended only to takings of substantially all of a person's interest in property.<sup>547</sup> As an originalist, Justice Scalia began with the text—which states no such limitation—and the original understanding thereof.<sup>548</sup> But he immediately noted the limited guidance that could be obtained by that inquiry.<sup>549</sup> He endorsed the extension of the protection of the Takings Clause to impairment of property rights by regulation in *Mahon*.<sup>550</sup> His argument was a structural one, based upon the commitment of the Constitution to a government of limited powers.<sup>551</sup> He then went on to try to define the standard by which to apply Justice Holmes's notion that regulation that went “too far” would be a taking.<sup>552</sup>

Justice Scalia identified two classes of regulation that constitute takings without need for “case-specific” inquiry into” the governmental policy advanced.<sup>553</sup> First were those in which there was a so-called “physical ‘invasion’

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543. *Lucas*, 505 U.S. at 1007.

544. *Id.* at 1018–19.

545. *Id.* at 1027.

546. *Id.* at 1031–32.

547. *Id.* at 1015–20.

548. *Id.* at 1014–20.

549. *See id.* at 1028 n.15.

550. *Id.*

551. *Id.* at 1014.

552. *Id.* at 1015–19.

553. *Id.* at 1015.



“of” an owner’s property.<sup>554</sup> Second were those in which all economic use of land was eliminated by regulation.<sup>555</sup> Justice Scalia relied upon a lower court finding that all economic value of the property had been eliminated by the zoning regulation.<sup>556</sup> Accordingly, under his characterization of the precedent, Justice Scalia found a taking. The Court remanded the case for a determination whether Lucas’s use of his property constituted a nuisance under South Carolina law.<sup>557</sup>

Two comments about the Court’s opinion are important before turning to the arguments made by the concurring and dissenting opinions. The first is to note the unusual procedural posture of the case. The Court made its decision based upon a prior version of the relevant regulatory statute and failed to reflect fully the subsequently-enacted amendment that governed the subject property.<sup>558</sup> The amended statute permitted an exception for building permits to be issued outside the general rule as “special permits.”<sup>559</sup> Thus, without a determination whether the plaintiff could secure a building permit under the amended statute, the Court confronted a case that either presented a temporary taking or manifest ripeness issues.<sup>560</sup> The Court found that the case was ripe in reliance on the state court’s determination that there had been no taking. According to the Court, that determination could only be reviewed in the instant proceeding, and on that basis preceded to a disposition on the merits.<sup>561</sup>

Second, Justice Scalia’s opinion reflects a judicial strategy to bring some consistency and principle to the Court’s takings jurisprudence. An evident willingness to test the procedural and decisional parameters permeates the Court’s opinion.<sup>562</sup> In that context, Justice Scalia’s unwillingness to move to a level of

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554. *Id.* Physical invasion is defined broadly, in Justice Scalia’s formulation, extending to the installation of a cable television wire on an owner’s rooftop. That type of trespass is not ordinarily thought of as an invasion.

555. *Id.* at 1015–16. By privileging the protection for governmental regulation that destroyed substantially all of the economic value of a property, Justice Scalia was tacitly disregarding Epstein’s argument that no such limitation should apply. *See* EPSTEIN, TAKINGS, *supra* note 2, at 35–36.

556. *Lucas*, 505 U.S. at 1020.

557. *Id.* at 1030–32.

558. *Id.* at 1010.

559. *Id.* at 1010–11.

560. *Id.* at 1012–13.

561. *Id.* at 1010–14.

562. *See id.* at 1012–13 (defending the Court’s willingness to decide the case in the face of concerns about ripeness and the record).

abstraction or conceptual sophistication beyond the level of constitutional doctrine is all the more striking. That reluctance likely derives from Justice Scalia's account of the limited role of philosophical argument in constitutional interpretation and decision.<sup>563</sup> Justice Scalia rejects an affirmative role for philosophical argument in constitutional law. In its place are the interpretative methodologies of originalism.<sup>564</sup> Thus, the Court employed canonical historical and precedential modes of argument in its opinion.

*Lucas* also generated a concurrence, two dissents, and a separate statement by Justice Souter. Justice Kennedy wrote a concurring opinion.<sup>565</sup> He argued that the South Carolina Supreme Court's finding that the prohibition on development had eliminated all value of the subject property was unsupported by the record.<sup>566</sup> Moreover, the determination of values, according to Justice Kennedy, must be determined by reference to the owner's reasonable commercial expectations.<sup>567</sup> When the plaintiff purchased the subject land, recurring serious problems of beachfront erosion were under study by a special committee of the State.<sup>568</sup>

Justice Blackmun dissented.<sup>569</sup> He began by arguing that the Court's determination that the State's regulatory regime deprived the owner of all value of the subject property "[a]lmost certainly . . . did not happen in this case."<sup>570</sup> It is not entirely clear what Justice Blackmun asserted here. It initially may appear that he is expressing a valuation conclusion in the face of an adverse finding by a lower trial court. Such a factual valuation question would appear a difficult matter for an appellate judge to express a different view on. Justice Blackmun may have been prepared to express his conclusion because of the apparent legal error in the

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563. See SCALIA, INTERPRETATION, *supra* note 226, at 44–45 (mocking the notion that constitutional interpretation and decision could be grounded on the uncertain and controversial foundations of philosophical theory). See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11 (arguing that philosophy can provide therapeutic rather than foundational arguments for constitutional argument and decision); LeDuc, *Ontological Foundations*, *supra* note 11.

564. SCALIA, INTERPRETATION, *supra* note 226, at 44–45.

565. *Lucas*, 505 U.S. at 1032 (Kennedy, J., concurring).

566. *Id.* at 1033–35.

567. *Id.*

568. *Id.*, at 1037–38.

569. *Id.* at 1036.

570. *Id.*

determination of the lower court.<sup>571</sup> A better interpretation is that Justice Blackmun believed that long-established exceptions from the application of the Takings Clause for the exercise of police powers to prevent harms by property owners apply in *Lucas*. Justice Blackmun is thus making prudential and structural arguments and, to a lesser extent, a doctrinal argument that invokes the Court's prior Takings Clause decisions.

Justice Stevens also dissented.<sup>572</sup> In addition to questioning the Court's procedural judgment to decide the case on the merits, he challenged the Court's expansion of the doctrine of regulatory takings.<sup>573</sup> Justice Stevens argued from precedent that the Court's formulation of a bright line rule finding a constitutional taking when a regulation causes a total loss of value subject only for a narrow exception for nuisance constituted, in both respects, an unwise departure from the Court's takings jurisprudence.<sup>574</sup> Justice Stevens expressed skepticism that the common law test of nuisance was the right measure for testing whether a regulatory regime constituted a taking either as a matter of original understandings, federalism, or policy.<sup>575</sup>

Although the Court's opinion did not rely expressly on the academic analysis of the Takings Clause, the dissents of Justice Blackmun and Justice Stevens included unusually full references to the academic literature. Justice Blackmun even cited Michelman and Sax.<sup>576</sup> It is less clear, however, how important a role the analysis in those authorities played in the dissents' arguments. Michelman's article appears in a footnote with only a "see also" signal.<sup>577</sup> Another of his articles is quoted in the text for a description of the ambiguities inherent in describing regulations.<sup>578</sup> Michelman asserted that any land use regulation can be described as a total taking of a lesser interest or a partial taking of the entire interest.<sup>579</sup> That claim challenges the Court's claim to articulate a special rule for total takings.<sup>580</sup>

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571. *Id.* at 1043–44 (arguing that the trial court conflated the terms "less value" and "valueless").

572. *Id.* at 1061 (Stevens, J., dissenting).

573. *Id.*

574. *Id.* at 1063.

575. *Id.* at 1067–71.

576. *Id.* at 1054 n.18 (Blackmun, J., dissenting).

577. *Id.*

578. *Id.* at 1054.

579. Michelman, *Takings 1987*, *supra* note 292, at 1614.

580. *See Lucas*, 505 U.S. at 1015–19.

But it does not require the endorsement or deployment of any of Michelman's philosophical theory. When Justice Blackmun cites one of the seminal articles by Paul Sax addressing the border between the exercise of regulatory police powers and the Takings Clause, it, too, is introduced with that same "see also" signal and without comment.<sup>581</sup> Moreover, as described above, Justice Blackmun's dissent focused on the valuation issues of the case and, in particular, the manifest uncertainty whether substantially all of the subject property's value had been eliminated under the state's regulatory regime. Justice Blackmun's central argument was thus whole within the existing doctrinal mainstream of our Takings Clause jurisprudence (on the assumed facts) and needed no conceptual support from Michelman's philosophical arguments. While it would be unfair to characterize the dissenters as citing the academic literature for support rather than illumination, it is not unfair to recognize that the citation of that literature is not for its philosophical argument.

The Court's rule created a narrow exception from the Takings Clause if the use of the relevant property constitutes a nuisance.<sup>582</sup> This approach is, in an important sense, inconsistent with the analysis that Michelman defended.<sup>583</sup> Michelman emphasized the importance of framing the perspective to determine whether any particular use was canonical or intrusive. It is thus particularly ironic that Justice Scalia cited Michelman's article.<sup>584</sup> Michelman, after all, argued that the decision whether to provide compensation under the Fifth Amendment could not turn on questions of preventing harm or extracting benefits.<sup>585</sup> Michelman rejects employing such a distinction because he believes that characterizing a regulation as preventing a harm or capturing a benefit is largely a matter of a subjective choice as to how to describe a rule. Most rules can be described both ways, depending on the perspective from which the regulatory regime is described.<sup>586</sup> Justice Scalia does not engage Michelman's argument. He simply argues that the State always has the power to prohibit the unlawful use of property

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581. *Id.* at 1054 n.18 (Blackmun, J., dissenting).

582. *Id.* at 1030–32 (majority opinion).

583. Michelman, *Fairness and Utility*, *supra* note 1, at 1199.

584. *Lucas*, 505 U.S. at 1030.

585. Michelman, *Fairness and Utility*, *supra* note 1, at 1199. ("The foregoing paragraphs suggest a useful way of stating the reason why compensability cannot depend on a rule couched in terms of harms and benefits. As long as efficiency is the only justification advanced for a measure, it is impossible to classify that measure as one which prevents harms rather than extracts benefits, or vice versa.").

586. *Id.* at 1197–1202.

that constitutes nuisance.<sup>587</sup> Michelman, of course, argued that the concept of nuisance ought not to play an important role in constitutional takings law.<sup>588</sup>

Justice Scalia's citation of Michelman's article appears almost tongue-in-cheek because the citation appears in the context of a decision that elevates the concept of nuisance to a novel and uniquely powerful place.<sup>589</sup> The Court adopts a strategy of focusing on the distinction between harm and benefit that Michelman expressly argued against. Justice Scalia ought to have used a "*but see*" signal for his citation. Nor does Justice Scalia defend the powerful role that he accords the concept of nuisance against Michelman's argument; he simply ignores the substance of the academic argument. As the dissent pointed out, that elevation of the tort law as dispositive for certain takings questions is a novel doctrinal development and there are a number of arguments that speak against such a change.<sup>590</sup>

Justice Scalia's emphasis of the role of the common law of nuisance is, however, consistent with the approach defended by Epstein.<sup>591</sup> While Justice Scalia does not cite Epstein's analysis or argument, his approach would seem to follow Epstein's lead. Epstein also believes that the common law tort doctrine should set the boundaries of state regulation and thus the boundaries of uncompensated regulation. Justice Scalia does cite, in passing, Epstein's criticism of the Court for its failure to articulate a principled approach to its Takings Clause jurisprudence, again without any substantive engagement.<sup>592</sup> Thus, there is an apparent paradox: Justice Scalia cites the theorist whose approach he rejects and fails to cite the theorist whose approach he appears to follow.

The apparent solution to the paradox lies in the distinction that Justice Scalia may want to draw between his approach and that defended by Epstein. While Justice Scalia generally wants to pursue an originalist approach to constitutional interpretation, he does not do so in *Lucas*.<sup>593</sup> Nowhere does he inquire into the original understanding of the Takings Clause. He does not defend a claim that the original understanding of the Takings Clause was that any regulation of property or restriction of property rights that went beyond abating a

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587. *Lucas*, 505 U.S. at 1030.

588. Michelman, *Fairness and Utility*, *supra* note 1, at 1235–39.

589. *Lucas*, 505 U.S. at 1030.

590. *Id.* at 1063 (Stevens, J., dissenting).

591. EPSTEIN, TAKINGS, *supra* note 2, at 35–36 (arguing that the principles of tort liability that govern private citizens apply equally to the government with respect to putative takings).

592. *Lucas*, 505 U.S. at 1015 (citing Epstein, *Descent and Resurrection*, *supra* note 2).

593. *Lucas*, 505 U.S. at 1028 n.15.

common law nuisance was a taking that entitled the property owner to payment of just compensation.<sup>594</sup>

Instead, after first clearing some procedural underbrush as to ripeness,<sup>595</sup> Justice Scalia turns to the Court's doctrine and precedent, beginning with *Pennsylvania Coal Co. v. Mahon*, with respect to when government regulation gives rise to a compensable taking.<sup>596</sup> There is no analysis of the constitutional text or the original linguistic understanding of that text. Justice Scalia states the scope of the protection conjunctively, asserting that a taking occurs when the government regulation involves a physical invasion, advances no legitimate government purpose, or denies an owner all economic value of his property.<sup>597</sup> He makes no effort to ground the Court's doctrine and precedent in the constitutional text. Instead, Justice Scalia proceeds in *Lucas* to articulate the scope of the last branch of the doctrine. In his analysis, he looks to nuisance law, arguing that the state must make a showing that the prohibited private use is tortious or tort-like.<sup>598</sup> Justice Scalia's tort law is not the austere common law; he acknowledges the broader standards of the *Restatement*.<sup>599</sup> But he never explains why the standard of tort law is relevant, much less determinative.

Justice Scalia's analysis thus departs substantially from that defended by Richard Epstein. First, it is deeply embedded in and reliant on the Court's prior doctrine and precedent, as Epstein's philosophical analysis is not.<sup>600</sup> Epstein is fully prepared to ride roughshod over the Court's Takings Clause precedent because he views such precedent as manifestly wrong. Wrong, indeed, the day it was decided. Second, Justice Scalia's appeal to tort law appears to be an appeal based upon our established legal practice, not to the *determinatio* of natural law that Epstein's appeal appears to be.<sup>601</sup> Had Justice Scalia invoked Epstein's philosophical argument he would have raised far more profound questions than he would have resolved. Justice Scalia's approach also highlights the difference I have emphasized between constitutional decisional arguments and the theoretical, philosophical arguments that Epstein advances. Here, too, Justice Scalia is loath to accord philosophical

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594. See, e.g., *id.* (acknowledging that early constitutional theorists did not believe the Takings Clause addressed property regulation).

595. *Id.* at 1010–14.

596. *Id.* at 1017–19; see also Baude, *Rethinking*, *supra* note 11.

597. *Id.* at 1019, 1027–32.

598. *Id.* at 1031–32.

599. *Id.* at 1030–31.

600. *Id.* at 1027–30.

601. *Id.*

argument—even if headed in the right direction—any role in his constitutional jurisprudence.

Although at least one important commentator argued that with *Lucas*, *Nollan*, and *Dolan* the Court had finally created a principled jurisprudence that provided certainty and a coherent structure to our Takings Clause jurisprudence, at least in the context of land use planning regulation.<sup>602</sup> Douglas Kmiec argued that the requirement that the regulatory condition be roughly proportional to the regulated impact of the private party's proposed action was an administrable standard that properly balanced the property rights with the state's police power.<sup>603</sup> History has proved that judgment too optimistic.

In *Koontz v. St. Johns River Water Management District*,<sup>604</sup> the Court confronted the question of how *Nollan* and *Dolan* applied to zoning regulation that required payment of particular costs in connection with permitting.<sup>605</sup> In that case, a landowner sought to develop property subject to restrictive wetland preservation regulations.<sup>606</sup> Many had read the earlier cases as distinguishing the surrender or loss of a property right as distinguished from the imposition of a fee.<sup>607</sup> In *Koontz*, the governing agency proposed certain related environmental protection costs as a

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602. Douglas W. Kmiec, *At Last the Supreme Court Solves the Takings Puzzle*, in *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 107 (David L. Callies ed., 1996). But to read *Lucas*, *Nollan*, and *Dolan* to provide a principled structure or *solution* to the puzzles and anomalies of our Takings Clause jurisprudence, even in the limited field of land use regulation, Kmiec must excise or limit substantial parts of our established takings law, as he acknowledges. *Id.* at 109, 113 (treating the 1979 decision in *Keystone* as an outlier (characterizing it as a “precedential hiccup”) and proposing to overrule or dramatically limit the regulatory takings analysis of *Pa. Coal Co. v. Mahon* and *Penn Cent. v. New York City*). Moreover, Kmiec's exuberance requires that he gloss over some of the problematic feature of the recent land use regulation takings cases.

603. *Id.* at 114.

604. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

605. *Id.* at 601–02.

606. *Id.*

607. *See, e.g., E. Enters. v. Apfel*, 524 U. S. 498, 554 (1998) (Breyer, J., dissenting) (criticizing the Court's argument and arguing that “[t]he Constitution's Takings Clause does not apply” to the facts, because “[t]he ‘private property’ upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property,” whereas “[t]his case involves, not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.”).

condition to approving the development permit sought.<sup>608</sup> If the narrow reading of the precedent was correct, the regulatory action should have been upheld. Instead, in an opinion by Justice Alito, the Court held that the imposition of fees was subject to the same test as requiring the surrender or transfer of a property interest.<sup>609</sup> Thus, the fee must satisfy the same condition imposed by *Nollan* on the regulatory condition of that case that the fee substantially advance the government's regulatory interest.

*Koontz* also split the Court.<sup>610</sup> Justice Kagan wrote a dissent in which Justices Ginsburg, Breyer, and Sotomayor joined.<sup>611</sup> The disagreements were several, but central to the dissent was Justice Kagan's argument that conditioning regulatory approval on the payment of money did not implicate the Takings Clause because no property was taken.<sup>612</sup> Classically, fees and taxes payable in cash have not traditionally analyzed under the Takings Clause.<sup>613</sup> The state argued that the Takings Clause should not apply to a regulatory process that conditioned the issuance of a permit on receipt of a cash payment.<sup>614</sup> The Court rejected this argument, stating that "if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."<sup>615</sup> Thus, in *Koontz* we see the continuing development of a Madisonian, public choice skepticism about the integrity and good faith of state action—and the increasing willingness of the Court, as remarked by Michelman with respect to *Lucas*<sup>616</sup>—to step in.

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608. *Koontz*, 570 U.S. at 602.

609. *Id.* at 607 (unconstitutional conditions doctrine applies, because the doctrine recognizes that "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

610. *See id.* at 597.

611. *Id.* at 619 (Kagan, J., dissenting).

612. *Id.* at 623–26.

613. *Id.* at 623.

614. *Id.* at 612 (majority opinion).

615. *Id.*

616. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 313 (1993) ("Under Justice Scalia's reasoning [in *Lucas*], a State cannot avoid [a determination that a taking has occurred through regulation] just by showing that it has a very strong reason of public policy for imposing the restriction.").



The Court has clearly moved our Takings Clause with respect to land use regulation substantially in the past thirty years. It has done so without tacitly or expressly invoking the theories of the academy. Neither Professor Michelman's former colleagues Justices Breyer and Kagan, nor Professor Epstein's former colleague Justice Scalia have incorporated the arguments of their former colleagues in their reasoning in Takings Clause cases. As Justice Rehnquist has noted, the Court has found it easier to resolve the cases in practice than it has in theory.<sup>617</sup> Cass Sunstein might find in these developments some proof of his argument for judicial minimalism.<sup>618</sup> The Court has repeatedly addressed cases on narrow grounds, confronting the implications of its decisions only when required to do so in a later case.<sup>619</sup> *Lucas* may be an exception to this pattern. Moreover, the Court has generally made its judgments without invoking broad, conceptual theoretical arguments. But this method may be born more of necessity of finding five votes than a matter of principle or theory.

While there are elements of the Court's evolving Takings Clause jurisprudence that are persuasive and engaging, there are also important problematic elements. The assessment of these cases must be made in the context of the controversies that they presented and the arguments that the justices endorsed and rejected. The current law distinguishes between regulations of general application and particularized regulatory determinations, applying a stricter level of scrutiny to the latter.<sup>620</sup> Nothing in the constitutional text supports such a distinction, of course. But structural features of our democracy and the potential for corruption in exploiting minority factions support drawing just such a

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617. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (characterizing the Court's takings jurisprudence as "engaging in essentially ad hoc, factual inquiries that have identified several factors").

618. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3–4 (1999) [hereinafter *SUNSTEIN, ONE CASE*] ("[F]requently judges decide very little. They leave things open. About both liberty and equality, they make deliberate decisions about what should be left unsaid. This is a pervasive practice . . . [Decisional] minimalism is likely to reduce the burdens of judicial decision . . . [and] is likely to make judicial errors less frequent and (above all) less damaging."); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* vii–viii (1996) [hereinafter *SUNSTEIN, LEGAL REASONING*].

619. See, e.g., *Koontz*, 570 U.S. at 607 (extending the analysis of *Dolan* to regulatory permitting fees).

620. See Mark W. Cordes, *The Land Use Legacy of Chief Justice Rehnquist and Justice Stevens: Two Views on Balancing Public and Private Interests in Property*, 34 *ENVIRONS* 1, 23–25 (2010) (citing *Dolan*) (noting that the *Dolan* Court required "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development").

distinction. The relevance of the importance of the regulatory purpose served by the potential regulatory taking continues to prove controversial. The case law, particularly in the opinions of Chief Justice Rehnquist, has emphasized this element.<sup>621</sup> Commentators have questioned why this should matter; in actual takings, the purpose for which property is taken is irrelevant.<sup>622</sup> The attenuated interpretation of the requirement of public use has continued to figure as a controversial element of the law.<sup>623</sup> The role of common law foundations—the importance of physical trespass and whether the use of property blocked by regulation is or resembles a common law nuisance continue to be controversial, too.<sup>624</sup> These are all elements of our current Takings Clause jurisprudence that appear far from settled.

The Court considered the scope of the federal government's ability to regulate without paying compensation outside the context of land use regulation in *Horne v. Department of Agriculture*,<sup>625</sup> another case that divided the Court. Under the relevant New Deal statute designed to create and maintain stable agricultural markets, the Department of Agriculture regulated raisins. It required raisin handlers to deliver a portion of their raisin harvest to the Department. The handlers retained a contingent interest in certain proceeds of the disposition by the Department of such raisins, but the Department was under no obligation to, nor did it customarily, dispose of such raisins at their fair market value.<sup>626</sup> The plaintiffs denied that they qualified as raisin handlers and refused to deliver the required reserved raisins. The Department then brought an enforcement action against the plaintiffs and imposed a fine equal to the fair market value of the raisins required to be delivered.<sup>627</sup>

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621. *See, e.g., Kaiser Aetna*, 444 U.S. at 175.

622. *See, e.g., Cordes, supra* note 620, at 40–43.

623. *See* Alberto P. Lopez, *Revisiting Kelo and Eminent Domain's Summer of Scrutiny*, 59 ALA. L. REV. 561, 567–69, 574–75 (2008).

624. For example, the extension of *Berman's* taking of “blighted” property to property which presented no such potential nuisance in *Kelo* drew a vigorous dissent. *See* 545 U.S. at 500–01 (O'Connor, J., dissenting).

625. 135 S. Ct. 2419 (2015).

626. *Id.* at 2424.

627. *Id.* at 2424–25.

The Court held that the regulatory requirement that a portion of a market participant's harvest be delivered without payment constituted a taking.<sup>628</sup> The Court reasoned that while the case presented the validity of a fine imposed by the Department of Agriculture, the fine was only imposed because of the plaintiff's failure to deliver the required raisins.<sup>629</sup> The fine was thus a proxy for the raisins that had been commandeered. The Court held that the regulatory regime requirement constituted a taking because the participation in the interstate market for raisins was not a benefit that justified the burden imposed by the reserve requirement. Without a satisfactory *quid pro quo*, the reserve requirement, and therefore the resulting fine, constituted a taking.<sup>630</sup> The Court did not acknowledge that the pervasive regulatory regime and its associated reserve requirement fundamentally altered the domestic market for raisins and, by reducing supply, inflated the market price of raisins. Thus, the right to sales into the market that the Hornes asserted was not a right to sell at a fair market value; the Hornes were free riders, obtaining the benefits of the regulatory regime without sharing in its cost.

Justice Thomas concurred, but would have held the taking invalid as failing the public use requirement.<sup>631</sup> Because he believed the federal action was invalid, Justice Thomas found it unnecessary to reach the question whether just compensation was due or to remand the case for a determination of the amount of compensation due.<sup>632</sup>

Justice Breyer (joined by Justices Ginsburg and Kagan) dissented in part.<sup>633</sup> Justice Breyer focused upon the benefits conferred on the Hornes by the regulatory regime imposed upon the market.<sup>634</sup> That benefit consisted in the above market price that the Hornes would receive for the portion of their raisins that were not required to be delivered to the Department. Justice Breyer argued that benefit ought to be netted against the fair market value of the raisins subject to the reserve requirement, and if that benefit were great enough, no compensation would be

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628. *Id.* at 2431 (“Raisins . . . are private property—the fruit of the growers’ labor . . . Any physical taking of them for public use must be accompanied by just compensation.”).

629. *Id.* at 2425.

630. *Id.* at 2430.

631. *Id.* at 2433 (Thomas, J., concurring).

632. *Id.*

633. *Id.* (Breyer, J., dissenting).

634. *Id.* at 2435.

due.<sup>635</sup> No justice defended the regulatory regime as the valid exercise of the federal government's police power.

The Court failed to meaningfully engage Justice Breyer's criticism.<sup>636</sup> It simply asserted that the benefits of the regulatory regime, whose principal purpose, after all, was to stabilize the market and produce an above-market price for raisins, were not analogous to benefits arising on the condemnation of land for highways or other infrastructure improvements.<sup>637</sup> The apparent arrogance in disregarding Justice Breyer's argument is startling. The attempt to distinguish the two cases appears artificial and insubstantial. But we do not need philosophical argument to reach a better result.

Justice Sotomayor alone dissented in full in a forceful opinion.<sup>638</sup> She argued that the Takings Clause precedent establishing per se takings requires that the State take the entirety of the property rights held by the private person, and that that standard was not satisfied in *Home*.<sup>639</sup> Even when subject to the reserve requirement, the Hornes retained a contingent partial interest in the value of reserve raisins.<sup>640</sup> That retained property right was sufficient to distinguish the complete taking cases. She characterized the Court's assertion that there had been a total taking, in the face of the retained contingent interest, as "breezy."<sup>641</sup>

Justice Sotomayor also criticized the Court for emphasizing the physical dimension of the taking in its reasoning.<sup>642</sup> She did not, however, invoke Michelman's theoretical stance to make her argument.<sup>643</sup> A physical taking or trespass, Justice Sotomayor argued, no longer figures significantly in takings jurisprudence.<sup>644</sup> She could make the claim simply, and compellingly, as a doctrinal matter. She is right, based on the Court's precedent. In the context of the

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635. *Id.*

636. *Id.* at 2432.

637. *Id.* at 2432–33.

638. *Id.* at 2437 (Sotomayor, J., dissenting). The decision of *Home* on an 8–1 vote might be construed to indicate that the takings jurisprudence is finally moving toward a principled resolution. That optimism would be premature. *Home* produced four separate opinions, including Justice Thomas's concurrence. The doctrinal and decisional disagreements thus persist.

639. *Id.* at 2437–38.

640. *Id.* at 2438–39.

641. *Id.* at 2441–42.

642. *Id.* at 2442–43.

643. *Id.*

644. *Id.* at 2443.

ongoing debate over originalism, however, the originalists on the Court have repeatedly endeavored to assimilate constitutional doctrine to common law concepts, like trespass, that were more important at the Founding.<sup>645</sup>

Consider how the theoretical stances defended by Michelman, Ackerman, and Epstein engage the issues facing the Court in *Horne* as well as the reasons behind the Court's reluctance to introduce those theoretical stances into its decision and reasoning. The Court and three other opinions employed a range of textual, historical, and doctrinal arguments in their respective decisions as to the scope and application of the Just Compensation Clause. None of the opinions explicitly considered utilitarian calculations or Rawlsian principles of fairness. While those principles could have been implicit or tacitly assumed in their analysis, few traces can be found.

The more liberal wing of the Court is more likely to be sympathetic to the work done by Michelman and Ackerman. Still, even there we find little evidence of their theoretical conceptualization in either majority or dissenting opinions. While utilitarian arguments figure in prudential arguments, it is on the basis of ordinary, commonsense considerations, to employ Ackerman's notions.<sup>646</sup> They are not doctrinaire conceptual arguments deriving independent force from their utilitarian structure and foundations. Turning to the more conservative justices where we might expect Epstein's libertarian theory to be employed, we find equally little evidence of his conceptual contributions. Indeed, Epstein's theory is expressly at odds with the originalism defended by Justices Scalia, Thomas, and Alito and Chief Justices Rehnquist and Roberts.<sup>647</sup> So it would be less surprising to find little evidence of that theory. But in the reasoning of the Court in *Nollan*, *Dolan*, *Lucas*, *Kelo*, and *Horne*, for example, that libertarian theory is invisible. Instead, we have,

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645. See, e.g., *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (argument that the warrantless installation of a GPS tracker on a suspect's car was an unreasonable search not because it violated legitimate expectations of privacy but because it was a trespass); André LeDuc, *Beyond Babel: Achieving the Promise of Our American Constitution*, 64 CLEV. ST. L. REV. 185, 197–204 (2016) [hereinafter LeDuc, *Beyond Babel*] (criticizing this approach).

646. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 10–12.

647. See BORK, TEMPTING, *supra* note 19, at 229–30. But see Clarence I. Thomas, *Toward a "Plain Reading" of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L. REV. 983 (1987) (emphasizing natural law elements in originalist constitutional interpretation). Justice Thomas subsequently distanced himself from these commitments in his confirmation hearings. See generally LeDuc, *Paradoxes of Positivism and Pragmatism*, *supra* note 389, at 629–30 (explaining that the legal positivism prevalent among originalist judges rejects the natural law originalism of scholars like Epstein who attempt to derive constitutional meaning from philosophical or moral theory).

to a lesser extent, some attention to the text and to the original historical understandings and intentions (which are both too limited to provide much insight) and, to a greater extent, structural and ethical arguments about the nature of limited government and individual liberty.<sup>648</sup>

The conventional judgment that Takings Clause jurisprudence is in disarray is fair. The classical accounts have adduced a variety of factors as the source of the Court's difficulties. Some have attributed the problem to the terseness of the constitutional text.<sup>649</sup> The disarray has also been attributed to failures by the Court in its use of an ethical standard in the requirement of "just compensation."<sup>650</sup> Classically, the constitutional theorists examined here have attributed the disarray to the inattention to first principles<sup>651</sup> and the conceptual confusion that has resulted from the collision of two alternative, inconsistent accounts of the law and legal reasoning.<sup>652</sup> More recently, Margaret Radin attributed the disarray to the subject matter of the law.<sup>653</sup> Finally, some have attributed the disarray to dueling stances on public choice theory and competing assessments of the nature of the state and the trustworthiness of state agents.<sup>654</sup> While some of these elements may have contributed, there is a simpler, more direct account of the disarray.

It is helpful to distinguish at least four disparate sources or accounts of the substantive problems in our contemporary Takings Clause jurisprudence. First,

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648. It might be argued that such structural and ethical arguments are Epstein's arguments clothed in the habiliments of constitutional argument. This characterization appears somewhat inadequate and implausible because Epstein's argument is different, and its implications are different from the arguments made by the Court.

649. *See, e.g.*, Dunham, *supra* note 1; EPSTEIN, SUPREME NEGLECT, *supra* note 1, at 43 (arguing that "short texts" make particular demands on interpretation). *But see* Gordon D. Henderson, *Controlling Hyperlexis: The Most Important "Law and . . ."*, 43 TAX LAW. 177 (1989) (arguing that the burgeoning detail and specificity in statutory and administrative law had introduced such substantial ambiguity as to risk compromising the continuing practical benefits of the rule of law).

650. Dunham, *supra* note 1, at 105–06 (speculating whether the legislative branch might fare better in articulating a fairness standard for just compensation).

651. *See* EPSTEIN, TAKINGS, *supra* note 2, at vii–x; Michelman, *Fairness and Utility*, *supra* note 1, at 1171–72.

652. *See* ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 1–20.

653. *See* Radin, *Diagnosing the Takings Problem*, *supra* note 1.

654. *See* Farber, *Public Choice*, *supra* note 3, at 306 (concluding that while the economic analysis of public choice theory makes an important contribution to understanding the proper scope of the Takings Clause, it is incomplete).

contemporary takings cases split the Court both as to reasoning and as to result.<sup>655</sup> The fracture lines are multiple, overlapping, and shifting. First, contemporary takings jurisprudence disregards the text of the Constitution in its reduction of the requirement of public use to a requirement of public purpose.<sup>656</sup> That reduction, now well established in our takings doctrine, is problematic for at least two reasons. The first reason is that we can imagine takings for a public purpose that are not for an apparent public use. A vessel taken from an owner by the State and then transferred over for the use of a privateer would be such an example.<sup>657</sup> Reading the requirement of public use as simply a matter of public purpose narrows the scope of the Fifth Amendment to exclude such cases. Such a case would appear to present precisely the extreme case of a taking of private property that the Court distinguished in *Kelo*.<sup>658</sup> To the extent that the constitutional text and the historical understanding of the constitutional text are increasingly central to the constitutional interpretation and decision of members of the Court, conflict among the justices may be expected.

The second reason to question the reduction of the public use requirement to the requirement of public purpose is Epstein's. Epstein's principal argument against such a reduction is that permitting another person to capture the value of state action rather than the original owner violates Lockean private property rights.<sup>659</sup> As made, Epstein's argument is based upon his claim that the economic benefits of the creation and operation of the state must be distributed according to a linear function.<sup>660</sup> But the argument can be expressed without that foundation simply as an argument against the risk of corruption on classical republican political theory.

None of the dissenting opinions in *Kelo* made any version of Epstein's argument. Instead, Justice Thomas argued from the constitutional text that the

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655. See discussion *supra* Part II.

656. *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (criticizing the majority on the basis that its holding would "effectively . . . delete the words 'for public use' from the Takings Clause of the Fifth Amendment.>").

657. It might be argued that the use by the privateer is a public use, but that argument would appear to conflate purpose with use. The purpose of the takings is public; the choice where to sail the vessel and what ships to attack would appear entirely that of the privateer. The economic benefit of the privateering, as well as the risk, would appear to be entirely the captain and crew's too. See generally Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 222 (2009).

658. *Kelo*, 545 U.S. at 486–87.

659. EPSTEIN, TAKINGS, *supra* note 2, at 162–64.

660. *Id.* at 166–68.

state lacked the power to take the appellant's land.<sup>661</sup> Justice O'Connor argued on the basis of doctrine and, ultimately, on the basis of an ethical argument from the place of private property in American life, that the requirement that a taking be for public use should not be disregarded.<sup>662</sup> We can understand why the dissenters eschewed Epstein's argument, even if we were to concede, *arguendo*, that it is correct. Its very simplicity and abstraction is at odds with our rich, complex, and historical Takings Clause jurisprudence.

Second, the most obvious source of disarray in our takings jurisprudence is the doctrinal tensions and inconsistencies in the case law. The oft-cited distinction between the requirement for compensation for the noisy aircraft that fly over one's land<sup>663</sup> and the absence of such a requirement for such aircraft that fly along the border of one's land but over one's neighbor's land<sup>664</sup> is only the most obvious example of a distinction without a meaningful difference. Moreover, it is unclear why tort or property law theory ought to play such an important role in drawing fine distinctions in our law of takings. Ackerman, of course, would have an easy answer: those are natural sources for a scientific approach to the constitutional law of takings.<sup>665</sup> Resolving the doctrinal tensions can only be done in traditional ways.<sup>666</sup> That involves making the traditionally accepted kinds of constitutional arguments but paying particular attention to the demands of doctrine and precedent and the need to articulate a coherent and principled takings jurisprudence. There are not any shortcuts to resolve the constitutional controversies generated by the Takings Clause, even if we seek guidance in philosophical first principles. Indeed, philosophical arguments cannot decide our constitutional controversies.

Third, it might be argued that the current disarray in our takings jurisprudence can be reduced to a political disagreement about the role of government. This argument would also explain the tensions and disarray in our Takings Clause jurisprudence as expressions of more fundamental political conflicts. On this account, the more conservative judges have voted to strike down state and federal government action that impairs property rights without just

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661. *Kelo*, 545 U.S. at 506–07 (Thomas, J. dissenting).

662. *Id.* at 494, 496–505 (O'Connor, J., dissenting).

663. *See* *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962).

664. *See* *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Brandes v. Mitterling*, 67 Ariz. 349, 196 P.2d 464 (1948).

665. *See* ACKERMAN, *PRIVATE PROPERTY*, *supra* note 1, at 26–28.

666. For a sophisticated contemporary discussion of constitutional doctrine see FRIED, SAYING, *supra* note 29 (arguing that constitutional doctrine cannot be reduced to politics).



compensation. The more liberal justices, committed to a more activist state, have voted to permit such governmental actions without payment of compensation.

While there is admittedly some truth in this characterization of the voting patterns of the Justices,<sup>667</sup> this argument does not satisfactorily explain much of the disarray. This characterization of voting patterns does scant justice to the reasoning of the Court's decisions. Neither the more conservative nor the more liberal justices have voted as blocks on takings questions over the years.<sup>668</sup> Some of the differences are attributable to the extent to which conservative justices have consistently endorsed textual or originalist readings of the Constitution.<sup>669</sup> Some of the differences are attributable to the extent that the liberal justices are committed to an active role for government or to the constitutional protection of the means for achieving personal autonomy and self-actualization.<sup>670</sup> Part of the absence of bloc voting arises from the spectrum across which the conservative and liberal justices are arrayed. That contributes, undoubtedly, to the proliferation of concurring and dissenting opinions. For example, Justice Thomas has frequently concurred in the judgment of the conservative majority in striking down state action where compensation has not been paid, but he has also dissented when such action has been upheld, as in *Kelo*.<sup>671</sup> In each case, his reasoning is consistent with his insistence that there be a public use and his robust defense of private property. It is also consistent with the pervasive originalist skepticism about employing philosophical argument a central place in constitutional interpretation and

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667. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (articulating and defending a social science approach to designing predictive models, not normative constitutional models, of the Supreme Court justices' judicial voting behavior).

668. *See, e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 at 867 (1987) (Stevens, J., dissenting) (attributing some of the responsibility for the disarray in the Court's takings jurisprudence to opinions authored by Justice Brennan). *See generally* FRIED, SAYING, *supra* note 29, at 242–44 (noting that the general categories of political persuasion and sympathy do not map smoothly onto the patterns of constitutional decision by the Court).

669. *Compare* *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (rejecting a requirement that property be taken only for public use while arguing that the public benefit claimed was insufficient to permit the government to take the private property) *with id.* at 505–14 (Thomas, J., dissenting) (arguing that the constitutional text requires implicitly that a taking be for public use).

670. *Compare* *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 at 865 (Brennan, J., dissenting) *with id.* at 866–67 (Stevens, J., dissenting) (criticizing the *ad hoc* arguments of both the Court and Justice Brennan's dissent).

671. *Kelo*, 545 U.S. at 505.

decision. Moreover, a reductionist political account of the decisional disputes within the Court does not explain the duration of the disarray, which long predates the current Supreme Court political alignments.

The fourth strategy to explain the source of the disarray is to consider its genealogy. To do so, before understanding *why* the disarray has arisen one must begin by asking *when* it arose. It may appear that it arose only after *Berman v. Parker*. That case was decided in less than five weeks by a unanimous Court.<sup>672</sup> *Berman* is strong evidence that the Court's takings jurisprudence was principled and clear at that time. But the sources of disarray appeared well before that case. The Reconstruction extension of the Takings Clause to the States and the expansion of the administrative state require distinguishing permissible police power regulations that impair property rights from the impermissible taking of private property without payment of just compensation. Justice Holmes recognized that challenge in *Mahon*.<sup>673</sup> Reconciling the legitimate exercise of state and federal police powers with the Takings Clause has proved difficult for the Court. The task is made harder in the absence of a consensus as to how seriously to treat the risk of corruption in government actions, whether expressed in traditional Madisonian republican terms or in the more modern vernacular of public choice theory. This challenge is the fourth source of a substantial part of the Court's travails.

The Court has consistently rejected the highly conceptual and philosophical arguments proffered by the academy. Academics emphasize the Court's citation of Michelman's seminal article in *Penn Central*<sup>674</sup> as evidence of the practical force of their analysis.<sup>675</sup> The express use of that article is limited, introduced twice at the end of string citations with a "*See generally*" signal.<sup>676</sup> Of course, it may be that Michelman's article had a more pervasive tacit impact on the Court. But this argument has never been made. The reasoning of the Court appears comfortably in the mainstream of the regulatory takings precedents, albeit in the novel context of a historic preservation regulatory regime. It is not clear what Michelman's superstructure of philosophical theory adds anything important to the Court's reasoning.

Why, then, does the academy think its conceptually sophisticated analyses have had such important practical implications? Part of the explanation may simply be the natural hope that we all have that there is significance to what we do. But there also would appear to be an insensitivity to the difference between the

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672. *Berman v. Parker*, 348 U.S. 26 (1954).

673. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

674. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978).

675. *See, e.g.*, RADIN, *Liberal Conception*, *supra* note 46, at 135.

676. *Penn*, 438 U.S. at 128.

kinds of arguments made in our constitutional decisional arguments—the kinds of arguments that an advocate would make to a court in hope of convincing it to rule in her client’s favor—and the arguments made in the legal academy or, even more different still, the arguments made in academic philosophy. Some academics, of course, are also renowned constitutional advocates. The advocates undoubtedly note the distinction among the various modes of argument, unless it is a matter, in the case of their advocacy, of *knowing how* rather than a self-conscious *knowing that*. In the case of Charles Fried, there is a sophisticated recognition of the nature of what lawyers do in court and the situatedness of our constitutional argument.<sup>677</sup> This recognition is less expressly articulated by Tribe. But most of the academic commentators are not also practicing advocates,<sup>678</sup> and they appear less aware or self-conscious of the difference between the arguments that they make and the arguments that would be effective in court.

We search in vain in the reasoning and decisions of our contemporary jurisprudence for the theories and arguments of the academy. That rejection has been as consistent from justices on the right who would restrict the power of eminent domain and expand the obligation to pay just compensation as for justices on the left who would generally interpret state and federal police powers more broadly and the rights of property owners to compensation for takings more narrowly. In none of the central takings cases over the past decades have those theories proved important. They have neither been expressly invoked in the opinions promulgated nor even figured tacitly in the justices’ reasoning.<sup>679</sup>

It might be argued that I impose too high a bar in my scrutiny of the Court’s takings jurisprudence for themes from, and other traces of, the theoretical

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677. See FRIED, SAYING, *supra* note 29, at 241–42, 242 (emphasizing the constraining role of precedent and constitutional doctrine more generally and characterizing the Court’s arguments and opinions as “responsible to the past and hostages to the future”); Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025 (2011) (describing the role of judgment in adjudication). For Fried’s earlier attempt to articulate what is distinctive about legal reasoning, see Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 39 (1981) [hereinafter Fried, *Artificial Reason*].

678. None of Professors Michelman, Ackerman, and Epstein maintains a significant advocacy practice, according to their respective faculty web sites. See *Frank I. Michelman*, HARV., <https://hls.harvard.edu/faculty/directory/10585/Michelman>, (last visited March 31, 2019); *Bruce Ackerman*, YALE, <https://law.yale.edu/bruce-ackerman> (last visited March 31, 2019); *Richard Epstein*, N.Y.U., <http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=26355> (last visited March 31, 2019).

679. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

work in the legal academy. The Court is proceeding in a common-law like manner, case by case. To expect to find direct evidence of the highly theoretical work in the academy may appear to set an unrealistic hurdle. Perhaps we should recognize that we could at most hope to find such arguments expressed in constitutional garb. Even couched in such terms the inquiry proves fruitless, however. Contemporary constitutional takings jurisprudence cannot be translated into the arguments and theories of the academy.

The academy's claim that its academic theorizing has had a discernible impact on the evolving Takings Clause jurisprudence is implausible. The proponents do not cite any cases *expressly* decided along the lines suggested by the academic theorists.<sup>680</sup> Moreover, given the substantial tensions and inconsistencies between the various theories, it would appear that only one could have such an impact. The mutual exclusivity of the competing accounts calls Dana and Merrill's claim into doubt.<sup>681</sup> They also do not offer any evidence that the cases have developed along the lines urged by the theorists albeit only *tacitly* looking to those theories, without express articulation of the abstract academic theories.

It may seem premature to expect that the theoretical arguments of the academy would have reached the Court. But while constitutional doctrine evolves slowly, the evolution of privacy doctrine, for example, establishes a timing benchmark that confirms that it is not premature to look for a doctrinal impact here.<sup>682</sup> To the extent that Radin is right in her conclusion that the consensus overstates the disarray in contemporary takings jurisprudence, the potential role for abstract theory to mitigate the disarray is perhaps limited.<sup>683</sup> On Radin's account, the limited disarray that does exist has a complex set of sources, including fundamental features of the underlying liberal concepts and exaggerated

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680. See DANA & MERRILL, *supra* note 1, at 26 (asserting Michelman, Sax, and Epstein, among others, have had a "discernible effect" on the law); ALEXANDER & PEÑALVER, *supra* note 10, at xi ("Theory matters.").

681. On pluralist theories like those defended by Philip Bobbitt and Dennis Patterson, such theoretical stances could be expressed in inconsistent arguments, each vying for application in a particular case. See generally DENNIS PATTERSON, LAW AND TRUTH (1996) (defending a general anti-foundational, anti-representational account of how legal argument and decision makes propositions of law true); BOBBITT, FATE, *supra* note 121.

682. See Charles Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

683. See Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 165.

expectations for the simplicity and consistency of our takings jurisprudence.<sup>684</sup> Based on the preceding analysis of the evolving case law, Radin's optimism about the state of our Takings Clause law appears exaggerated and the puzzling impotence of philosophical arguments persists.

### III. WHY PHILOSOPHY CANNOT REFORM OUR TAKINGS LAW

Why has the Court rejected or ignored the philosophical arguments of the academy? How may we hope to harmonize and reform the constitutional takings jurisprudence? In this part I will first explain why philosophical arguments will not resolve the anomalies in our Takings Clause jurisprudence. Second, I will describe the strategies that may help resolve those anomalies and make our Takings Clause as consistent and principled as we may hope for.

The classical Takings Clause scholarship is not methodologically particularly self-conscious, as I have discussed above. Nevertheless, the tacit premises of the turn to philosophical argument are apparent. First, faced with a body of constitutional law that suffers from the weaknesses described above, it is natural to look everywhere for analytical tools with which to reform that law. Second, Takings Clause cases present issues about the nature of property, fairness, the power of the state, democratic decision-making, corruption, and the role of property in defining individual freedom and ensuring individual autonomy. These are topics that have been central to our philosophical tradition, too. Moreover, these questions were central to the groundbreaking political philosophical work that John Rawls and Robert Nozick were doing at the time. Philosophical arguments are ready at hand and, unlike many epistemological or philosophy of language arguments, largely accessible to the legal academy. Moreover, the issues raised by constitutional Takings Clause cases sound like philosophical questions. It is understandable that the new philosophical arguments emerging from the academy looked appealing as a means to cut through the complexities and doctrinal mess of our Takings Clause jurisprudence.

At the outset, we should note that the justices have not disputed the philosophical arguments that have been made or sided with one position or another in the theoretical landscape; they have just ignored the theoretical arguments of the academics. Most simply, that is because the philosophical and conceptual arguments made in the legal academy are not constitutional arguments.

One way to see why philosophical theory and argument may not be helpful (let alone dispositive) in the space of constitutional reasons is to consider the analogous project of crafting a *mathematical* theory of the Takings Clause.

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684. *Id.* (characterizing the law as reflecting the courts making "situated judgment[s]").

Admittedly, for a variety of historical and cultural reasons the project of creating a mathematical theory is not nearly as enticing as the classic project of creating a philosophical theory. A mathematical theory of the Takings Clause might begin with the identification of the relevant variables—the property rights held, the nature of the state action, the property rights taken, used, or destroyed, and the relevant relative valuations of such rights, for example. The next step would call for the formulation of an equation, inequality, or other mathematical expression that would specify when a cognizable taking had occurred. The manifest challenge of such a project, both as a matter of theory and as a matter of explaining the existing Takings Clause jurisprudence may explain why such strategies are not more compelling. More fundamentally, such a project is not a natural strategy in our current constitutional discourse in the academy or, *a fortiori*, in the courts.

If we return to the text of the Fifth Amendment, we must immediately note the fundamental ambiguities in the constitutional text. In relevant part the Fifth Amendment reads: “nor shall private property be taken for public use, without just compensation.”<sup>685</sup> Read according to its literal, semantic meaning, the provision does not speak to the taking of private property when there is no public use. The text of the Clause also does not expressly encompass the impairment of property by regulation. By its express, semantic meaning the Fifth Amendment neither prohibits such Takings nor requires just compensation when such Takings occurs. As a matter of traditional semantic meaning, the text does not address those topics at all.<sup>686</sup>

Even if the term “taken” could be interpreted or understood to include diminutions in value arising out of regulatory action, it is hard to see how the requirement of “public use” could be satisfied with respect to the property whose value has been so diminished as a semantic matter. Absent an express constitutional restriction on such action by the federal government it would appear that such a power, to the extent created under the Constitution’s regime of limited powers, as limited only by the other relevant provisions of the Constitution, would exist without restriction by the Fifth Amendment. Either an additional, stricter standard applies under the Fifth Amendment to the taking of private property for *public use* than when private property is taken by the state for *private use*, or we must introduce constitutional pragmatics to determine the import of the constitutional text.

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685. U.S. CONST. amend. V.

686. On an inferentialist account, the meaning is perhaps less austere. *See generally* BRANDOM, MAKING IT EXPLICIT, *supra* note 167 (by analyzing the meaning of utterances and texts in terms of the inferential commitments they rely upon and the further commitments that they support inferentialism would likely include in the linguistic content of the Takings Clause an implicit limitation upon the scope of the eminent domain power).

Two commentators have distinguished three possible interpretations of the Public Use Clause in the Fifth Amendment.<sup>687</sup> These readings are offered as a matter of, and limited to, the semantic meaning of the text. First, the phrase might simply be descriptive, clarifying the kind of takings for which just compensation must be paid under the Fifth Amendment.<sup>688</sup> Second, the phrase might limit the scope of the provision, indicating that takings for private use are not required to be compensated.<sup>689</sup> The first approach has long been rejected.<sup>690</sup> Interpreting the clause as merely descriptive strips the clause of any force in the constitutional text, reducing it, functionally, to mere surplusage. The second interpretation has had more recent defenders.<sup>691</sup> Surprisingly, some have indeed argued that takings by the state for private use may be made without payment of compensation.<sup>692</sup> Admittedly, the express language of the constitutional text does not prohibit such takings.<sup>693</sup> But before dismissing that interpretation of the literal meaning of the text we should note that arguments for such a reading could be made beyond the simple semantic meaning of the text. The Founders might have assumed that the democratic processes available against elected representatives would be a sufficient check on such arrogations of power to prevent it from occurring. Yet that assumes a level of principled concern for others—including potentially minorities—because the electoral power of the victims of taking for private use could well be small in number. Third, it may be argued that takings for private use ought to be treated differently and, in the context, prohibited.<sup>694</sup>

There are compelling pragmatics arguments against both the first and second readings of the text. Philosophical work in linguistic pragmatics sheds some light on these questions.<sup>695</sup> Pragmatics explores how the context and use of a text

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687. DANA & MERRILL, *supra* note 1, at 192–94.

688. *Id.* at 193.

689. *Id.* at 193–94.

690. *Id.* at 194.

691. *Id.* at 193 n.305.

692. *Id.*

693. U.S. CONST. amend. V.

694. See Clegg, *supra* note 11; see also Baude, *Rethinking*, *supra* note 11 (arguing that the original understanding of the federal government’s power of eminent domain limited that power to the territories and the District of Columbia).

695. See generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989) (describing the tacit maxims of conversation and writing that allow utterances and statements, in context, to carry far richer meanings and import than those utterances’ and statements’ mere semantic meaning might suggest); J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS*

or utterance contributes to the meaning of the act that is not carried by the austere semantic meaning of the text or utterance. In particular, work by Paul Grice can help us understand the force of the Takings Clause.<sup>696</sup>

Three of Grice's categories of conversation and, more generally, verbal communication, along with their attendant maxims or principles can be applied to the constitutional text to help us understand the Takings Clause.<sup>697</sup> The first relevant category of Quantity and the associated maxim or principle is that of matching the utterance or text to the mission of the exchange.<sup>698</sup> That maxim requires a speaker or text to address the relevant issues in the conversation. The failure to do so can convey a message not carried by the semantic meanings of the words used.

Grice gives the example of an academic letter of recommendation that speaks only to a candidate's punctuality.<sup>699</sup> Such a letter does not say, as a matter of its semantic meaning or even of the material inferences that follow from its meaning,<sup>700</sup> that such a candidate is not recommended. Yet the writer's failure to address the relevant criteria for a recommendation would be understood by its readers as a clear signal that the writer did not recommend the candidate.<sup>701</sup> Part of the linguistic content would be shaped by the social practice of avoiding the express statement of negative views. That is a linguistic practice that goes to language use rather than to meaning itself, although it shapes, as in the example, the linguistic content of texts and utterances. In the context of the Takings Clause, this maxim would attach import to the failure to expressly address the application of the principle to takings for private use (or otherwise to address that class of potential governmental actions).

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(1962) (emphasizing the role of performatives in our language and arguing that performatives may be infelicitous, but that they have trivial truth conditions); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1970).

696. GRICE, *supra* note 695.

697. Perhaps somewhat surprisingly, in a legal text like the Constitution, Grice's fourth maxim of quality, which calls for utterances and texts to be true and reliable, does not appear very relevant. This makes sense, however, because of the performative character of the constitutional text. Texts that make something true may be prudent or wise, but in the absence of a linguistic expression that purports to be saying true, reliability is not a relevant standard.

698. *Id.* at 28, 33.

699. *Id.* at 33.

700. Material inferences are conclusions that can be drawn from the conceptual content of premises but do not follow as a matter of formal logic from the premises. *See* BRANDOM, *MAKING IT EXPLICIT*, *supra* note 167, at 97–104.

701. *Id.*



The second category is that of Relation and the relevant principle or maxim is the principle of appropriateness.<sup>702</sup> According to that principle, utterances and texts express only the meaning that is relevant and salient in the context in which they are spoken or disseminated. Irrelevant material is not properly included; it is communication static. The context of the Takings Clause of the Fifth Amendment is limitations on (initially, before Reconstruction) the federal government in its dealings with respect to private property. In this context, this maxim calls for the Takings Clause to speak to what action is limited and how actions are limited and, perhaps, to what is required to the extent the limitations are violated. In this context, we may understand the text to provide a limitation on the power of the federal government.

The third category is that of Manner and the relevant maxim or principle was that of brevity.<sup>703</sup> That principle dictates that an utterance or text not include extraneous detail of little or no relevance. In statutory or constitutional interpretation, a parallel maxim requires that each term in a text be given meaning or import.<sup>704</sup> In the context of the Takings Clause, this maxim requires that the phrase “for public use” be relevant to the text and not simply constitute an extraneous phrase.

Applying Grice’s maxims to the relevant Fifth Amendment text implies, first, under the maxims relating to Quantity and to Relation that the provision is to be read for the proposition that takings for private use are not permitted. If such takings were permitted, then articulating only the rules applicable to takings for public use in the Fifth Amendment would be manifestly misleading. The omission of language describing the treatment of such takings for private use would violate Grice’s pragmatic rules governing the principle of Quantity. Nothing about the context of such text otherwise makes it clear that such takings are permitted (or irrelevant to the text). Moreover, if such takings were permitted, then just compensation would surely be required, too. In context, treating takings for private use more favorably—dispensing with a requirement to pay just compensation—appears implausible or worse. Applying the second maxim of brevity yields the conclusion that the language “for public use” is necessary. Implicitly, the inclusion of that language indicates that the rules for takings for public and private use are different. That principle, alone, does not tell us how they are different, however.

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702. *Id.* at 28.

703. *Id.*

704. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (identifying and defending “The Surplusage Canon” that asserts that “every word and every provision” of a text should be given effect “if possible”).

The principle of appropriateness requires that the text speak to the important questions presented by the Takings Clause and perhaps the Fifth Amendment and the Bill of Rights more generally. Those Amendments address important rights of the people, rights of the states, and limits on the powers and procedures of the federal government.<sup>705</sup> This principle raises the question whether the Fifth Amendment should be read to confirm that the power to take private property exists under the Constitution in the absence of an express grant of such a power. If the Fifth Amendment is about limitations on federal powers and procedures, is it anomalous to confirm a power nowhere stated expressly? Is doing so inconsistent with the principle of relevance? The import of that language is to confirm that such takings are permitted, by contrast to takings for private use. In the absence of a grant of a power to take property for private use by another, and a provision that taking for public use requires just compensation, the better reading of the semantic and pragmatic sense of the provision is that takings for private use are prohibited. In that instance the provision states the requirement of just compensation. The constitutional text on takings thus provides a neat demonstration of the need for, and power of, constitutional pragmatics. It is important, however, to recognize that the application of the insights of philosophical pragmatics does not give us a foundation for a constitutional argument or, indeed, an argument at all. Attention to pragmatics simply helps us understand what the constitutional text says—and that what it says is not simply a matter of its semantic meaning. What a judge then does with this understanding of the linguistic meaning of the constitutional text to resolve a constitutional controversy is complex and not reducible to ordinary concepts of following a rule.<sup>706</sup>

Turning back to the academy and the philosophical arguments that have been imported into our Takings Clause discourse, what conclusions may we draw as to the proper role of philosophical analysis? We can see why the move to philosophical argument was so appealing. Faced with the doctrinal disarray in our Takings Clause jurisprudence, the apparent potential of political philosophy or economic, utilitarian analysis to reveal a deeper structure to which the constitutional doctrine could be conformed, the academic theorists were understandably captivated.<sup>707</sup> Yet philosophy has proven largely unhelpful because the controversies in the contemporary constitutional takings jurisprudence are not

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705. *Id.*

706. See André LeDuc, *Competing Accounts of Interpretation and Constitutional Argument in the Debate over Originalism*, 16 U. N. H. L. REV. 51, 92–109 (2017) [hereinafter LeDuc, *Competing Accounts*].

707. See, e.g., Michelman, *Fairness and Utility*, *supra* note 1, at 1169–72; ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 4–5, 24.

rooted in the kinds of confusions that philosophy can help with. The controversies are substantive, implicating the rights we think property owners should have and the confidence or distrust of government actors and their projects that shape our perspective on our political lives. For example, in *Kelo*, the question whether the Public Use Clause may be reduced to a matter of a sufficient public purpose reflects a real textual disagreement, albeit not a disagreement about semantic meaning. The semantic meaning, while clear, has been disregarded by long-established doctrine and precedent. More fundamentally, there may also be a disagreement among the justices about the scope of the power of eminent domain, but this disagreement is not easily translated into constitutional argument, at least when the putative power is exercised by a sovereign state, as in *Kelo*, and not the federal government.<sup>708</sup>

If we look at a couple of representative suggestions made in the academy we can see why they have not proved fruitful in the work of the Court. The arguments made in the academy are generally not made in the form of the accepted modes of constitutional argument. Michelman, Ackerman, and Epstein believe that they are making constitutional arguments. Proof that they are not comes from the reception those arguments have had in the Court. Bork was right when he concluded that Epstein had failed in his project to incorporate his libertarian account of the Takings Clause in our constitutional law.<sup>709</sup>

To understand why we do not need a *philosophical* foundation and theory is to consider the analogous project of pursuing a *mathematical* theory for our Takings Clause jurisprudence. We can imagine a project to provide a comprehensive mathematical model of our constitutional law that promises to provide answers to constitutional questions by deriving the answers under that model. Such a mathematical theory of our constitutional law would potentially be elegant, in the same way that the calculus offers an elegant model of Newtonian physics or higher mathematics models Einsteinian physics. Most of us discount the potential for such a mathematical account of our constitutional law, however, and would be skeptical of an answer or proof of the right answer to a constitutional question derived from such a model.<sup>710</sup>

That skepticism arises from at least three sources. First, we are no longer captivated in the space of practical reason by the models of science and mathematics, either as a matter of methodology or as a matter of epistemological aspiration. As Rorty has noted, most of us do not aspire to a science of law.<sup>711</sup>

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708. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

709. BORK, *TEMPTING*, *supra* note 19, at 230.

710. See Rorty, *Banality of Pragmatism*, *supra* note 161, at 91 (“Nobody wants to talk about a ‘science of law’ any longer.”). *But see* authorities cited *supra* at note 161.

711. Rorty, *Banality of Pragmatism*, *supra* note 161, at 91.

Second, there is a recognition that the constitutional jurisprudence of takings is a non-ideal theory, designed to capture the most justice in an administrable way. The crystalline clarity and precision of most mathematical theories do not easily fit or model such behavior. A mathematical theory would be hard-pressed to capture the socially normative dimension of our constitutional practices. Our constitutional arguments proceed by material inferences that justify conclusions chosen because they are plausible or attractive in light of our overall constitutional and other normative commitments.<sup>712</sup> Third, as suggested in the preceding description of constitutional reasoning, in constitutional decision judges make normative decisions. Outcomes, especially in hard, constitutional cases are underdetermined (but hardly indeterminate). A mathematical theory might describe decisional behavior but cannot prescribe how judges should decide cases. This is a substantial limitation on a mathematical theory.

The theoretical, conceptual arguments made in the academy, to the extent plausible or insightful, offer *something* to us in our thinking about the Constitution. It is in characterizing that contribution that we have to be attentive to the nature of constitutional argument. But we must also account for what the academic theorists can achieve and have achieved. We might say that the academic theorists, to the extent that their arguments are successful, offer us *reasons* to prefer certain outcomes but they do not offer us *constitutional arguments* for such results. The difference is that constitutional arguments are only arguments that fit within our practice of making such arguments, acknowledging such arguments, rebutting them, or offering alternative supporting or opposing arguments.<sup>713</sup>

Five differences highlight the fundamental distinction between constitutional and philosophical argument. First is the difference between the nature of compelling constitutional and philosophical arguments in the case of hypotheticals. Both philosophical and constitutional argument and reasoning incorporate hypothetical cases in their arguments. But the hypotheticals employed—and their force—are quite different in the two contexts. In the philosophical context, hypotheticals can be implausible and far-fetched.<sup>714</sup> They nevertheless stand as acceptable and often highly regarded steps in celebrated

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712. See LeDuc, *Competing Accounts*, *supra* note 706, at 92–109 (defending an account of the informal arguments of practical reasoning in our constitutional practice and criticizing theories that seek to reduce constitutional reasoning to formal syllogisms).

713. Christopher L. Eisgruber, *Should Constitutional Judges be Philosophers?*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 5 (Scott Hershovitz ed., 2006) (arguing against Dworkin's argument that adjudication requires philosophical argument).

714. See, e.g., MARGARET GILBERT, *ON SOCIAL FACTS* 10 (1989) (acknowledging that the counterexamples that she may adduce against a claim may appear *silly* as a practical matter); NOZICK, *supra* note 227, at x.

arguments.<sup>715</sup> While epistemology has been one of the most fertile grounds for such hypotheticals, Rawls's veil of ignorance, the central, informing hypothetical construct employed to derive his distributive theory of justice, is not intended as anything other than a conceptual tool.<sup>716</sup> In the constitutional context the range of hypothetical cases that figure persuasively in argument is much narrower. The hypotheticals that are most powerful in constitutional argument are those that are real and evocative. Implausible hypotheticals may be dismissed as unpersuasive.<sup>717</sup> In the context of the practical reasoning of constitutional law, relevance and salience is restricted to the possible that seems probable or important.

A second difference between arguments in the two contexts relates to the need to create an alternative theory or principle before a criticized theory may be rejected. In the famous epigram of the late Justice Scalia, "you can't beat somebody with nobody";<sup>718</sup> that is, to discredit and reject a theory, in this case the originalist theory of constitutional interpretation, the critic must offer a plausible alternative. To the extent that Justice Scalia was right, it is because, in the context

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715. See, e.g., Alvin I. Goldman, *Discrimination and Perceptual Knowledge*, 73 J. PHIL. 771, 772–73 (1976) (arguing for a causal theory of knowledge on the basis of an example of a county in which the inhabitants construct extremely realistic barn facades, making it impossible for an ordinary observer unaware of this practice to distinguish looking at barns from looking at barn facades); Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963) (arguing against the definition of knowledge as justified true belief on the basis of hypothetical examples of justified true beliefs that are justified by erroneous reasons and so are not comfortably called knowledge).

716. See RAWLS, JUSTICE, *supra* note 39, at 136–42.

717. BORK, TEMPTING, *supra* note 19, at 169 ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). For example, the Court in *Horne* rejected the Government's defense of the restriction on the Hornes' ability to sell all of their raisins into the market without being held to have suffered a taking of the restricted raisins on the basis of the offsetting pricing benefits as an unsupported "hypothetical-based" argument. *Horne v. Dep't of Agric*, 135 S. Ct. 2419, 2432 (2015). While the meaning of the Court's argument is not wholly clear, the term "hypothetical" is clearly pejorative and figures in its rejection of the Government's defense. The dissent, by contrast, saw nothing hypothetical about the proposed netting. *Id.* at 2435 (Breyer, J., dissenting). *NFIB v. Sebelius*, 567 U.S. 519, 616–17 (2012) (Ginsburg, J.) (mocking the Court's argument from the broccoli hypothetical as "specious logic"). *But see id.* at 558 (Roberts, C.J.) (invoking the hypothetical of a government mandate to buy broccoli as a means to improve public health to argue against the power of the federal government to impose a requirement on individuals to purchase health insurance under the Commerce Clause).

718. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989). See also Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professor Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983) ("it takes a theory to beat a theory").

of constitutional law, controversies must be resolved and decisions made. In the constitutional space of practical reason, it is not enough to know that a theory or principle is imperfect or subject to exception. A controversy must be resolved and the most persuasive arguments, however imperfect they may be, are sufficient for decision.<sup>719</sup> In theoretical philosophical argument there is no compulsion to decide, so a powerful argument against a theory or argument, even in the absence of an alternative theory or argument, can be accepted.

Third, constitutional and philosophical arguments approach precedent differently, at least since the Renaissance. For philosophy, precedent may pose or highlight a philosophical problem, but there is never an argument from authority for a philosophical position. In constitutional law, by contrast, precedent provides an argument from authority.<sup>720</sup> The reasons for this difference are at least two; there may be others as well. First, precedent simplifies constitutional argument. It permits new questions to be analyzed not on a blank slate but in a context of established doctrine that can provide direction and guidance.<sup>721</sup> There is no comparable advantage to simplification in philosophical reasoning. Second, independent of the role precedent and authority plays in constitutional reasoning, constitutional authority reflects the importance of protecting legitimate

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719. This same necessity of decision explains why ordinary historical techniques may be insufficient to answer the questions that arise in constitutional controversies. Historians choose the questions that they address, and they generally choose questions that they believe have historical answers in the data available *and that were meaningful in the relevant historical past*. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B. U. L. REV. 204, 218–22 (1980); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 441 (1996) (noting that professional historians generally do not ask the kinds of questions that legal historians seek to answer regularly).

720. See, e.g., RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 98–101 (2018) (arguing that precedent plays a valuable role in the Supreme Court even when a majority of the sitting justices question the merits of the earlier decision); SCALIA, INTERPRETATION, *supra* note 226, at 139–40 (noting that *stare decisis* and precedent makes authoritative decisions that are not necessarily defensible on their merits); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 181–87 (paperback ed. 1992); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) [hereinafter Schauer, *Precedent*] (characterizing precedent as providing authority solely as a result of its “historical pedigree”).

721. FRIED, SAYING, *supra* note 29, at 4–5 (criticizing the alternative of a “fresh start” approach to judicial decision-making rather than using precedent).

expectations.<sup>722</sup> Constitutional precedent provides greater certainty as to the law for the political community bound by such law.<sup>723</sup> Again, there are not comparable expectations in the broader community as to philosophical principles or arguments that warrant protection.

Fourth, there is a granularity to constitutional argument that philosophical argument, even in its most discrete and casuistic forms, lacks.<sup>724</sup> Some of the difference is captured with the recognition that our constitutional practice calls for practical reasoning, not theoretical reason.<sup>725</sup> Constitutional law must stand ready to provide resolution to constitutional controversies—if only to deny consideration on the basis of standing, the requirement of a case or controversy, the doctrine of political questions, or other doctrinal predicates that must be satisfied before a question may be considered. (There are no similar threshold questions to philosophical inquiry.) Once the Court entertains a constitutional case, the parties must go home with a resolution. Since constitutional controversies arise in particular cases, constitutional arguments and reasoning must address those particular cases.<sup>726</sup> In drawing this distinction I am not suggesting that the general principles of philosophy form the foundation for constitutional reasoning, only that constitutional argument is more particularized, in general, than philosophical argument. I am agnostic as to the logical relationship of the sets of conclusions generated from the two practices. The argument requires no such further (and likely unsustainable) claim of philosophical priority.

Fifth, the pragmatics and use of constitutional and philosophical arguments are very different. Philosophical arguments operate within the space of theoretical reasons. Constitutional arguments advanced in the context of the adjudication of constitutional cases play an important role in the decision of these

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722. See Schauer, *Precedent*, *supra* note 720, at 597–98 (describing the benefits of predictability that precedent enhances); SCALIA, *INTERPRETATION*, *supra* note 226, at 139–40.

723. FRIED, *SAYING*, *supra* note 29, at 7–9 (describing the measures and benefits of doctrinal continuity articulated through precedent).

724. See Fried, *Artificial Reason*, *supra* note 677, at 54 (“it is preposterous to imagine that philosophy can tell us whether there should be a right to privacy in a public telephone booth”).

725. See generally ROBERT AUDI, *PRACTICAL REASONING* 102–06 (1989) (comparing practical and theoretical reason).

726. The granularity of our constitutional law is undoubtedly also reinforced by the common law tradition. See generally SCALIA, *INTERPRETATION*, *supra* note 226, at 45. Ely sarcastically highlights the very different categorical force of philosophical argument nicely. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58 (1980) (“We like Rawls. You like Nozick. We win, 6–3.”).

cases. They have a performative role as judges employ them to do their job—decide cases. The differing missions of arguments in the two contexts helps explain why, for example, implausible hypotheticals do not figure in constitutional argument and why constitutional arguments are so focused upon the particular case at hand.

In short, philosophical argument calls for the exercise of theoretical reason and constitutional argument calls for practical reason.<sup>727</sup> The differences between the two prevent easy substitution of arguments from one space into the other. The norms governing what is a good or dispositive argument (if the latter concept is even non-trivial in the space of constitutional reasons) are different in the two contexts. While constitutional law is not entirely insulated from philosophy or the rest of our social and normative practices, it has an important autonomy that shapes its practice of argument and the decision of constitutional controversies.

The first, perhaps most obvious path to rehabilitate the arguments of these theorists in the face of this criticism would be to interpret their arguments to extend to a claim that our constitutional practice should be revolutionized to incorporate the kinds of philosophical arguments they make. As I have noted, these theorists do not have the methodological self-consciousness to make such a claim expressly. But if we so interpret and extend their claims, then we disarm the challenge that the arguments that they made are not constitutional arguments in our current practice. We can, however, reject this strategy easily. In the hurly burly, practical world of our constitutional decision-making, we are not about to adopt the theoretical reasoning and arguments of philosophy.<sup>728</sup> Nor should we.

Without endorsing the Chief Justice's tacitly dismissive stance toward much contemporary legal scholarship, we can acknowledge that his reservations are appropriate with respect to the prospect of importing philosophical arguments into our constitutional argument and reasoning.<sup>729</sup> As others before him have

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727. See generally AUDI, *supra* note 725; LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING (2008). I have also previously defended a metaphilosophical claim, drawn from Wittgenstein (among others) that philosophy is not foundational or systematic, but only therapeutic. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11. But see BRANDOM, MAKING IT EXPLICIT, *supra* note 167 (offering a comprehensive theory of language and meaning).

728. See John G. Roberts, *Interview at the Fourth Circuit Court of Appeals Annual Conference* (June 25, 2011) (criticizing much of the academic scholarship as theoretical and of little utility in our legal and constitutional practice); see also Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18<sup>th</sup>-Century Bulgaria*, 18 GREEN BAG 2D 251 (2015) (parodying Chief Justice Roberts's criticism).

729. See RICHARD POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (2016); Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) [hereinafter Posner, *Problematics*].



remarked the uncertain and open-ended nature of philosophical debate offers little promise of providing answers for the hard choices we must make to resolve constitutional cases.<sup>730</sup> We cannot substitute theoretical reason for the instantiated practical reasoning and discursive practices of our constitutional law.

Critics may argue that my insistence that the arguments and reasons given by the academy for particular outcomes in our constitutional Takings Clause jurisprudence translate into constitutional arguments may impose too strict a requirement. Moreover, my analogy to the power of mathematical theory in law may appear to have renowned counterexamples. The Learned Hand formula for determining when a claim for negligence lies is perhaps the most obvious.<sup>731</sup> This formula asserts that in the case of reasonably foreseeable harms if the cost of preventing the harm is less than the amount of the harm multiplied by the probability of harm then the failure to incur the prophylactic costs is negligence.<sup>732</sup> The Hand formula may appear to be an example of a mathematical argument for a definition of negligence. If we can have mathematical arguments in law it would hardly seem implausible that we might have philosophical arguments, too.

It is thus important to be precise about the role that the Hand formula plays in the decision of *Carroll Towing* and in our negligence law more generally. The principal question is whether the formula stands as an *argument* for the definition of negligence or as the *expression* of the definition of negligence. Hand first states the formula for when conduct is negligent discursively, and then restates it algebraically, suggesting that “[p]ossibly it serves to bring this [definition of negligence] into relief to state it in algebraic terms.”<sup>733</sup> The formula is thus presented as a perspicuous means by which to express the principle of our negligence law, not to make an argument for what these principles should be.

The constitutional theorists claim to be doing constitutional law (sometimes, like Epstein, in addition to doing political philosophy or theory). But perhaps they should be understood only to be giving us a framework within which to do constitutional law, providing signposts as to where we ought to be headed. Separating the classical academic Takings Clause theory from the constitutional law of that Clause in this manner divides the constitutional space of reasons in an implausible and unpersuasive manner. Constitutional argument is not supposed to be merely an empty form, window dressing for the outcomes that are already

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730. See SCALIA, INTERPRETATION, *supra* note 226, at 45; BORK, TEMPTING, *supra* note 19, at 254–55. See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11.

731. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

732. *Id.*

733. *Id.* at 173.

determined. As Bobbitt has asserted,<sup>734</sup> the legitimacy of constitutional decision turns on it being embedded in our practice of giving and answering constitutional arguments in our space of constitutional reason. No further argument can be offered to legitimate this practice. If there is not a translation of an argument from a constitutional theory into our canonical constitutional arguments, then we do not have a theory of constitutional law we have a theory *about* constitutional law.

Two arguments may appear to support the philosophical strategies challenged here. The first argues that the role of philosophy in Takings Clause theory may be charitably interpreted as *therapeutic*, not *foundational*. My argument here—and elsewhere<sup>735</sup>—goes only to foundational philosophical arguments. This response does not fit the facts. Apart from some casual references to Wittgenstein's metaphilosophical characterizations of philosophy as therapeutic, all of these theorists deploy philosophical argument in a foundational role. From premises from their diverse substantive philosophical claims they seek to make substantive, constitutional arguments. It is this foundational use of philosophical argument that fails.

A second and final line of defense for the kind of scholarship and arguments that Michelman, Ackerman, and Epstein exemplify can be drawn from some of the thinking about legal scholarship by Meir Dan-Cohen<sup>736</sup> and Edward Rubin.<sup>737</sup> Both defend normative legal scholarship that aspires to draw from arguments beyond those available to judges and to offer an analysis that is distinct from the practice and discourse of adjudication.<sup>738</sup> They argue for the autonomy of

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734. See generally BOBBITT, INTERPRETATION, *supra* note 369, at ix–xv (describing the modalities of constitutional argument as providing a framework within which we can assess the legitimacy of constitutional argument and decision).

735. See LeDuc, *Anti-Foundational Challenge*, *supra* note 11; LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11.

736. Meir Dan-Cohen, *Substantive Legal Theory and Its Audience*, 10 TEL AVIV U. STUD. L. 7 (1990).

737. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889 (1992) (articulating a normative theory of legal scholarship that assesses work on the basis of clarity, persuasiveness, significance, and applicability); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) [hereinafter Rubin, *Practice and Discourse*].

738. Dan-Cohen, *supra* note 736, at 8; Rubin, *Practice and Discourse*, *supra* note 737, at 1904 (arguing that by writing in the style of judges, legal scholars are less effective at speaking to administrators and legislators—who are more important decision-makers in the modern administrative state); see also Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993) (assessing criticism of

legal scholarship.<sup>739</sup> Rubin, in particular, argues against scholars seeking to maintain a unity of discourse with judicial decision makers.<sup>740</sup> The normative, philosophical arguments of these scholars may appear to be just the kind of work that the Dan-Cohen and Rubin methodological analysis calls for. My objection based upon the practical unimportance of this work may appear from their perspective to be a reactionary defense of a traditional, doctrinal type of scholarship whose time has passed.

This is not the place to adequately engage these complex, subtle and important claims. But two points can be made in passing. First, in our constitutional discourse, the dimension of legislative discourse is largely atrophied. As Ackerman trenchantly notes, there have been no fundamental amendments to our Constitution since Reconstruction.<sup>741</sup> There is no meaningful opportunity to engage constitutional amendment in our normal constitutional discourse. So the focus Rubin emphasizes is simply unavailable as a dimension of normal constitutional discourse. Normal constitutional scholarship can only address constitutional judges if it is to have practical import. Second, while Dan-Cohen and Rubin defend normative legal scholarship, they do not expressly defend philosophical argument. My argument here is not against normative arguments and claims but against the intellectualized, foundational, conceptual, philosophical argument Michelman, Ackerman, and Epstein pursue.

It would be nice to have an account of how all of the takings scholars examined here made such a wrong turn; it would be nice to have an account of the genealogy of the disarray in the classical commentary on our Takings Clause jurisprudence. The wrong turn was made, I suggest, when these academics mistook persuasive conceptual arguments for constitutionally authoritative arguments. I have explained above why this move was so tempting: it offered the

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the movement away from doctrinal scholarship in the academy); Posner, *Autonomous*, *supra* note 23.

739. Dan-Cohen, *supra* note 736, at 8, 14 (arguing the separation of the two discourses of scholars and judges is appropriate because legal scholars are seeking truth and judges are “result oriented wielders of power”); Rubin, *Practice and Discourse*, *supra* note 737, at 1904.

740. Rubin, *Practice and Discourse*, *supra* note 737, at 1904–05, 1904 (“The great defect in legal scholarship is that scholars tend to speak the way judges do, that they have adopted a unified discourse with their subject matter.”).

741. ACKERMAN, THE CIVIL RIGHTS REVOLUTION *supra* note 16, at 3–19, 23–26. *But see* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014) (arguing for fundamental substantive constitutional amendments).

advantages of theft over honest toil.<sup>742</sup> Each of the classical theorists surveyed here offered thoughtful, insightful analyses of the questions that arise under the Takings Clause or the Just Compensation Clause thereof. Each believed the arguments they made and the conclusions that they derived. What they all missed (although Ackerman came closest to recognizing it<sup>743</sup>) was that the kinds of arguments that they made were not like the arguments made by the courts in deciding Takings Clause (or any other constitutional) cases. Implicit in the claims that Michelman, Ackerman, and Epstein make is a commitment to a metaphilosophy that treats philosophy as a discipline that has a particular subject matter and a claim to provide a foundational account of the truth and knowledge.<sup>744</sup> They sought to deploy those privileged philosophical claims in the context of constitutional argument and theory. Ackerman, for example, looked expressly to utilitarian<sup>745</sup> and Kantian<sup>746</sup> principles to suggest ways to conceptualize the Takings Clause. But both Michelman and Ackerman lacked the methodological sophistication to recognize the ways in which their arguments were more theoretical, more speculative, and, ultimately, more controversial, than constitutional arguments. They all saw the power and virtues in the abstraction and conceptualization of their approach and none saw the flaws.

As noted above in my analysis of the Court's decision and argument in *Lucas*, the consonance of the decision with Epstein's substantive stance is paralleled by the Court's unwillingness to make or endorse the theoretical arguments that Epstein advances. The Court's diffidence toward Epstein's philosophical theory should not surprise us. Rather, it would have been surprising, perhaps even shocking, if the Court had adopted Epstein's theoretical, philosophical foundational arguments, because advancing those kinds of arguments as the grounds of decision would have been outside the Court's own decisional practice.

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742. *See supra* pp. 322–23.

743. *See* ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 84–87.

744. *See* Michelman, *Fairness and Utility*, *supra* note 1, at 1219–23; ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 5; EPSTEIN, TAKINGS, *supra* note 2, at 7–23 (describing the fundamental theory of the Constitution as drawing principally from Hobbes and Locke). Ironically, while Ackerman invoked Wittgenstein's therapeutic model of philosophy in passing, that acknowledgment never seemed to inform the systematic philosophical commitments and aspirations of his project. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 177. *But see* RICHARD RORTY, *Keeping Philosophy Pure: An Essay on Wittgenstein*, in CONSEQUENCES OF PRAGMATISM: ESSAYS 1972–1980 19 (rejecting the claim that philosophy is an autonomous, foundational *Fach*); LeDuc, *Anti-Foundational Challenge*, *supra* note 11.

745. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 41–54.

746. *Id.* at 71–80.

Thus, *Lucas* is a good example of why these philosophical arguments cannot be made the basis for resolving the constitutional disagreements of our Takings Clause cases.

The role for philosophy and philosophical argument in our constitutional takings jurisprudence is similarly a limited one. The first role that philosophy can play is to acknowledge that it has no substantive role in the decision of constitutional controversies about the public use requirement or the distinction between the proper exercise of regulatory powers and takings that require just compensation, among others. Radin argues that philosophy shows us a couple of confusions in Epstein's libertarian account of our takings law.<sup>747</sup> First, she argues that the nature of the concept of property as an essentially contested concept carries with it the germs of significant difficulties in our takings law.<sup>748</sup> Second, she argues that Epstein tacitly adopts an erroneous conceptualist stance.<sup>749</sup> That is, he assumes that the legal and constitutional concepts he employs in his constitutional reasoning have meanings that can do more work than is, in fact, possible.<sup>750</sup> Radin's arguments are examples of such a therapeutic role for philosophy in our constitutional jurisprudence.

Is this argument against a foundational role for philosophical argument in grounding our law of takings itself grounded on (and dependent upon the truth of) an anti-foundational account of constitutional argument?<sup>751</sup> While those metaphilosophical arguments support the conclusion that the philosophical arguments advanced in the academy ought not to determine the constitutional legal questions, more direct arguments are in play here, too. The competing libertarian theory of Epstein and personality theory of Radin would result in radically different limits on the state's ability to take private property. Indeed, on the very concept of what constitutes property subject to protection from taking by the state. The incompatibility of those theories and, at the end of the day, the absence of the requisite grounding for either theory in the constitutional text, constitutional doctrine, or the Constitution makes the project to reshape our constitutional takings jurisprudence in the model of those theories impossible.

In addition to challenging Epstein's libertarian approach to the Takings Clause, Radin offers her own account. In doing so, she has probably come closest

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747. Radin, *Diagnosing the Takings Problem*, *supra* note 1; *see* Radin, *Problems*, *supra* note 56.

748. Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 160–61.

749. *See* Radin, *Problems*, *supra* note 56, at 100–05.

750. *Id.*

751. *See generally* LeDuc, *Anti-Foundational Challenge*, *supra* note 11 (arguing that there is a plausible alternative to the representational account of constitutional language and the foundational account of philosophy's role in constitutional theory).

to what is needed in her defense of the concept of situated judgment.<sup>752</sup> Yet even she is insufficiently attentive to the demands of doctrine and text<sup>753</sup> and too willing to intellectualize her analysis.<sup>754</sup>

We can see, too, why Radin's complex account of our takings jurisprudence and the structure of its arguments has proven less helpful or influential than it might have been. Part of the reason lies in Radin's anti-formal, anti-conceptual account of the law.<sup>755</sup> Radin's account would not have predicted or supported the Court's elevation of the doctrine of nuisance as a bright line test for the scope of regulatory authority before a taking occurs because, like Michelman before her, she does not believe that direction is fruitful. The Court, by contrast, has employed increasingly formal arguments.

The greatest flaws in Radin's account are its failure to engage adequately with existing constitutional doctrine and the constitutional text. Such engagement—as well as engagement with the historical understanding of that text—is not incompatible with the pragmatist stance Radin adopts. In a pragmatist theory, the arguments from text and history supplement the central prudential and functional arguments of our constitutional practice. Contemporary takings jurisprudence has little text or history on which to construct the jurisprudence of takings, but it now has a significant corpus of doctrinal precedent. That precedent perhaps does not need to be read with precisely the same kinds of textual and historical arguments that are appropriate for the constitutional text, but it nevertheless requires deference and attention.

Radin, despite her pragmatism, does not acknowledge the power of that precedent and the radicalism of her own stance. She sees how radical Epstein's

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752. Situated judgments are pragmatic decisions based on the recognition of “partial principles and the unique particularities of each case.” Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 165; *see also* Michelman, *Takings, 1987*, *supra* note 292, at 1629 (endorsing an account of situated judgment).

753. In arguing for a fundamental distinction in our Takings Clause jurisprudence between fungible and nonfungible property, Radin never really addresses the objection that such a fundamental distinction must be created whole cloth by the courts, without any foundation in the constitutional text. Such construction is not unprecedented, but it merits a defense. Radin, *Property and Personhood*, *supra* note 445. Textual, historical, and doctrinal arguments about the Takings Clause are important in our Takings Clause jurisprudence, the absence of a textual or historical anchor in Radin's theory poses a challenge for her.

754. Radin, *Introduction*, *supra* note 131, at 1.

755. *See, e.g.*, Radin, *Problems*, *supra* note 56, at 99 (attacking Epstein's theory as excessively conceptual).

theory would be<sup>756</sup> but never really acknowledges the radicalism in her own takings jurisprudence. By making the relationship between property rights and the ability of individuals to achieve and protect their identity as autonomous and equal persons central to her analysis of the state's relationship to property and the nature of the state's obligations under the Takings Clause, Radin takes a position that has no express nexus with the history or text of the Constitution. While recognizing the centrality of situated judgment and calling for it in the decision of takings cases, Radin strips too much of the doctrinal situatedness of our takings jurisprudence from her account to give an adequate description of our Takings Clause jurisprudence. In its place she emphasizes philosophical argument.<sup>757</sup> Moreover, the decisional implications of that argument are substantial, even radical. For example, Radin would have upheld the permit requirement rejected in *Nollan*.<sup>758</sup> Radin would also reject the mechanical or absolute application of the long-standing trespass line of authority that was reaffirmed in *Loretto* on the basis that we need a further inquiry into the import of the trespass for the persons suffering the trespass.<sup>759</sup>

What, then, is to be done about the apparent disarray in our constitutional takings jurisprudence if philosophical analysis cannot reform that law? The disarray in our constitutional takings jurisprudence is to be solved by the traditional, retail methods of constitutional argument and decision. *Kelo* provides a good example of how this might occur.<sup>760</sup> In *Kelo*, the Court confronted an urban redevelopment project that targeted a distressed neighborhood that was not found to be blighted.<sup>761</sup> The private residences (and other properties) that had been taken were to be transferred to another private person for its commercial ownership and use.<sup>762</sup> The dissents call out the troubling implications of the elimination of the public use requirement.<sup>763</sup> *Kelo* was a hard case; it does not seem that the Court got it right.

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756. *See id.* at 98.

757. *See* Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 161–64.

758. Radin, *Liberal Conception*, *supra* note 46, at 128–29.

759. Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 155.

760. For a discussion of how this case might have gone, see LeDuc, *Beyond Babel*, *supra* note 645 (arguing that greater attention to the particular issues presented in *Kelo*—and less attention to the framework of the originalism debate—would have produced a more powerful and persuasive decision).

761. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

762. *Id.* at 474.

763. *Id.* at 494 (O'Connor, J., dissenting).

Can the public use requirement be revived in a manner that is not a radical, discontinuous departure from existing Takings Clause doctrine while limiting state action in a manner more consistent with the constitutional text and traditional republican concerns about the exercise of state power? The requirement of public use would appear to preclude the taking of private property for transfer to another private person unless the state (or a state instrumentality) was the user of the property. Articulating when the state or a state instrumentality was the user of property would permit condemnation of private property in some circumstances while precluding contemporary statist models of redevelopment like that in *Kelo*.<sup>764</sup>

Justice O'Connor sought to make a start toward restoring the public use requirement to a practical, meaningful role in our constitutional takings law.<sup>765</sup> Requiring public use would bar some of the more ambitious corporatist undertakings by the state. But while some such projects face challenges from free riders, the practical reality is that private development has been the historical model for industrial, commercial, and residential real estate development. The proponents of a more activist state have not made a case of market failure that might motivate permitting a broader state role. If such a case could be shown, the public welfare could be enhanced by a more activist governmental role, as classical liberal political theory acknowledges.<sup>766</sup> So the growing doctrine and precedent reading the public use requirement out of the takings Clause would indeed appear ripe for reconsideration.

Another, perhaps more charitable approach to the theoretical literature of the Takings Clause is to read it not as speaking to our constitutional takings jurisprudence but to a model takings jurisprudence. Such an interpretation admittedly does some violence to the aspirations of that literature which purports to contribute to the space of constitutional arguments and reasons for decisions.<sup>767</sup> With the benefit of several decades of experience, it is now clear that whatever the aspirations of that literature, it has not featured in the space of reasons in our constitutional takings jurisprudence. What that literature does offer are competing visions of statutory or constitutional principles for delineating the scope of state regulatory power and the rights of persons to private property in the face of that state power. But our constitutional law is not, now, returning to first principles,

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764. See Rubinfeld, *supra* note 1.

765. *Kelo*, 545 U.S. at 494.

766. See generally RAWLS, JUSTICE, *supra* note 39 (arguing under Rawls's difference principle, that inequality is permissible only if, and to the extent, that it results in an improvement in the position of the least well-off members of society).

767. See, e.g., EPSTEIN, TAKINGS, *supra* note 2, at x; Michelman, *Fairness and Utility*, *supra* note 1, at 1165.



either with respect to the legitimacy of the federal government or with respect to the Takings Clause. That may have been the state of our constitutional jurisprudence in the first few decades of the Republic as the Court wrestled with fundamental questions of standing, the requirement of a case or controversy, judicial review, and the like, but the passage of time, the growth of constitutional doctrine, and development of our constitutional decisional practice has foreclosed that approach today. Our constitutional takings jurisprudence is a matter of normal law, not a matter for revolutionary jurisprudence.<sup>768</sup>

The central arguments made by Michelman, Ackerman, and Epstein are not constitutional legal arguments. They are not legal arguments because they are not in (and cannot be persuasively restated in) an accepted mode of constitutional argument.<sup>769</sup> By contrast, the Takings Clause opinions that have been written take the canonical form.<sup>770</sup> Perhaps such academic arguments ought to have been introduced and accepted as new modes of constitutional argument. That would be a radical step and, on balance, an undesirable direction for our law to move in.

It would be undesirable because such arguments do not have the transparency, certainty, or finality that we need in constitutional legal arguments.<sup>771</sup> Evidence for the absence of finality is the failure to resolve the fundamental differences between Michelman and Epstein, for example—a gulf that is even greater than the disagreements about our substantive constitutional takings jurisprudence in the Court. Evidence for the lack of transparency arises from the conceptual sophistication that the academics bring to their debate. The kinds of questions that Rawls's theory raises and the kinds of arguments necessary to reach judgments about the claims Rawls defends<sup>772</sup> make it unlikely that such theory could ground our constitutional takings jurisprudence. In particular, the

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768. To put the matter more precisely, from within our practice of constitutional takings law, revolutionary approaches or theories are not welcome or possible (effective). Revolutionary change would appear to come only from outside, by constitutional amendment or from adoption of a new constitution.

769. See BOBBITT, FATE, *supra* note 121. Statements of utilitarian philosophy or of the conclusions of Rawlsian moral theory do not constitute premises or grounds for constitutional argument without, at the least, a context that translates them into elements in the form of canonical constitutional argument.

770. See *supra* Part II.

771. See generally LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11, at 153–54 (arguing for the distinction between constitutional argument and philosophical argument on the basis of the practices within which such types of arguments are conducted and the different norms for strong and weak arguments within such different—if sometimes overlapping—spaces of reasons).

772. See, e.g., MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 11–15 (1987).

universal and ahistorical foundations of that theory in the concept of the original position where individuals are behind the veil of ignorance is not easily reconciled with the historical Constitution and constitutional doctrine. Even if the metaphilosophical claim I have made<sup>773</sup> were not true, the nature of contemporary ethical theories like that propounded by Rawls makes them poor candidates to ground our constitutional law because of their sophistication and complexity. Judges are not philosophers and the qualities that make good judges are not the same as the fluency with abstract (and sometimes arcane and abstruse) concepts and argument that make good philosophers.

Similar objections may be made to libertarian theories.<sup>774</sup> Epstein's theory is vulnerable to a range of criticism. In particular, Epstein's claim that property owners are entitled to share in the benefits of the formation and operation of the state in proportion to their ownership of property in the state of nature<sup>775</sup> appears implausible. The failure to address the challenges that intangible property creates for the libertarian account of the Takings Clause is another important flaw.

Finally, a more fundamental challenge to the project that Michelman, Ackerman, and Epstein share is to reject their ontological assumption that the nature of propositions of constitutional law is declarative, to *say* what the constitutional law is, to take the constitutional law as true rather than performative, to make the propositions of constitutional law true. The first step in the argument is to show that the theorists examined here endorse the representational account of constitutional language and the independent ontological status of the Constitution. In the case of Michelman, one important source of his ontological commitments may be Rawls. While Rawls, in his account of the veil of ignorance and the choices that we would make in the original position, may appear to be describing how we construct a just and fair society, is instead describing an analytical methodology that enables us to discover the requirements of justice.<sup>776</sup> Michelman follows this approach.<sup>777</sup>

Ackerman's references to the later Wittgenstein might suggest that he rejects a foundational account of philosophy and a representational account of

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773. LeDuc, *Making Constitutional Meaning Express*, *supra* note 34, at 123 (denying that philosophy can play a foundational role in other realms of our discourse).

774. *See generally* Radin, *Problems*, *supra* note 56, at 100–04 (arguing that the ahistorical natural law of libertarianism is implausible).

775. EPSTEIN, TAKINGS, *supra* note 2, at 4–5.

776. RAWLS, JUSTICE, *supra* note 39, at 17–22 (characterizing “justice as fairness”).

777. Michelman, *Fairness and Utility*, *supra* note 1, at 1221.

constitutional language.<sup>778</sup> But he puts his stance expressly as to the foundational role of philosophy when he claims that philosophy decides cases.<sup>779</sup> Utilitarian and Kantian moral theory is far more central to Ackerman's constitutional ontology than Wittgenstein is.<sup>780</sup> Those moral theories are each committed to a non-relativist moral theory. They each accord philosophy the role of identifying the nature of moral obligation. To the extent that Ackerman eschews the dominant legal positivist account of the relationship between moral theory and legal obligation,<sup>781</sup> he can directly construct a foundationalist account of the role of moral philosophy in our constitutional law of takings.

Ackerman does not make clear his commitments to legal positivism, asserting that legal positivism is a concept "whose precise meaning I have never got entirely clear."<sup>782</sup> The separability thesis of positivism claims that the content of legal propositions is not necessarily congruent with the content of moral propositions.<sup>783</sup> Ackerman is committed to the claim that the kinds of philosophical arguments he has identified in utilitarian and Kantian moral philosophy are necessarily good legal arguments, too. Ackerman seems to want to be a legal positivist and still eat his moral philosophical cake, too.

With respect to the representational account of language and the truth of authoritative propositions of constitutional law Ackerman is less explicit. With his model of Scientific Policymaking,<sup>784</sup> it may appear that he contemplates, at least as an alternative,<sup>785</sup> a performative account of constitutional decision. But Ackerman's four archetypes of constitutional theory are archetypes of constitutional interpretation. Ackerman addresses these issues most clearly—if not so very clearly—in his ultimate chapter, *On the Nature and Object of Legal Language*.<sup>786</sup> It is not entirely clear what Ackerman believes about either the *nature* of legal language or its *object*. Object can mean the referent of words or it can take a purposive meaning, referring to the task or end of words and language. The

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778. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 177. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 11, at 151–59 (describing the anti-representational account of the truth of propositions of constitutional law).

779. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 5.

780. *Id.* at 44–46, 71–72.

781. See generally LeDuc, *Paradoxes of Positivism and Pragmatism*, *supra* note 389.

782. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 283–84 n.46.

783. COLEMAN, *supra* note 389, at 104 n.4.

784. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 10–15.

785. *Id.* at 168.

786. ACKERMAN, PRIVATE PROPERTY, *supra* note 1, 168–89.

argument of the chapter is somewhat clearer: our constitutional takings law is a morass that can only be cleaned up with philosophical arguments that lead to a “reorganization of an entire sociocultural system.”<sup>787</sup> It is not clear what Ackerman envisions here as the social action or theoretical project. Indeed, interpreting this entire chapter is at best difficult. It appears both Hegelian and Marxist, attributing priority sometimes to concepts and philosophy and sometimes to the economic and social practices and institutions that underlie the theoretical apparatus.<sup>788</sup> On the question of the nature of constitutional language, Ackerman apparently believes that authoritative propositions are about the Constitution-in-the-world<sup>789</sup> and have non-trivial truth conditions.

For Epstein, the derivation of the role of the State and the limits of liberty also reflect a commitment to a foundational role for philosophy and the objective moral law and objective Constitution. Epstein asserts the foundational role of philosophical argument expressly.<sup>790</sup> Epstein’s emphasis on the importance of the philosophical foundations of the Constitution in shaping constitutional has grown over the years. Thus, Epstein asserts that the current stalemate in our constitutional jurisprudence arises, as he puts it succinctly, from “completely theorized disagreements.”<sup>791</sup> The cases play out fundamental, theoretical disputes about “human nature, language, knowledge, and institutions.”<sup>792</sup> Epstein’s insight here parallels the conclusion Radin came to from a very different approach to property law in general and takings in particular.<sup>793</sup> Epstein does not, however,

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787. *Id.* at 188.

788. *See id.* at 5 (asserting that resolving hard philosophical questions will permit resolution of our constitutional controversies), 188 (describing a revolutionary project of social change).

789. *See generally* LeDuc, *Ontological Foundations*, *supra* note 11, at 310–18, 329–330 (describing the tacit concept of the Constitution-in-the-world of representational accounts of the Constitution and constitutional interpretation); LeDuc, *Anti-Foundational Challenge*, *supra* note 11, at 142–59 (describing an anti-representational alternative to the dominant representationalist account of the authoritative constitutional texts).

790. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 3–5.

791. *Id.* at 5.

792. *Id.*

793. Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 160–61.

explain what he thinks the disputes over language and knowledge are, or how he thinks those disputes figure in the ongoing constitutional debates.<sup>794</sup>

Epstein notes that, over time, his constitutional analysis has increasingly recognized the importance of the constitutional text.<sup>795</sup> Although Epstein acknowledges this development, he does not pause to explain how that increased textual emphasis is to be harmonized with his theoretical, philosophical approach to the Takings Clause.<sup>796</sup> There is more tension between the two, and thus more of a puzzle inherent in the acknowledgment, than Epstein admits.<sup>797</sup> But he also immediately notes his distance from the claims made by the originalists.<sup>798</sup> While he endorses Justice Scalia's argument that the constitutional interpretation begins with the text, he asserts that the semantic content of the text is inadequate and the legal analysis must quickly move beyond that textual meaning.<sup>799</sup> Epstein goes on to argue, quite traditionally (from an originalist stance), that there is a fixed legal meaning of the constitutional text (and thus that Balkin's living originalism and Lessig's call for a theory of constitutional translation are mistaken).<sup>800</sup> While Epstein discusses Wittgenstein's *Philosophical Investigations* briefly, it is fair to say that he, like Ackerman, does not venture very far into it or draw very much from it for his analysis.<sup>801</sup> Ironically, Epstein looks to it principally a source of support for looking to underlying Hobbesian and Lockean philosophical theories in interpreting the Constitution. It is even less clear how Epstein thinks disagreements about knowledge figure into the current constitutional disagreements.

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794. Epstein touches on the philosophy of language when he discusses the nature of the constitutional text and the project of constitutional interpretation and decision. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 45–71.

795. *Id.* at ix.

796. *Id.*

797. Constitutional text would not appear to support arguments for decision in the realm of philosophical argument. Epstein does not pause to explain how textual and philosophical arguments might be harmonized. A modal, pluralist account that describes our constitutional practice as constituted by incommensurable, sometimes inconsistent types of arguments would incorporate these two types of argument, but Epstein's own account would not appear consistent with such a pluralist theory.

798. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at ix.

799. *Id.*

800. *Id.* at 54–56, 351–52; *see also* JACK BALKIN, LIVING ORIGINALISM (2011); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (proposing a model for constitutional interpretation across temporal distance based upon translation between different languages).

801. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 50.

Epstein also discusses in detail the disagreements about human nature and institutions he finds in (or underlying) our Takings Clause jurisprudence. With respect to human nature, Epstein argues that the progressives fail to recognize the frequency with which individuals—including individuals acting on behalf of the government—act in their own self-interest.<sup>802</sup> The theorists of Epstein's classical liberal Constitution, notably including James Madison, recognized this dimension of human nature.<sup>803</sup> Epstein is right that there is a different psychology among the conservatives who endorse something like Epstein's Constitution and the progressives who urge a greater role for the state and a more active redistributive constitutional agenda.

The difference in psychology yields different views on governmental institutions. Progressives have more confidence (or faith) in governmental institutions and their actions.<sup>804</sup> Epstein's libertarians are more skeptical of, and therefore more willing to circumscribe, governmental power and action.<sup>805</sup> They are more willing to scrutinize actions taken by the state more carefully.<sup>806</sup> Yet these impressionistic sketches do not capture the complexities of the differences between the two approaches. There are further important differences in where the different theorists choose to look closely at the governmental action. Progressives like Kathleen Sullivan are more suspicious of government actions that affect civil rights and less suspicious when the government acts to impair property or Second Amendment rights.<sup>807</sup> Libertarians and conservatives adopt scrutiny that is almost

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802. *Id.* at 30–31.

803. *See, e.g.*, THE FEDERALIST NO. 47 (James Madison); EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 30–31.

804. *See, e.g.*, Michelman, *On Protecting the Poor*, *supra* note 132; ELY, *supra* note 725 (defending the Warren Court's constitutional jurisprudence enhancing representative democracy); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005) (arguing that the modern administrative regulatory regimes enacted by the Progressives and the New Deal make a positive contribution to American life—and are generally so regarded).

805. *See* EPSTEIN, BARGAINING, *supra* note 9, at 83–87 (invoking Madison in describing the risk of corruption in governmental action); BARNETT, LOST CONSTITUTION, *supra* note 228, at 274–318 (arguing that the Commerce Power is far narrower than it has been held by the Court and that much of the modern administrative state is unconstitutional); NOZICK, *supra* note 227, at 88–120 (describing the origin and legitimacy of the minimal state).

806. *See* EPSTEIN, BARGAINING, *supra* note 9, at 83–87.

807. *See* Sullivan, *supra* note 373, 1487–88.

a mirror image, looking closely at limits on property and Second Amendment rights and often evincing less concern about most civil rights.<sup>808</sup>

Epstein is right that the *theoretical* disagreements about particular constitutional doctrines or decisions reflect a much broader set of disagreements. His passing dismissal of Sunstein's endorsement of incompletely theorized agreements is more unkind than wrong.<sup>809</sup> Sunstein would have courts try to avoid confronting and resolving the underlying fundamental disagreements by confining judicial decision to the narrowest possible grounds.<sup>810</sup> If that approach could work, it would make the fundamental disagreements that Epstein articulates less important in our constitutional law. It fails because the Court has not been consistently minimalist—and because minimalism is not what the most compelling constitutional arguments sometimes call for. *Brown*<sup>811</sup> is the clearest and most important example of such a case. It could not have been adequately decided on such a minimalist basis.<sup>812</sup> But it is not clear that our Takings Clause jurisprudence needs non-minimalist decisions. Getting *Loretto*, *Nollan*, *Kelo*, and *Horne* right would require only modest revision of our Takings Clause jurisprudence, not grand theoretical commitments or radical change.

Epstein is mistaken that our constitutional practice is hostage to the broader philosophical disagreements that he describes. We can and, under our established constitutional decisional practice, we must, decide and defend the decision of constitutional cases on largely aphilosophical arguments and grounds. We can do that without endorsing the model of incompletely theorized opinions<sup>813</sup>

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808. See Randy E. Barnett, *Is the Constitution Libertarian?*, 2008 CATO SUP. CT. REV. 9, 32; BARNETT, LOST CONSTITUTION, *supra* note 228 (defending a libertarian Constitution and a corresponding less robust federal government).

809. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 11–12 (rightly criticizing Sunstein's judicial minimalism as uncertain in application and also as unduly deferential to democratic decision-making, in light of the limits on such democratic processes under the Constitution). Epstein's judgment is unkind in its suggestion that Sunstein's position had been anticipated by Bork; given the very different arguments Sunstein and Bork offer for their conservative approach to judicial decision, Epstein's linkage of the two seems a little unfair.

810. SUNSTEIN, ONE CASE, *supra* note 618; SUNSTEIN, LEGAL REASONING, *supra* note 618.

811. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); LeDuc, *Striding Out of Babel*, *supra* note 11, at 127. Incompletely theorized, minimalist decisions generally do not carry the moral force that the Court sometimes concludes must be asserted, as in *Brown*.

812. See LeDuc, *Striding Out of Babel*, *supra* note 11, at 127.

813. See *generally* SUNSTEIN, LEGAL REASONING, *supra* note 618 (defending judicial minimalism and the use of incompletely theorized judicial decisions as preferred

or a passive or minimalist judicial decision-making process. We need take only two measures. First, we must eschew Epstein's invitation to import sweeping, conceptual, philosophical argument into our canonical modes of constitutional argument. Second, we must address the Takings Clause controversies that arise in the contexts in which they occur and employ our best constitutional judgment to resolve them in light of all of the kinds or modes of constitutional arguments that may be advanced for the respective claims. We must also recognize that the choices we make in reaching the judgments that decide these cases will continue to be controversial.<sup>814</sup> Our disagreements about the place of property in the Republic and the rights of citizens with respect to the property they hold, like many other fundamental normative controversies, will not be easily—or finally—resolved. But these controversies are more likely to be resolved only if we confront them in the space of constitutional reasons. If we merely articulate a philosophical foundation or meta-theory with which to ground or conceptualize the constitutional controversies, we are left without authoritative constitutional arguments with which to argue for, defend, and make, determinative constitutional judgments.

### CONCLUSION

Three principal conclusions follow from this iconoclastic account. First, the contemporary constitutional takings jurisprudence *is* still in disarray. Under a variety of measures, that law is in an unsatisfactory state. While the doctrine has evolved significantly in the past half century, Takings Clause cases continue to bedevil the Court. Three measures make the most compelling case for this judgment of disarray.

First, takings cases split the Court, not just as a matter of the outcomes that the justices would reach but also as a matter of the reasons for the various decisions.<sup>815</sup> Justices who vote together nevertheless often disagree in their

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judicial methods in constitutional adjudication in order to preserve the primacy of democratic decision-making).

814. See Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 146–47 (suggesting that the continuing controversies of our Takings Clause jurisprudence arise from essentially contested notions of polity and personhood at the foundation of our shared notion of our Republic and our rights and responsibilities to that Republic). Even without committing to Radin's claim that the Takings Clause implicates essentially contested concepts, a performative, modal account of our constitutional practice recognizes that constitutional decision is a matter of making choices, not simply a matter of finding truths about the semantic or broader linguistic meaning of the constitutional text.

815. See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (per Stevens, J.) (recognizing broad definitions of public use and public purpose); *id.* at 493 (Kennedy, J., concurring) (recognizing that some factual situations might call for a stricter



reasoning. This judicial behavior is powerful evidence that the law is not settled and that the Court's jurisprudence is not broadly accepted as compelling. This assessment of the Takings Clause law is ultimately contextual; it asserts that the constitutional law of takings is in disarray in comparison with other fields of constitutional law.

Second, the distinctions drawn in the law of takings and the basis for those distinctions have been consistently criticized.<sup>816</sup> The doctrinal structure of our takings jurisprudence remains controversial in seemingly fundamental ways. There is no consensus as to the degree of respect for and deference that ought to be accorded democratic decision-making—and, correspondingly, the level of suspicion that should instead be brought by the Court to constitutional controversies in keeping, for example, with public choice theory<sup>817</sup> or classical republican political theory.<sup>818</sup> Some decisions, like *Dolan* and *Nollan*, reflect substantial skepticism about the altruism and transparency of governmental action<sup>819</sup>; others, like *Kelo*, reflect a willingness to give government decisions substantial deference.<sup>820</sup>

Third, the repeated necessity to return to questions of the application of the Takings Clause to governmental land use and other regulatory regimes evidences the absence of clear rules or principles of law. The complexities and inconsistencies in our Takings Clause jurisprudence leave governments and their citizens with a takings law that they cannot understand or apply. This uncertainty

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standard); *id.* at 494 (O'Connor, J., dissenting) (arguing that the *Kelo* majority effectively changes the Fifth Amendment's text); *id.* at 521 (Thomas, J., dissenting) (analyzing a takings claim under the original public meaning of the Fifth Amendment).

816. *See, e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting); ACKERMAN, PRIVATE PROPERTY, *supra* note 1, at 8; Michelman, *Fairness and Utility*, *supra* note 1, at 1170.

817. *See generally* FRICKEY & FARBER, *supra* note 309 (offering an introduction to public choice theory); Farber, *Public Choice*, *supra* note 3 (exploring the implications of public choice theory for the standard of judicial scrutiny of governmental takings).

818. *See generally* POCOCK, *supra* note 308 (describing classical republican political theory and its role in early American political thinking about corruption, self-interest, and the separation of powers); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Rodgers, *supra* note 308.

819. *See Nollan*, 483 U.S. at 836–37.

820. *Kelo*, 545 U.S. at 483 (characterizing the Court's Takings Clause doctrine as “affording legislatures broad latitude in determining what public needs justify the use of the takings power”).

and indeterminacy, as the Court has often pointed out, is costly for the states.<sup>821</sup> It also imposes costs on private property owners because it is harder to assess the regulatory risk that property owners face in the enjoyment and use of their property.

The rare commentators, like Radin, who argue that the disarray in our Takings Clause jurisprudence is exaggerated, are unduly optimistic.<sup>822</sup> Radin argues that the anomalies, complexity, and recurring controversies we have result naturally from the conflict inherent in our concepts of private property, freedom, and the nature of the Republic.<sup>823</sup> This description of the source of the conflicts is accurate insofar as it acknowledges that the nature of the performative function of constitutional adjudication is to choose—and to judge. It is, however, inaccurate insofar as it is an overly intellectualized description of the sources of the conflict. It becomes so when Radin characterizes the source as a matter of disagreements about the meaning of concepts.<sup>824</sup> The disagreements are not always disagreements about the meaning of language or the meaning of concepts. They may be—but the disagreements may also be about the constitutional values we want to espouse and the constitutional choices we want to make—and those sources may not be reducible to meanings of language or of concepts.

The second principal conclusion to be drawn is that the Takings Clause law has continued to evolve without meaningful reliance on, or authoritative constitutional decisional arguments drawing from, the philosophical arguments made in the academy. The ambitious theoretical and philosophical analysis that Michelman, Ackerman, and Epstein have each articulated has not yielded substantial substantive contributions to our constitutional takings *law*. Even where, as in *Lucas*, the Court reaches a decision consistent with that advocated within the academy on a basis congruent with the theoretical argument offered there for that result, the Court seems at pains to distinguish its own approach.

The fundamental restatements of the law of takings that all three of these commentators would defend lies at the root of the inability to translate their theoretical and academic arguments into persuasive constitutional legal arguments. Put most simply, the arguments each make prove too much. Fried highlighted this all-or-nothing feature of theories that grounded protected property rights in the

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821. *See, e.g., Nollan*, 483 U.S. at 866 (Stevens, J., dissenting).

822. *See* Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 147 (suggesting that the difficulties presented by Takings Clause cases could be mitigated by adopting more ad hoc, less categorical decision-making and reasoning).

823. *See id.* at 146–47.

824. *Id.*

concept of individual liberty.<sup>825</sup> He argued that such an approach to the Takings Clause was ill advised.<sup>826</sup> He also noted the implication for the application of the Takings Clause to constrain statutory changes in the legal rights of property holders and regulatory legislation more generally.<sup>827</sup> There, too, philosophical accounts based upon liberty or concepts of property were not easily tailored to questions presented for constitutional adjudication. Philosophical arguments are not necessarily constitutional arguments. The willingness to put aside practical concerns and common knowledge in following the implications of arguments and claims in philosophical argument<sup>828</sup> is very different than the methods of canonical legal or constitutional argument. Constitutional argument is often thought to have a granularity that philosophical argument lacks.<sup>829</sup>

Perhaps a more precise way to put the difference is not in terms of granularity but as to subject matter: philosophical arguments are generally made at a conceptual level as a matter of pure reason while constitutional arguments are arguments of practical reason about particular controversies. Good philosophical arguments aren't always good constitutional arguments and good constitutional arguments aren't always good philosophical arguments.<sup>830</sup> The two kinds of arguments address different sorts of questions. Our practice of constitutional

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825. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT* 183–86 (1992) (describing the doctrinal and political issues raised by the litigation of Takings Clause cases in the Supreme Court in the Reagan administration); FRIED, *SAYING*, *supra* note 29, at 182–84.

826. FRIED, *SAYING*, *supra* note 29, at 183–84 (expressing concern particularly with the concept of awarding property owners interim damages for proposed uncompensated takings).

827. *Id.* at 177–81.

828. See GILBERT, *supra* note 714, at 10.

829. Epstein articulates this objection to Rawls's theory. EPSTEIN, *TAKINGS*, *supra* note 2, at 339–40. Similar concerns may be raised with respect to Epstein's approach. See Radin, *Problems*, *supra* note 56, at 100–04; see also Fried, *Artificial Reason*, *supra* note 677, at 39; J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 8–9 (2012) (arguing that judicial commitments to grand theory is eroding confidence in the rule of law).

830. See Fried, *Artificial Reason*, *supra* note 677, at 54 (“it is preposterous to imagine that philosophy can tell us whether there should be a right to privacy in a public telephone booth”). On Fried's early view, it is preposterous because philosophical principles are general, abstract, and timeless and questions whether or when particular things (like telephone booths) fall within the ambit of such principles are not philosophical questions.

argument and decision does not recognize such philosophical arguments as permissible within the constitutional space of reasons. The academic theorists recognize this flaw in the competing theories but rarely recognize it in their own.<sup>831</sup> Because most of the kinds of arguments Michelman, Ackerman, and Epstein make are not constitutional legal arguments, their arguments have not figured tacitly or expressly in the Court's arguments and reasoning with respect to constitutional cases.<sup>832</sup> That is a large part why the appeal to philosophical argument made by the academy has fallen on frozen ground. The apparent puzzle of the Court's indifference to those arguments is solved.

The failure of the courts to respond to the academic writing about the Takings Clause can be contrasted with the response to the academy's calls for reinvigorating the doctrine of unconstitutional conditions. Academic theorists called for revivifying the unconstitutional conditions doctrine as a means to protect individual civil rights and civil liberties in the administrative state.<sup>833</sup> As with the analysis of the foundations of just compensation law the academic commentators offered a variety of accounts of how the doctrine of unconstitutional conditions should be formulated and applied.

Epstein made a theoretical argument for the doctrine on the basis that permitting the state to acquire property interests, like the easement in *Nollan*, without valuing that property interest and paying for it, would create an incentive for the state to acquire property that had a lower value or utility in its hands than it had in the hands of the private transferor.<sup>834</sup> Such a regime would likely yield suboptimal, inefficient allocations of resources and suboptimal economic outcomes.<sup>835</sup> Sullivan effectively made a form of traditional equal protection argument,<sup>836</sup> although she did not make the argument expressly as such.<sup>837</sup>

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831. See, e.g., FRIED, SAYING, *supra* note 29, at 177–81; Radin, *Problems*, *supra* note 56, at 100–04, 100 (criticizing Epstein as an “unabashed conceptualist”).

832. See SCALIA, INTERPRETATION, *supra* note 226, at 45.

833. See Sullivan, *supra* note 373, at 1419.

834. EPSTEIN, BARGAINING, *supra* note 9, at 84–85.

835. *Id.*

836. See Sullivan, *supra* note 373, at 1506 (“[The doctrine of unconstitutional conditions] bars redistribution of constitutional rights as to which government has obligations of evenhandedness.”).

837. *Id.* at 1498 (arguing that the equal protection doctrine provides useful analogies). Sullivan does not make the argument as a canonical equal protection argument. That is because she wants to provide a unified account of unconstitutional conditions. That account applies not only to conditions imposed on rights protected under the Equal

Without a robust prohibition on unconstitutional conditions doctrine, state action could result in a fundamentally unequal enjoyment of constitutional rights. This is a classical form of constitutional argument, drawing on doctrinal modes, recognizing the strands of unconstitutional conditions doctrine, Lockean structural modes that recognize the temptations of government and ethical modes of argument based upon the nature of equality in America.

The contrast between the level of generality or theoreticity of the two strands of academic commentary—that with respect to the Takings Clause and that with respect to unconstitutional conditions—helps explain their very different degrees of impact. Some of the arguments made for the expansion of the doctrine of unconstitutional conditions sounded not in abstract philosophy but as canonical arguments of constitutional law and practice. When Sullivan argued for the need to prevent constitutional castes,<sup>838</sup> while rhetorically somewhat overheated, she captured the fundamental concerns underlying Bobbitt's notion of an ethical mode of argument.<sup>839</sup> It is not surprising that the doctrine of unconstitutional conditions has been particularly powerful with respect to rights like those protected by the First Amendment.<sup>840</sup>

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Protection Clause but also on government programs to which recipients and participants have no recognized constitutional right.

838. *Id.* at 1497–99.

839. When her argument is cast more expressly as an ethical argument, Sullivan is arguing that our American notions of dignity and equality limit the state's power to condition the receipt of otherwise available entitlements on a waiver of rights or privileges that implicate our dignity or equality.

840. Radin's work may appear to challenge my argument. Radin stands out as a relatively untheoretical pragmatist. But she, too, has had little apparent impact on the development of our contemporary Takings Clause law. If it is the appeal to philosophical argument that has prevented Michelman, Ackerman, and Epstein from having more substantive impact on our constitutional law, then Radin would appear to be a scholar positioned to have more immediate effect.

The reasons for that lack of impact are different. Radin's arguments—or at least the implications of those arguments—have been rejected, not ignored, by the conservative majorities of the Rehnquist and Roberts Courts. A property regime that enhances self-actualization and accords a particular importance for non-fungible property is not how the conservative majorities on those Courts would interpret and apply the Constitution. On the other hand, Radin's theories and arguments have also not been adopted or endorsed by the dissenters. Here, too, the tacit force of precedent and doctrine, prudential concerns, and the constitutional text have all proved more central than the implicit ethical argument (in the American exceptionalist sense that Bobbitt describes) that Radin makes. *See* BOBBITT, FATE, *supra* note 121, at 97–119 (describing ethical argument not in moral terms but instead by reference to the

By contrast, academic commentators' confidence in the practical force of these Takings Clause arguments is misplaced. Richard Epstein has recognized that his libertarian constructions have achieved little purchase in the development of our Takings Clause law,<sup>841</sup> but the other theorists have achieved no greater doctrinal impact on our law. The value of the theoretical arguments that the classic Takings Clause commentators make (and the theoretical arguments and critique defended by Radin), lies in the explanatory apparatus each articulates because those themes do sound, muted, in the constitutional arguments of our contemporary takings jurisprudence. Articulating the conceptual framework and drawing out the implications helps us understand the content and import of some of the themes inherent in the constitutional law and the arguments offered for decision. Claims for a more substantial or pervasive impact for the project of articulating the inherent conceptual structure of the law are not well-founded.

It may seem unfair to test these three icons of our canonical constitutional analysis against the more sophisticated and advanced constitutional understanding of the twenty-first century. What purports here to be substantive doctrinal and theoretical engagement may be only dry reconstruction and analysis of history. Moreover, on my reading of *We the People*,<sup>842</sup> Ackerman has largely abandoned in his later work the earlier methodological stance criticized here. Michelman's analysis of the takings issue also became, over time, less theoretical and more contextually instantiated.<sup>843</sup> (Epstein is seemingly unreformed).<sup>844</sup>

There are three reasons not to dismiss my analysis and criticism as simply out of date and of only historical interest. First, I question the implicit claim that we have made significant advances in our constitutional thinking.<sup>845</sup> There has been no resolution of the fundamental debate between Epstein, on the one hand,

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American *ethos*). The failure of the liberal dissenters to engage Radin's arguments may suggest that the divide between the articulation of constitutional adjudication in our Takings Clause jurisprudence and the academic theory is even deeper than I suggest.

841. EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281, at 365–66.

842. *See supra* pp. 242–43.

843. *See, e.g.*, Michelman, *Takings, 1987*, *supra* note 292.

844. *See, e.g.*, EPSTEIN, LIBERAL CONSTITUTION, *supra* note 281.

845. *See generally* LeDuc, *Striding Out of Babel*, *supra* note 11 (arguing that the dominant constitutional debate over originalism in the late twentieth and early twenty-first centuries displays symptoms of pathology and stands more in need of therapy than brilliant new constitutional arguments); Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 295 (2005) (declaring constitutional law to be in a state of disarray and conceding that “I do not have, nor do I believe I have seen, a vision capacious and convincing enough to propound as an organizing principle for the next phase in the law of our Constitution.”).

and Michelman and Radin on the other Change may have been mistaken for progress. The increasingly narrow field from which nominees to the Court are now chosen and the homogeneity of the pool might, depending on one's account of constitutional judgment, raise questions about how doctrinal progress would be generated.<sup>846</sup> The shared commitments and backgrounds of the Burger, Rehnquist, and Roberts Court justices are substantial.<sup>847</sup> Moreover, the appeal to philosophical argument and philosophical foundations for our constitutional law continues largely unabated.<sup>848</sup> Our Takings Clause jurisprudence remains unreformed. Claims of transcendence or even of substantial progress appear implausible.

Second, however the authors qualify their continuing commitment to their earlier work, these three works have a canonical, iconic place in our constitutional scholarship. They cast a long shadow. Understanding and acknowledging their limits and the fundamental mistake they all share is an important project. Admittedly, some important recent work in property law does not follow the classical strategy. For example, Jedediah Purdy's important book on property does not claim a foundational role for philosophical theory.<sup>849</sup> Instead, Purdy expressly eschews an inquiry into the first principles of property law—what he terms “high normative theory” in favor of exploring “the tradition of argument about property

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846. *Cf.* NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2011) (describing the diverse backgrounds of, and the personal, doctrinal, and jurisprudential tensions among, President Roosevelt's nominees to the Court).

847. *See* CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 135–41 (2007) (describing and criticizing the increasingly narrow criteria employed in selecting Supreme Court nominees since 1969).

848. *See, e.g.*, EPSTEIN, *LIBERAL CONSTITUTION*, *supra* note 281 (published in 2014—forty-seven years after *Fairness and Utility*); ALEXANDER & PEÑALVER, *supra* note 10 (emphasizing the importance of philosophical theory in property law and published in 2011); BARNETT, *LOST CONSTITUTION*, *supra* note 228 (2004). *But see* WILKINSON, *supra* note 829 (arguing that sweeping constitutional theories are subverting the mission of the Court in our democratic republic and undermining confidence in the rule of law); FARBER & SHERRY, *supra* note 20 (challenging the project of comprehensive constitutional theory building, philosophical and otherwise); Posner, *Problematics*, *supra* note 729, at 1639–40 (arguing that academic moral theory does not provide valuable insights and answers to important constitutional questions).

849. JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 18 (2010).

law itself, asking what values it serves.”<sup>850</sup> While the call to employ express philosophical argument remains strong, not all follow.

Third, if systematic, foundational philosophical argument is central to our Takings Clause jurisprudence, as all of these iconic works argue, then that role would appear to challenge the generalization of my previous claims about the relationship of constitutional law to philosophy with respect to the originalism debate.<sup>851</sup> Why would our Takings Clause law be different? In light of the continuing call of philosophical argument and philosophical foundations in constitutional law, it is important to understand why the appeal to philosophy in our iconic academic Takings Clause literature is misguided. It is important both for our understanding of Takings Clause law and for our constitutional law more generally.

The third conclusion from this argument is the most important. There is a path forward for our Takings Clause jurisprudence. It requires that we recognize the wrong turn taken in the classical arguments criticized here. The recent case law indicates what is both necessary and possible.

First, *Horne* highlights the continuing complexity of the regulatory takings issue and the importance of understanding the substance of the regulatory regime and the economic ramifications of that regime.<sup>852</sup> The *Horne* Court was properly more skeptical of the pervasive, anti-competitive regulatory regime for raisin growing than the earlier cases upholding New Deal and associated state economic regulation in the immediate aftermath of the Constitutional Revolution of 1937.<sup>853</sup> But the *Horne* Court was sloppy in its economic analysis, as remarked by Justice Breyer. This kind of failing can be cured by greater care, greater attentiveness to the facts presented, and more judicial humility. The regulatory regime applicable to raisin growers was both intrusive and anti-competitive. But it did not have the entirely one-sided effect tacitly assumed by the Court. The regime provided benefits to growers by restricting the supply of raisins to the market, thereby raising the price.<sup>854</sup> There is no apparent basis on which to credit the Hornes with the economic benefit of the higher, non-market price for their raisins while treating the

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850. *Id.* By inquiring into the values served by concepts or dimensions of property Purdy tacitly adopts a consequentialist approach to property law. But he does so without stating his premises expressly or otherwise explaining his choice.

851. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 11.

852. *Horne*, 135 S. Ct. at 2430–31.

853. Compare *id.* with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding state minimum wage regulation for women and minors and reversing earlier contrary *Lochner*-era precedent without much substantive inquiry into the state’s policy determinations).

854. *Horne*, 135 S. Ct. at 2434–35 (Breyer, J., dissenting).



regime as imposing on them the gross cost of the sales limitation. The two elements were complementary parts of the same regulatory regime. At the least, the Court mis-measured the just compensation due, because it failed to take account of this offsetting benefit.<sup>855</sup> A first step would be to measure the adverse impact, if any, of the comprehensive regime. Once the net economic harm is properly measured, existing doctrine might show that there was no taking. If the relative magnitude of the taking was sufficiently great, then compensating the growers for the *net* harm would appear consistent with long standing doctrine.<sup>856</sup>

Second, *Kelo* highlights the need for the Court to revisit the current reading of the public use requirement. In light of the increasing importance attributed by Court originalists to the constitutional text and to the historical understanding of the text, the continuing disregard of the public use language does not appear to be a well-founded position, at least without a stronger defense than has yet been offered. The Court, particularly to the extent that it continues to become more originalist in its arguments, must engage the competing doctrinal and prudential arguments that support the current limited, reductionist reading of the public use requirement as well as the historical and textual arguments that would give that clause more force. Takings Clause cases should not be decided on the basis of grand, philosophical principles and theories. They should instead be decided through the application of the classical, canonical forms of constitutional argument and what Radin terms situated judgment.

More generally, skepticism about, and distrust of, the motivation behind governmental action generally and takings specifically may derive from either of a couple of sources. They may arise from classically Madisonian concerns or from modern public choice theory premises. The Takings Clause decisions, like *Berman*,<sup>857</sup> in the immediate aftermath of the New Deal, now appear overly sanguine in their faith in governmental solutions. Our Takings Clause jurisprudence should reflect some caution toward government action against

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855. Because the Court ignored this benefit it did not offer any argument why netting was not required. It is not clear what argument could be made, as a doctrinal matter. *See* Regional Rail Reorganization Cases, 419 U.S. 102, 151 (1974) (*cited in* Horne, 135 S. Ct. at 2434 (Breyer, J., dissenting)). As a theoretical matter, Epstein's linearity principle would permit an inquiry into whether such benefits were distributed generally or only made available to the owner of the property taken. In the case of the raisin growing regulatory regime, however, the price benefits were available only to those raisin handlers whose crop output was restricted.

856. Epstein would not inquire into the relative magnitude of the taking. EPSTEIN, TAKINGS, *supra* note 2, at 35–36.

857. *Berman v. Parker*, 348 U.S. 26 (1954).

persons' rights in property.<sup>858</sup> Epstein is right that this caution was needed in some of the more exuberant decisions affirming a power to take private property or to take it without compensation.<sup>859</sup> But the Court need not—and should not—adopt in its decisional reasoning Epstein's elaborate and complex libertarian theory. The relevant constitutional arguments can naturally be made as structural arguments. Occasionally, they may be made also as ethical arguments. These arguments can be made without grounding in political philosophy or reliance on abstruse and controversial philosophical arguments. This is the legacy of *Nollan* and *Lucas*. But the reasoning in those cases goes further than may be needed to establish the limits that freedom requires be placed upon state action.

Radin gets it right when she argues for a pragmatic, historical approach to Takings Clause adjudication. She rightly places herself in the American pragmatist philosophical tradition.<sup>860</sup> Radin asserts "it has always seemed important to me to focus on the nonideal nature of property practices and institutions, on the situated, and second best."<sup>861</sup> She endorses a historical approach to constitutional analysis, in part as a consequence of her pragmatism.<sup>862</sup> But the historical approach she takes is also grounded in her Hegelian, historicist account of law and personhood.<sup>863</sup> Radin asserts that we must assess law not on the timeless scales of natural law but in the historical context within which it operates.<sup>864</sup> She presents a powerful case for limiting or even overturning *Loretto*, *Nollan*, and *Dolan*.<sup>865</sup>

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858. See generally SOMIN, *supra* note 446 (describing the history of the *Kelo* case and its aftermath, which left Mrs. Kelo's property and the surrounding land undeveloped a decade after the city had condemned it).

859. EPSTEIN, TAKINGS, *supra* note 2, at 178–81.

860. Radin, *Introduction*, *supra* note 131, at 1.

861. *Id.*

862. *Id.*

863. See generally RADIN, REINTERPRETING PROPERTY, *supra* note 1.

864. See Radin, *Problems*, *supra* note 56, at 119 (criticizing Epstein's natural law account of property and the Takings Clause). Radin's commitment to a historicist account of takings law is an element of her overarching claim that our Takings Clause jurisprudence must reflect situated, context-specific judgments.

865. One loose end, however, is how considerations of *stare decisis* might figure in the cases' defense. To the extent that these cases have given rise to expectations or reliance interests that deserve protection, overruling these cases might be problematic. But with the possible exception of economic reliance on *Kelo* by developers, that does not appear likely—and the widespread political criticism that greeted *Kelo* may undermine claims of reliance on it.

For Radin, the exercise of situated judgment provides the preferred approach to interpret and apply the Takings Clause in constitutional adjudication.<sup>866</sup> Situated judgment provides arguments, rationales, and decisions in particular cases. Radin recognizes the limits of philosophical argument. But she errs to the extent that she incorporates non-canonical constitutional arguments in her prescription of situated judgment.<sup>867</sup> At most the philosophical arguments she makes motivate or may be translated into canonical constitutional arguments. Moreover, Radin's situated judgment serves her instrumental ambition to enhance "traditional commitments to equality of political power and respect for persons . . . [to extend our intuitions distinguishing personal and fungible property] and their embodiment in practice . . ."<sup>868</sup> Radin's moral vision informs her stance toward the questions that arise in constitutional adjudication. The extent to which her account may be reconciled with a pluralist description of the autonomous canonical modes of constitutional argument turns on the way that situated judgment can be expressed in traditional constitutional arguments. But exploring this relationship leads beyond the argument I have made here.

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866. See Radin, *Diagnosing the Takings Problem*, *supra* note 1, at 165.

867. It is not clear whether Radin's philosophical discussion is intended to explain why she finds particular constitutional arguments persuasive or to provide a theoretical foundation for those arguments. Radin, *Introduction*, *supra* note 131, at 1–2, 2 (emphasizing the importance of theory for constitutional practice and her own movement toward a "more explicit . . . philosophical pragmatism").

868. Radin, *Liberal Conception*, *supra* note 46, at 145.