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ESSAY: THE CONCEPT OF PROPERTY AND THE TAKINGS CLAUSE

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Abstract: Leif Wenar examines the impact on takings scholarship of the redefinition of "property" early in the twentieth century. He argues that the Hohfeldian characterization of property as rights (instead of as tangible things) forced major scholars such as Michelman, Sax, and Epstein into extreme interpretations of the Takings Clause. This extremism is unnecessary, however, since the original objections to the idea that "property is things" are mistaken.

Text:

What constitutes a taking of private property is a question that admits to a rigid logical answer, so it is always possible to judge which judicial decisions are clearly right or clearly wrong. On this question there is simply no room for intellectual disagreement or for judicial deference to the legislature.

Richard Epstein n1

As Justice Brennan candidly admitted in Penn Central ... whether or not a government action is a taking "depends largely 'upon the particular circumstances [in that] case.'" The Court must engage in "essentially ad hoc, factual inquiries."

But is anything wrong with "essentially ad hoc, factual inquiries"? That is simply one way of expressing a pragmatic approach to decision making. Pragmatism is essentially particularist, essentially context-bound and holistic; each decision is an all-things-considered intuitive weighing.

Margaret Radin n2

The Takings Clause of the United States Constitution reads: "nor shall private property be taken for public use without just compensation." n3 It is perhaps not surprising that legal academics have vigorously disputed the interpretation of such a politically charged text. What is surprising - as the quotations above suggest - is how distant these academic interpretations have become from each other. Even more surprising is how far all of these academic interpretations are from what a nonspecialist or layman would think is at stake in the Takings Clause. One [*1924] might imagine any number of explanations for such a state of affairs. I will claim, however, that all sides in the academic debate have been drawn into extreme interpretative positions by a fundamental mistake in the modern legal analysis of property. This mistake is, in fact, the standard academic understanding of property itself.

The plan of the argument is as follows. I first explore the background of two influential academic approaches to the Takings Clause - the Michelman-Sax and Epstein approaches - by tracing their roots back to the early days of "Scientific" thinking about property around the turn of this century. n4 The pivotal event in Scientific analysis of property was the Hohfeldian rejection of the layman's identification of property with tangible things. The Hohfeldians favored a conception of property not as things but as rights, and this rights-centered conception quickly became legal orthodoxy.

However, this Scientific conception of property as rights entails a reading of the Takings Clause that radically restricts the ways in which the government can legitimately alter property entitlements. Such a reading is conservative in requiring that most existing property entitlements be left intact, and libertarian in the sense of limiting the powers that the state may rightly exercise.

This conservative-libertarian reading of the Clause is one that early post-Hohfeldian interpreters were anxious to avoid. Yet these early interpreters also could not return to the pre-Hohfeldian idea that property is things. I show briefly how their attempts to shift the focus of the Clause away from the troublesome concept of property led to the successive destabilizations of the meanings of the Clause's other central terms.

This history of revisions is the background to Michelman's and Sax's influential work of the 1960s and 1970s. Both Michelman and Sax tried to bring order to takings interpretation while avoiding the Scientific conception of property and its conservative-libertarian conclusion. They did so by construing the Clause as an opportunity for the direct application of systematic political theory. I argue that this strategy succeeds only at the price of stretching the domain of the Clause beyond recognition. Epstein's more recent approach, by contrast, rationalizes the Clause by embracing both the Scientific conception of property and the conservative-libertarian reading that follows from it. Yet Epstein's interpretation is also overexpansive, and I trace its faults back to the Scientific conception of property itself.

Finally, I argue that the reasons for the original Hohfeldian redefinition of "property" were bad, and that we are not forced to go down the interpretative path that led to both the Michelman-Sax and the Epstein approaches. We should keep the powerful Hohfeldian analytical vocabulary; indeed, I propose an analysis of property centered on a particular structure of Hohfeldian claims, privileges, powers, and immunities. But we should reject the Hohfeldian thesis that "property" refers to property rights themselves. Returning to the more common understanding of property not as rights but as things holds out the prospect of recentering the takings debate around terms that legal academics share with other citizens of the democratic polity. And such commonality is desirable, I take it, whatever one's more particular views about constitutional interpretation, because of the attendant virtues of publicity or transparency in a democratic society's basic laws.

Background to Michelman, Sax, and Epstein: The Impact of the Scientific Conception of Property on the Takings Clause

The crucial terms for interpreting the Takings Clause are "private property," "taken," "public use," and "just compensation." In this section, I survey some historical landmarks in the interpretation of these terms in order to explain the intellectual legacy inherited by modern academics like Michelman, Sax, and Epstein. This is a history of the successive destabilizations of the previously accepted meanings of the first three crucial terms in the Takings Clause, which (as we will see) led Michelman and Sax to place all of their energies into finding an interpretation of the Clause focused on the fourth term.

Mugler and Hohfeld: The Rise and Fall of the Physical Invasion Test

The history begins in the late nineteenth century. Any judge deciding a takings case needs guidelines to determine whether the government has in fact taken private property for public use. The dominant nineteenth century rule of decision, known as the physical invasion test, received its classic formulation

from the first Justice Harlan in *Mugler v. Kansas*.ⁿ⁷ This test is based on the ordinary conception of property as things - property is a thing over which the owner has rights of "free use, enjoyment, and disposal."ⁿ⁸ The test also sets out a common sense rule for when a taking occurs. The government takes private property when it [*1926] takes physical possession of some privately owned thing, either instantly or after gaining title to the thing through the power of eminent domain. By this test, the boundaries of the property are the boundaries that the Clause says the government must not cross - and if the government does not cross these boundaries to gain possession of the thing, then there is no taking. Thus in the *Mugler* case, a Kansas law prohibiting the manufacture of alcoholic beverages was held not to effect a taking of *Mugler's* brewery. The State did not appropriate the brewery or make any use of it; the State only restricted the uses to which the brewery could be put. The State merely regulated - it did not "take" - since there was no physical invasion.ⁿ⁹

The conception of property underlying the physical invasion test came under sharp attack during the second decade of the twentieth century in Wesley Hohfeld's seminal articles on legal analysis.ⁿ¹⁰ According to Hohfeld, property cannot be things, like land or breweries; property can only be property rights - the rights over things. The word "property," that is, can only refer to the various claims, privileges, powers, and immunities which people hold that give them control over objects and spaces. Hohfeld was the first to make a clear analytical distinction between property as things and property as rights, and he and his students turned the legal profession decisively towards the second.ⁿ¹¹

Hohfeld and his students fired a barrage of arguments that sunk the old property as things conception within the legal profession. They argued that regarding property as a thing leads to a misplaced focus on physical possession of an object, instead of on the complexes of rights that form the stuff of modern property law. They objected that regarding property as things leaves intellectual property unexplained. They also complained that lawyers had often been misled by the Roman contrast between rights in rem (which can be translated as rights "against things") and rights in personam ("against people") to think that property rights are actually rights "against things" - which, they said, is absurd since of course all rights are against people.ⁿ¹²

Most importantly, Hohfeldian analysis was thought to deal the fatal blow to property as things by proving it incapable of handling divided legal control over objects. Bruce Ackerman describes the standard "divided [*1927] control" objection to property as things and the legal orthodoxy that formed around it:

In dealing with the concept of property it is possible to detect a consensus view so pervasive that even the dimmest law student can be counted upon to

parrot the ritual phrases on command. I think it is fair to say that one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership.... Instead of defining the relationship between a person and "his" things ... the law of property considers the way rights to things may be parceled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-à-vis other potential users; indeed in the modern American system, the ways in which user rights may be legally packaged and distributed are wondrously diverse.... Hence, it risks serious confusion to identify any single individual as the owner of any particular thing.... Once one begins to think sloppily, it is all too easy to start thinking that "the" property owner, by virtue of being "the" property owner, must necessarily own a particular bundle of rights over a thing. And this is to commit the error that separates layman from lawyer. n13

This is the objection that was decisive in swinging the legal conception of property over to the Hohfeldian analysis and away from the "thing-ownership" conception of Mugler. Conceiving of property as things conjures up the idea that there must be a single owner who holds some standard set of rights over a thing. But this idea is ill-suited to the common modern dispersion of the incidents of ownership among several parties. Since the "thing-ownership" model is inadequate to describe the legal realities of the property system, it is equally inadequate for interpreting the Takings Clause:

To any modern lawyer, there is an irreducible crudity about a decision that justifies compensation on the ground that the plaintiff has been deprived of some thing that formerly was "his." If there is anything a lawyer remembers from his legal education, it is that laymen are deeply confused in their property talk; that the law of property concerns itself with bundles of user-rights, not with the awkward idea that things "belong to" particular people. n14

The law of property concerns itself with bundles of user rights: indeed, "property" just means "property rights." So when the Hohfeldian legal theorist (the "Scientist" in Ackerman's terms) looks at the Takings Clause, he sees it as reflecting the thesis that property is rights not things:

Whenever the state takes any user right out of Jones's bundle and puts it in any other bundle, private property should be understood to have been taken. For it is precisely the Scientist's main [*1928] point to deny the propriety of a muddled search amongst the diverse bundles of user rights in quest of those that contain "the" rights of property. Even if Jones's bundle contains but a single user right, it is nonetheless protected against a taking by the clause. n15

This last passage contains two important theses in addition to property is rights not things. The first we might call each property right is property: because there is no "essence" to property, every stick in a property bundle itself counts as property. The second is the independence of incidents for takings. This follows from each property right is property: if each stick is property, then removing a stick from someone's bundle must be a taking regardless of what other sticks remain in the person's bundle (if any).¹⁶ The plausibility of the independence of incidents can also be shown separately. Suppose P holds property incidents a through j, and the government removes a through h from his bundle. If we don't say that this is a taking, because P is left with incidents i and j, then what would we say if P had transferred i and j the day before the government's action? The logic of divided control seems to compel the idea that what counts for a taking depends only on what the government removes, not on what any person has left.

In sum, the Hohfeldians dislodged the common sense property as things premise, and substituted for it the property as rights conception that became universal in the legal academy. And once this conception of property as rights was in place, it became almost irresistible to conclude that each property right is "property," and that government action that alters any existing private property right is a "taking" of property.

Yet as the final passage from Ackerman shows, these three theses present the Scientific interpreter of the Takings Clause with a dilemma. For the range of government acts that impinge on some private property right or other is immense, and requiring compensation each time such an act is performed would make the Takings Clause "one of the most ringing endorsements of the status quo in the history of the human race."¹⁷ So the Scientific interpreter of the Takings Clause must either find some way to deemphasize the Hohfeldian notion of property in his reading, or accept the Clause as a genuine conservative-libertarian mandate. This is the tension that has been driving takings jurisprudence since the Hohfeldian reconceptualization of property as rights instead of things. [*1929]

Defining a "Taking": Holmes's Diminution of Value Test

A second classic judicial rule arose shortly after the destabilization of the ordinary meaning of "property" by the Hohfeldians. This is the diminution of value test, sprung from Justice Holmes's decision in *Pennsylvania Coal Co. v. Mahon*.¹⁸ Holmes's test relied neither on the old property as things nor on the new property as rights conception. Rather, Holmes tried to shift attention away from the vexing concept of property altogether, toward a novel method of

determining whether a taking had occurred. This strategy of shifting the focus of interpretation was to be (as we will see) important for Michelman and Sax. Yet equally important was that Holmes's test itself proved unacceptable to the burgeoning Scientific orthodoxy, and its failure threw doubt on the attempt to put this second key term of the Clause - "taken" - at the center of any interpretation.

The diminution of value test grants that the government will negate established property rights through any number of its acts, but does not take any such negation to be conclusive as to whether a taking has occurred. Rather, the test distinguishes compensable "takings" from uncompensable "regulations" according to the percentage loss of economic value sustained by the property owner because of the government's action. For example, by this test a statute that reduced the value of someone's parcel of land by 19% would be a regulation, while a 99% devaluation would probably count as a taking.

The "old" conception of property and the physical invasion test from the days of Mugler are clearly absent in the Holmesian test, since any number of legislative acts can devalue property without the state gaining possession of anything. Yet although Holmes passed over the old property as things conception, he was no Scientist. The Hohfeldian image of property as a bundle of rights is downplayed in Holmes's test in favor of a focus on economic value. Holmes seems to have thought that governmental interference with private property rights was inevitable and that it would be disastrous to require compensation for all such interferences.

So Holmes took the first horn of the dilemma and shifted the interpretative weight of his reading away from the first crucial word in the phrase and onto the second: away from "property" and onto "taken." The state might invade, or property rights might be interfered with, but a taking occurs only if some person's holdings are diminished in value by a significant percentage through government action. By focusing on economic value, Holmes was able to avoid the extreme implication that every government action that alters property rights is a taking, while maintaining that compensation is required for some government actions that affect private holdings.

Both Holmes's emphasis on economic value and his strategy of shifting interpretative weight away from "property" influenced later interpret- [*1930] ers. But the diminution of value test itself cannot satisfy anyone of Scientific scruples. In addition to the obvious problem of setting the percentage that draws the line between a taking and a regulation, the diminution of value test fails because of its reference to owners instead of to incidents - it turns not only on what the government removes, but also on what a person has left. As Sax puts the problem: if the government floods eighty acres of someone's 640 acre plot, is this a 12.5% loss to the 640 acres or a 100% loss to the eighty acres? The first answer necessarily refers to incidents beyond those affected by the

governmental action, and so disregards the independence of incidents for takings. n19 For shouldn't the result be the same in the case where the owner of the 640 acres had sold the eighty acres to a newcomer the day before the flooding? Yet if all governmental actions that reduce the value of some property incident by 100% must be compensated, then we are back to the disastrous conclusion of always requiring compensation. n20

Berman and Coase: Redefining "Public Use" and Thinking Systematically

Two final intellectual events shaped the environment in which Michelman, Sax, and Epstein were to form their positive views. The first was the decision in *Berman v. Parker* concerning the Clause's third crucial term, "public use." n21 In the old *Mugler* interpretation, the "public use" phrase indicated that the Takings Clause was to be triggered by the government's asserting in itself (or in the public) a right to use private property in the ordinary sense of managing a facility or occupying a space. But by the time of *Berman* - when "property" and "taken" had both changed meanings - the context for this understanding of the Clause had disappeared. The question of the Clause was no longer whether the state was asserting a right to use some thing by managing or occupying it. As we have seen, the question of the Clause had become whether the state's actions affected any rights in someone's bundle, or diminished the economic value that these rights protected. And there is no place in these new interpretations for the old and more literal meaning of the phrase "public use."

The *Berman* Court decided that the "public use" language should instead be construed to ask whether a taking accomplished some public purpose. It held that so long as a government action that affected private property served some broadly defined public goal - where a public goal is the contrast to a private goal - its action fell within the limits of "public use." Thus in the case itself, the condemnation and transfer of a privately held department store to a private business interest counted as a taking for "public use" because the condemnation and transfer were part of a [*1931] neighborhood redevelopment scheme that would add to the orderliness and beauty of the district. The taking was for "public use" because the taking served a legitimate purpose of the state (order, beautification), even though the state did not assert in itself a new right to use (manage or occupy) the building. In this way the meaning of "public use" was reconciled to the new interpretations of "property" and "taken." n22

Finally, Coase's two seminal early papers had a great impact on those thinking about the Takings Clause scientifically. n23 They were taken to deal another blow to the physical invasion test (and thus to property as things) by showing that it was pointless on efficiency grounds to choose between two competing private uses of property as to which use "caused" a harm to the other. Crop growing hinders cattle grazing as much as cattle grazing hinders crop growing, and a quiet neighborhood conflicts with a noisy brickyard as much as

the reverse. Insofar as physical invasion looked less relevant to resolving issues of competing private uses, it began to look less relevant to resolving conflicts between public and private uses as well. n24

More generally, Coase's innovative style of analysis held out the prospect of systematizing property law by forcing it to work toward the goals of political economic theory (in Coase's case, the goal was productive efficiency). This desire to systematize through the application of political theory was inherited by Michelman, Sax, and Epstein, who brought it to bear, in different ways on the Takings Clause.

Michelman and Sax: Using Political Theory to Interpret the Clause

Michelman and Sax saw their task as replacing or rationalizing the "crazy quilt" of previous judicial tests with sophisticated political philosophy. n25 Yet by the time they sat down to write their classic articles, each of the first three concepts of the Takings Clause had come to seem either useless or dangerous as an interpretative focus. "Private property" itself was of course the biggest problem. The old conception of property as things and its physical invasion test had been completely undermined by Hohfeld and Coase. Yet the rights-oriented Scientific conception of "property" (which Michelman and Sax, who were trained in the Scientific orthodoxy, certainly accepted) threatened to turn the Takings Clause into a conservative-libertarian mandate. And this mandate was not one that liberal scholars like Michelman and Sax were willing to accept. n26 [*1932]

Moreover, the second key term of the Clause - "taken" - had been rendered problematic as a basis for interpretation by the Scientific objections to Holmes's diminution of value test. And in the wake of Berman there was no content in "public use" beyond its being a vague stand-in for state action towards some legitimate end.

Michelman and Sax broke through this interpretational impasse by touching only lightly on the troublesome first three concepts of the Clause, and resting their interpretations on the "justice" inherent in the fourth concept: "just compensation." They turned the problem posed by the Takings Clause into the problem of just reallocation of resources, familiar from classical political economy and naturally suited to comprehensive political theory. Here is how the Clause appeared to Sax:

Once reoriented to [a] more fluid concept of property as economic value defined by a process of competition, the question of when to compensate a diminution in the value of property resulting from government activity becomes a much less difficult one to formulate. The question now is: to what kind of

competition ought existing values be exposed. n27

Here is how the Clause appeared to Michelman:

In a given period, a person enjoys a certain liberty to do as he wills with certain things which he "owns," and a certain flow of income (utility, welfare, good) It is clear that this person's current flow of welfare is significantly affected by his being allowed to extract certain kinds of benefits from [these resources]. If any of these resources should be diverted by society into different uses, his personal welfare situation will be altered One effect of the decision to reallocate resources will have been to redistribute welfare among the members of society [So the question is w]hen a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society? n28

We have seen why Michelman in the first sentence would want to flag the word "owns" as suspect: it is part of the pre-Hohfeldian view of property that modern Scientific analysis rejects. Yet the most notable aspect of these passages is how both Sax and Michelman see through "property" and construe the Takings Clause as being about something else - economic value or welfare. No longer is the Takings Clause concerned specifically with governmental interference with property in either the pre-Hohfeldian or even the Scientific sense. Rather, it is about governmental [*1933] competition with privately controlled economic value, or it is about a social decision to redirect economic resources in a way that diminishes some private party's utility or well-being. The concept of property is expendable within these analyses of the Clause, since property is taken to be merely a proxy for other measures of personal advantage.

The second two of the first three concepts in the Clause ("taking" and "public use") are expendable as well. For Michelman and Sax the judgment that a governmental action is a "taking" has no independent criterion (as it did for Harlan and Holmes) but is wholly dependent on whether the correct theory of justice requires that the act be compensated. Thus Michelman: "'Taking' is, of course, constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation." n29 Any connotations of invasion or even a percentage diminution of value have disappeared here, leaving "taking" to fill only a functional role in the theory of just redistribution. So it is also natural that "public use" in these interpretations refers not to a governmental use of private property, but points only to governmental action in general.

What led Michelman and Sax to treat three of the crucial terms of the Takings Clause as dispensable? In particular, how did the central concept in the Takings Clause come to be not "property," but "economic value" or "welfare"? If

Michelman and Sax believed in the modern Scientific conception of property as rights (as they clearly did n30), why did they avoid using the Scientific conception of property in favor of these quite different notions?

First, of course, neither scholar wanted to end up in the conservative-libertarian reading of the Clause to which the Scientific conception of property points. And here it seems that the legacy of Mahon in the case law was significant. Although both scholars rejected the diminution of value test, both Holmes's interpretative strategy in shifting weight off of "property" and his construal of the Takings Clause as adjudicating between contending economic interests must have influenced Michelman's and Sax's understandings of how the Clause was best interpreted.

Moreover, emphasizing "economic value" or "welfare" instead of "property" allowed the legal scholars to embed the principles of political philosophy more deeply into their constructions. For these terms are part of the foundational vocabulary of modern political economy, and speaking in these terms makes it possible to construe the Takings Clause as a context for the direct application of philosophical theory.

Michelman's work is particularly interesting here, and will lead us to the main criticisms of this strategy of interpretation. Michelman pro- [*1934] poses two independent interpretations of what the Takings Clause pertains to and requires, one based on utilitarian theory and the other on Rawls's theory of justice. On both of these interpretations the Clause comes into play whenever a government action redirects resources from which some private party derives welfare. Michelman's utilitarian construal of the Clause requires weighing the welfare gains of a proposed redistribution against the welfare costs borne by the demoralized "losers" from the redistribution and the cost to the government of compensating these losers. In Michelman's Rawlsian reading, compensation for a redistribution is not required when a rational "loser" from a redistribution could be expected to see that such decisions will benefit people like him over the long run. n31

Now at the outset I claimed that influential academic legal approaches to the Takings Clause are far removed from any ordinary understanding of what is at issue in the Clause and the kinds of reasoning appropriately used in settling cases, and I think that this claim is borne out here. Michelman's interpretations of the Clause, though resourceful in their application of philosophical theories, bear only a tenuous relation to what a nonspecialist or layman might think about when and how the Clause should be applied.

In fact the relationship is so tenuous that we might wonder whether Michelman is still offering an interpretation of the Takings Clause, or whether he is using the Clause as an opportunity to apply political philosophy to a substantially different topic: the topic of government actions that have

redistributive effects on resources and thus welfare. n32 The question of interpretation arises because of the distance of the language on the constitutional page from the concepts of the philosophical theories. There are, of course, important relationships between property and welfare and economic value. Yet a natural, open question to ask in response to Michelman's or Sax's interpretation of the Takings Clause is "which of the government's actions that in some way affect a citizen's welfare (or that affect the value of a citizen's resources) is also a taking of private property for public use?"

Indeed, asking this question seems essential when one realizes how expansive the Takings Clause becomes once the concept of property is supplanted by welfare or economic value. When Michelman asks "if deliberate government activity foreseeably entails some injurious impact on an established private interest, how can we ... avoid concluding at once that compensation is in order?" n33 it is hard to see how the question [*1935] can be limited to government acts like condemning land for a new post office. For if this is the question asked by the Takings Clause, how can we keep the Clause from bearing on government acts like the lifting of a trade embargo, or the declaration of a war, or the decision to increase production at the money-presses? If all actions that affect private welfare or private economic interests are potentially at issue, then the scope of the Clause will have expanded to cover almost any government action whatsoever. At this point I think we should wonder again whether we do still have what could be called an interpretation of a text that prohibits taking private property for public use - and in any case, whether we have been forced to push our understanding of the Takings Clause as far from the text as it has gone.

Michelman and Sax may have been led astray by assuming that order could only be brought to the Takings Clause by casting out the language of property and recasting the Clause directly into the language of political philosophy - into the language of welfare, economic value, or whatever. Yet there is another way that political theory could be used to give a rational structure to takings doctrine that would not require abandoning the concept of property altogether. This strategy would be first to determine the general relation of private property to the values central to the preferred theory - for example, to determine the various ways in which property rules can promote utility. The Takings Clause could then be interpreted to be one rule that, together with other property rules in an overall scheme, fostered the realization of the theory's goals (e.g., maximizing utility). This strategy would reinsert the idea of property into the interpretation of the Takings Clause, and could thus hope to avoid the overexpansiveness that comes with the Michelman-Sax approach.

Epstein's Theory of the Takings Clause: Accepting the Conservative-Libertarian Reading

This is just the sort of strategy that Richard Epstein has been following since 1985. n34 In terms of the historical survey above, Epstein's theory would most naturally be placed at a time between the Hohfeldian redefinition of "property" and Holmes's attempt to change the subject. Epstein accepts all of the theses associated with the Scientific conception of prop- [*1936] erty: that property is rights not things, that each property right is property, and the independence of incidents for takings. And he rejects any attempt to substitute welfare or economic value for property as the topic of the Takings Clause.

This means that Epstein accepts - indeed he celebrates - the conservative-libertarian conclusions that everyone since Hohfeld has been trying to avoid: that government takes property whenever it disturbs any privately held property right and must compensate for all such disruptions. n35 Epstein maintains that requiring compensation for all such disturbances of property rights will not be disastrous (as Holmes seems to have thought) but will, on the contrary, maximize utility. He also believes that his reading stays close to a layman's natural-rights understanding of the terms and purposes of the Clause - indeed, that his is the best, and perhaps the only, coherent literal reading of the Takings Clause. n36 It is worth setting out Epstein's interpretation in some detail.

Epstein's theory begins with a utilitarian grounding of the rights found in the traditional libertarian state of nature. n37 Individual rights of life, liberty, and property are mandated by utility maximization. In particular, the rule that first possession of an object confers property rights over that object is the only efficient rule for solving the natural problems of conflict over scarce resources. Moreover, each first possessor must be assigned an "absolute" bundle of property rights over what she appropriates, because any qualified bundle would lead to utility-draining uncertainties among the natives concerning who should be thought to have which rights. The utilitarian considerations that require these absolute rights also require the familiar libertarian agency theory of the state, which says that a state can be endowed with no rights beyond those originally held by individual citizens on whose behalf it acts. n38

Once property entitlements have been determined, Epstein says, two threats to utility arise in sequence. The first is that collective action problems cannot be overcome through coordinated voluntary action. The only way to cut through collective action knots is to empower a state to manipulate individuals' property rights against their wills when there are, for example, "tragedies of the commons" (such as the overexploitation of a water source) looming. Yet attributing this power to the state brings on a second danger, which is

"rent-seeking." Once a state is empowered to manipulate individuals' property rights, special interest groups will devote resources to get the state to manipulate property rights [*1937] in their favor (for example, the paper industry may lobby for a law to prevent milk from being sold in plastic containers n39). And other groups will expend resources resisting these changes. Such expenditures of otherwise productive resources (rent-seeking) lead to pure deadweight social utility loss.

Epstein's response to the threat of rent-seeking is to restrict the state to making those changes in property rules that will result in a net social gain, and to insist that any such gain be distributed pro rata according to pre-existing property entitlements. n40 The state may revise property rules, that is, only if it makes the social pie bigger and divides the surplus so as to maintain the relative sizes of people's pieces of the pie. This constrained empowerment of the state allows the polity to overcome collective action problems while reducing the dangers of rent-seeking, since one citizen can only gain through state action if others also gain proportionately to their current holdings.

It is this combination of state power and restriction that Epstein believes is discoverable within the plain meaning of the Takings Clause. A state action triggers "takings" scrutiny if it alters any incident of any private party's property bundle. Such an act must be for "public use" if it is to be legitimate at all: it must either protect existing property entitlements or create a social surplus by overcoming a collective action problem. And if such a surplus is created by state action, there must be "just compensation" to ensure that the surplus is distributed pro rata. In short, any interference with an incident of private property is a taking and will only be legitimate if the holders of all incidents are compensated with a proportionate share of the gains generated by the interference. Epstein has squared the circle: the "ordinary meaning" of the Clause is also the one that, if respected, would produce the greatest social good.

Epstein wields his interpretation of the Clause with great vigor. There is no distinction between "taking" and "regulation" in this view. Any law that hinders or makes conditional a transfer of property alters a property right and therefore triggers the Clause, as does any law that limits any right of exclusion or use. n41 Some of these "takings" are legitimate, since compensation can be provided to rights-holders either explicitly or in-kind. Yet other familiar laws and programs are irremediably unconstitutional. These include progressive taxation, most zoning laws, minimum wage and price-setting laws, mandatory collective bargaining rules, and most welfare programs and compulsory contribution schemes like Social Security. None of these laws and programs increase the size of society's total utility pie, and even if they could, there is no chance that they would distribute this surplus to people proportionate to the size of their slices ex ante. The reforms are either

inefficient in themselves or are redistributive in a way that results from and encourages the inefficiencies of rent-seeking. n42

Many commentators have criticized Epstein either for not proving the congruence of utilitarianism and natural rights or for wanting heartlessly to dismantle the essential programs of the New Deal. n43 Whether or not these criticisms are correct, Epstein must at some point be met where he is strongest, which is on his understanding of "property" and his interpretation of the other terms in the Clause.

Criticism of Epstein's Theory of Takings

Epstein's theory is the culmination of the Hohfeldian redefinition of property as rights, not things. Epstein merely uses the conclusions required by the Scientific conception of property - such as the independence of incidents for takings - as part of a larger, complex utilitarian theory of politics. Rather than ignoring the Scientific conception of property when applying political theory to the Clause, as did Michelman and Sax, Epstein highlights the Scientific conception of property in order to show how it makes the Clause work toward the goals of his favored theory and the conservative-libertarian conclusion.

My main criticism of Epstein is that his reading of the Takings Clause, though narrower in scope than Michelman's and Sax's, is still implausibly broad. The Scientific conception of property forces Epstein to count as "takings" all sorts of government actions that no one would otherwise think of counting as such. It would be possible to make this objection simply by listing examples of the counterintuitive implications of Epstein's theory. But I will instead build up to the criticism by proposing a more detailed picture of property rights and examining its fit within Epstein's view. This material will lay the basis in the next section for the conclusion that it is possible for us to retain the sophisticated Hohfeldian analytical vocabulary in our understanding of property, without being pushed to the Hohfeldian thesis that property is rights not things and its corollaries.

The usual image of property in legal literature since the Scientific revolution is of a "bundle of rights" - specifically a bundle of Hohfeldian [*1939] claims, privileges, powers, and immunities. n44 As I propose elsewhere n45 this "bundle" of property rights may be more precisely represented as an orderly structure of Hohfeldian incidents in the following arrangement:

[SEE FIGURE IN ORIGINAL]

The importance of this particular structure of Hohfeldian rights is that

with it one can represent the "mechanics" of all of the typical property-regarding actions. When you use the computer that you own, you exercise a privilege; when you exclude trespassers from your house, you exercise a claim. We each have an immunity against others annulling our claims over our property or others foisting new claims upon us. And appropriation, transfer, and abandonment of property all involve the exercise of a power to create or cancel (in ourselves or in others) claim-rights over objects. The further details of how to represent various typical property-regarding actions by reference to the Hohfeldian rights in the structure are not so important here, but the interested reader may wish to satisfy herself that this structure of rights is up to the task of representing all such actions.

For our purposes here, the important fact about the diagrammatic representation of Hohfeldian property rights is that it has two levels. The first-order rights represent the property rights to the exclusive use of an object. But we also need to include second-order rights in the diagram to explain the voluntary transfer of these rights of exclusive use from one person to another. When, for example, you give me a gift, you do not merely transfer physical possession from yourself to me; you must also [*1940] exercise a second-order right (a power) to move your rights of exclusive use of the gift from yourself to me. Any set of rights capable of representing property transfer must therefore have such a layered structure.

Now Epstein should have no problem in principle with this multi-leveled diagrammatic representation of property rights, as it is only a more sophisticated version of the Scientific analysis that he shares with most academic property scholars. Indeed, he should welcome the attempt to replace the vague metaphor of a "bundle" of rights with an explicit depiction of the interrelated rights involved in property. He could take this idea of a property structure on board and translate his property is rights position into the claim that each of the rights shown in Figure 1 is, in itself, correctly called "property." Epstein would no doubt emphasize that the full property structure represented here can be disaggregated in many ways through voluntary transactions, so that each of two or more people may hold only fragmentary and overlapping structures of Hohfeldian rights over a particular object. He might also give examples of the various ways that the common law and statutes qualify and attenuate the incidents with which any individual may be vested. These points are certainly correct.

Yet once we examine the structure of rights with Epstein's agency theory of the state in mind, we see that there must be some conflict within his view. Recall that the agency theory says that a state can be endowed with no rights beyond those originally held by the individual citizens on whose behalf it acts. Yet recall also that Epstein's state has the power to alter any component of individuals' property-rights structures against their wills when doing so will help to overcome collective action problems (like tragedies of the commons).

These two views do not fit together.

One can see how Epstein's state might become endowed with powers to alter individuals' property rights of exclusive use. Individuals, after all, have natural (second-order) property rights to alter their own (first-order) rights of exclusive use, so there is no conflict with the agency theory of the state when the state becomes endowed with second-order powers. But the government that Epstein describes also has the power to alter individuals' legal powers of transfer - their second-order rights - when collective action problems loom. And where would the government get such a power? Individuals are not naturally vested with higher-than-second-order powers to alter their second-order rights, so it seems by the agency theory that a state could not possibly be vested with such powers either. n46 Yet the state that Epstein describes clearly has higher- [*1941] than-second-order powers to alter individuals' rights of transfer, and so clearly has powers beyond those held by individuals in the state of nature:

[SEE FIGURE IN ORIGINAL]

I take this to be a correct schematic representation of the relationship between the modern state and individuals' property rights. I note in passing that the "higher-order" powers marked in this extended diagram could be further specified (e.g., courts have third-level powers over individuals' property rights, legislatures have fourth-level powers over these powers of the courts, perhaps citizens have yet higher-order powers over these legislative bodies, and so on).

Still, Epstein might not be worried. He might just jettison his agency theory of the state as a remnant of his natural-rights libertarianism that should not have survived his transition to being a utilitarian foundationalist. Indeed, Epstein could say that the extended diagram (Figure 2) offers a good way to represent his thesis. For he could say it shows quite well what it means for private property to be taken. Whenever the state exercises its higher-order powers over individuals' property rights - whenever it alters an individually held right to use, exclude, or transfer - it takes private property. This doesn't settle the legitimacy of the state's exercise of its powers in any particular case, since takings can be legitimate if justly compensated. But Epstein could say that the extended diagram represents what he regards as the correct position on the contested conceptual issue of when a taking occurs.

I think that the diagram does help to capture Epstein's position, but that it also shows why we should not follow Epstein on what constitutes a taking unless we are forced to do so. For now we can see clearly just how many governmental actions must fall under Epstein's category of takings, [*1942] and how far Epstein actually is from any ordinary understanding of the terms and

the workings of the Clause.

For if we say, as Epstein does, that every governmental alteration of any private property right is a taking of private property, then we must label as "takings" at least all of the following alterations of individuals' property rights: laws forbidding the manufacture of nerve gas or forbidding the sale of pornography to minors; laws mandating construction standards for apartment buildings, toxicity testing for medications, and nutritional labels on food packaging; antitrust laws; fair housing laws; and laws requiring hunting permits. Each of these state actions removes or attenuates a previously existing private right - a power to transfer, a claim to exclude others, or a privilege of use. Even when the government mandates that cars have seat belts, and even when the government lowers the speed limit, it has "taken private property" by Epstein's test - because through these mandates the government removes rights that citizens previously held to use their vehicles in particular ways. n47

Now it is of course appropriate to require the government to justify its policies, and perhaps some of the above policies are unjustifiable. But there is no ordinary sense in which legislation requiring that cars have seat belts "takes private property for public use." Nor does it make any common sense to classify the other policies above, such as nutritional labeling or fair housing laws, as "takings." Epstein's reading of the Takings Clause, though more constrained than Michelman's and Sax's, is still implausibly expansive.

Two questions arise once we see how far Epstein's construction of the Takings Clause departs from a common sense understanding of its range of application. The first is the question of how Epstein could think that his reading is close to a literal reading of the text. The explanation for this may just be biographical: legal scholars, as all scholars, sometimes lose track of the distance between their own technical concepts and laymen's concepts. n48

The more interesting question is how Epstein, like Michelman and Sax, ended up with such an overbroad and counterintuitive reading of the scope of the Takings Clause. And by now the answer should be clear. [*1943] The source of the expansiveness in Epstein's interpretation is again just the Hohfeldian claim that property is rights not things - although Epstein, unlike Michelman and Sax, gets into difficulties not because he tries to avoid this claim, but because he embraces it. Once this central Hohfeldian claim is accepted, the thesis of the independence of incidents for takings seems inevitable. That is, it seems inevitable that "taking private property" will be construed as "limiting any private property entitlement," which forces the Clause open to a huge range of cases. The extraordinary implications of this interpretation should prompt us to reexamine the arguments that led to the central Scientific doctrine in the first place.

Hohfeld Revisited

We should review the Hohfeldian criticisms of the "thing-ownership" conception of property that led down the road to Michelman, Sax, and Epstein. According to the Hohfeldians, property is not a relationship between a person and an object, as believed by the masses, but a legal relationship between people with respect to objects: property is rights not things. The sophisticated lawyer must think in this way because she knows that there is not just one kind of legal relationship that a person can have to an object. The incidents of ownership can be divided up in any number of ways, and there is no minimal set of rights that constitutes the "ownership relation." Property cannot be things because sometimes people hold property rights without there being anyone who clearly "owns" the object of those rights. Moreover, no set of incidents is essential for calling a set of property rights "property," so each property right is property in itself. And the thesis that each property right is property yields the conservative-libertarian (Epstein's) conclusions because it supports the thesis of the independence of incidents for takings.

All of this is so familiar to the academic legal mind that it hardly seems to bear repeating. Divided control over objects shows that "ownership" is a vague folk-concept to be avoided; casting each property right as "property" lets us explain divided control in all of its many forms. Since the Constitution speaks in the primitive language of ownership of things, it must be reinterpreted using the sophisticated Scientific conception of property as rights appropriate to the modern world. Epstein merely draws the logical conclusion that Michelman and Sax wanted to avoid: to disturb any property right is to take private property.

Yet this progression cannot be carried through, because the Constitution does not speak in the primitive language of ownership at all. The Takings Clause does not say "nor shall what a person owns be taken for public use without just compensation." Nor does it say that "no one shall be deprived of ownership," nor that "nothing that belongs to a private party shall be taken." "Owns," "ownership," and "belongs" - these terms might lead to trouble with respect to divided control, but none of these terms is in the Clause. If divided control is what pushed constitutional [*1944] interpretation away from the reading of the Clause in Mugler, then it was not a push given by the words on the page.

This should give us pause to reflect on the objection to the old conception of property as things. Perhaps what should be abandoned is not the idea that property is things, but just the idea that property always involves a single holder of property rights or "undivided control." Perhaps we can say that there are things that are property but that may not be owned by or do not belong to a single person. This seems natural enough. A piece of land held in trust, for example, is still private property despite the fact that the trustee and the

beneficiary divide the rights over the land between them.

All we need to add is how we distinguish those things that are property from those things that are not. But this seems possible too - private property is all those things over which private property rights are held. And private property rights are just those rights in that two-leveled structure of Hohfeldian rights that we saw in Figure 1. Anything that is the object of such a structure of Hohfeldian rights is properly called "property," however these rights are divided up and however they are held among different people.

With this understanding of "property" we can handle all of the influential Hohfeldian objections to property as things. We can grant for the sake of argument that the things that are property include intangible as well as corporeal objects, and we of course acknowledge that all of the Hohfeldian rights in the figures are "against people" not "against things." Most importantly, we need not claim that all of the rights over a thing that make that thing private property must be held by one person or even by a few. Property is any object of that structure of Hohfeldian rights with which we can represent the typical property-regarding actions, regardless of who holds which of these rights. The objections to property as things disappear when the concept of property is dissociated from what is truly a holdover from the nineteenth century (or perhaps the mythology of the nineteenth century), the concept of universal, undivided control over objects.

With the "new" conception of property, we can keep the thought that property rights are relations between people with respect to things and the sophisticated Hohfeldian language to describe these relations. We can keep the modern insight that these rights-relationships can become very complicated. But we move away from the uncomfortable conflation of an object of rights with the rights themselves. Far from all property rights being property, none are - they are just property rights. Property is what property rights are rights over. We are not forced to a counterintuitive conception of property because of divided control, as is commonly assumed by property scholars in all camps. [*1945]

Conclusion

I claimed at the outset that currently influential academic approaches to the Takings Clause are surprisingly distant from each other and from a nonspecialist sense of what the Clause means. I hope to have explained why this has come to be so. Current academic interpretation is pulled either towards the Michelman-Sax model of wholesale reconstruction of the Clause according to some philosophical theory, or the Epstein model with its conservative-libertarian formalism. But neither model can generate a plausible reading of the Clause's scope and workings. Like a rogue star, the Scientific conception of property as rights has

drawn academic interpretations of the Takings Clause farther and farther out of their orbits, until they can no longer be seen from Earth.

This leaves us with the question of what takings jurisprudence would look like had the Hohfeldians not mischaracterized "property" so many decades ago. And, more importantly, how should we read the Clause now that we see that the common conception of property as things is better than the Scientific conception that eclipsed it? For surely we cannot simply go back to the old physical invasion test of *Mugler*. Physical invasion is now irretrievably quaint, as well as too simplistic for the complexities of modern property law and our contemporary regulatory state.

What we need in particular is an interpretation of the Clause that is based on the ordinary notion of property as things and that is sensitive to the multiform possibilities of modern divided ownership and the many powers of a modern government. We also need something to say about government acts that impinge upon various intangible economic assets like trade secrets, stock options, goodwill, and so on. ⁿ⁴⁹ I cannot even begin to lay out such an interpretation here (one cannot say a little without saying a lot); and it seems better in any case to invite interested readers to imagine for themselves the shape that a recentered interpretation of the Takings Clause might have. Yet I would like to give one reason for thinking that it is a promising line to pursue. Once we give the correct sense to "private property" and so need no longer worry about the conservative-libertarian conclusion, the other terms in the Takings Clause revive as guides to its interpretation.

For instance, the part of the Clause that says "nor shall private property be taken for public use" emerges from its obscurity since *Berman* to suggest that takings scrutiny should be brought to bear on cases in which some privately held object comes to be used by the public or its agents, and perhaps also on those cases where some private agent is required by the public to use some property in a particular way. Once we free ourselves from property as rights and its implausible theorems, we see that the combined language of the Clause actually constrains interpretation much more closely than one would think by reading the current literature, [*1946] which assumes that some of the Clause's central concepts have no content of their own.

Which is not at all to say that we must be literalists in constitutional interpretation. I expect that any plausible perspective on constitutional interpretation would accept the general point of this Essay - that we should give up what is pretty clearly an interpretational mistake that we have inherited. Whatever one's overall view of reading the Constitution as a whole, I take it that there is little reason to continue with a redefinition of a key term that was motivated by a bad argument. And there should be, from all perspectives, a good reason to begin interpretation by construing key terms as people commonly do. For then citizens who are legal specialists, and citizens

who are not, are more likely to have similar views about the meanings of the fundamental laws under which they all, after all, must live.

Footnotes

n1. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 85 (1985).

n2. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1680 (1988) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977)).

n3. U.S. Const. amend. V.

n4. The terminology is from Bruce A. Ackerman, *Private Property and the Constitution* 10 (1977). "Scientific" discourse about the law uses a set of technical terms whose meanings are set by clear definitions, while "Ordinary" analysis is rooted in the normal talk of nonlawyers. See *id.*

n5. Michelman's article in particular, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *Harv. L. Rev.* 1165 (1967), has been influential. It has been discussed in textbooks, mined in Supreme Court opinions, and refined in "state of the art" treatments of takings law like Stephen R. Munzer, *A Theory of Property* (1990).

n6. The survey I give is to some extent a retelling of the history found in Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36 (1964), which was an influential article in the modern academic takings literature. I aim to recast and expand Sax's history so that it can include his and his successors' work.

n7. 123 U.S. 623 (1887).

n8. 1 William Blackstone, *Commentaries* *138.

n9. See Mugler, 123 U.S. at 671. There is another facet of the history of takings doctrine, which we could call "nuisance control," concerning state regulation of property uses that violate personal or property rights or in some way threaten the public good. I will leave nuisance out of this analysis as an unnecessary diversion. I will also not attempt to sort out the various positions on what constitutes the state's "police power," or how this relates to nuisance control or the public use provision.

n10. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Greenwood Press 1978) (1919).

n11. See Arthur L. Corbin, *Forward to Hohfeld*, *supra* note 10, at xiii-xv, for an account of Hohfeld's influence on the profession and especially on the language of the 1936 Restatement of Property.

n12. See Hohfeld, *supra* note 10, at 74-91.

n13. Ackerman, *supra* note 4, at 26-27.

n14. *Id.* at 114-15.

n15. *Id.* at 28.

n16. See Radin, *supra* note 2, at 1676 (labeling this thesis "conceptual severance"). Note that the independence of incidents can be applied not only to separate incidents, but also to temporal slices of a single incident. The leading case here is *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 304 (1987) (holding that temporary deprivations of use are compensable under the Takings Clause).

n17. Bruce A. Ackerman, *Four Questions for Legal Theory*, in *Property* 351, 365 (J. Roland Pennock & John W. Chapman eds., 1980).

n18. 260 U.S. 393, 412-16 (1922).

n19. See Sax, *supra* note 6, at 60.

n20. See Ackerman, *supra* note 4, at 140-45; Michelman, *supra* note 5, at 1190-93; Sax, *supra* note 6, at 60.

n21. 348 U.S. 26, 32-34 (1954).

n22. See *id.*

n23. See Ronald H. Coase, *The Federal Communications Commission*, 2 *J.L. & Econ.* 1 (1959); Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

n24. See Michelman, *supra* note 5, at 1199-200; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149, 152-55 (1971).

n25. See Michelman, *supra* note 5, at 1165; Sax, *supra* note 6, at 37-38.

n26. See Ackerman, *supra* note 17, at 365, which lays out well the quandary of

the liberal takings scholar.

n27. Sax, *supra* note 6, at 61; see also *id.* at 64 ("Against what qualitative kinds of value-diminishing acts should existing values be insulated?").

n28. Michelman, *supra* note 5, at 1167-69; see also Munzer, *supra* note 5, at 419-20 (distinguishing the moral and social problems posed by governmental takings from the legal problems).

n29. Michelman, *supra* note 5, at 1165.

n30. See, e.g., Michelman, *supra* note 5, at 1187 n.45 (giving a perfect Hohfeldian analysis of the technical differences between the positive easement and the negative servitude); Sax, *supra* note 24, at 152 (giving a Hohfeldian characterization of property).

n31. See Michelman, *supra* note 5, at 1214-24. Sax's interpretations are framed somewhat differently. Yet in his 1964 article the focus is on the fairness of government action, and in the 1971 piece the goal is explicitly maximum productive output from a resource base. See Sax, *supra* note 6, at 64; Sax, *supra* note 24, at 158-62.

n32. This and the following two paragraphs draw on T.M. Scanlon, Comments on Ackerman's Private Property and the Constitution, in Property, *supra* note 17, at 341.

n33. Michelman, *supra* note 5, at 1166.

n34. Epstein became an unreserved utilitarian foundationalist shortly after the publication of Epstein, *supra* note 1. This summary of his views tries to represent his current position, drawing on Richard A. Epstein, *Bargaining with the State* (1993) [hereinafter *Bargaining with the State*]; Richard A. Epstein, *Simple Rules for a Complex World* (1995) [hereinafter *Simple Rules*]; Richard A. Epstein, *Takings: Of Maginot Lines and Constitutional Compromises*, in *Liberty, Property, and the Future of Constitutional Development* 173 (E.F. Paul & H. Dickman eds., 1990) [hereinafter *Takings*]; Richard A. Epstein, *A Last Word on Eminent Domain*, 41 *U. Miami L. Rev.* 253 (1986) [hereinafter *Last Word on Eminent Domain*]; Richard A. Epstein, *An Outline of Takings*, 41 *U. Miami L. Rev.* 3 (1986) [hereinafter *An Outline of Takings*]; Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 *Harv. J.L. & Pub. Pol'y* 713 (1989) [hereinafter *Utilitarian Foundations*].

n35. As noted above, I am leaving to one side the nuisance control and police power aspects of takings jurisprudence; including them would mean modifying this statement slightly.

n36. See Epstein, *supra* note 1, at 20-24; Last Word on Eminent Domain, *supra* note 34, at 263-65.

n37. See *Bargaining with the State*, *supra* note 34, at 25-38; *Simple Rules*, *supra* note 34, at 59-63; *Utilitarian Foundations*, *supra* note 34, at 730-37.

n38. See Epstein, *supra* note 1, at 12-24, 36, 331.

n39. Epstein discusses this example in Epstein, *supra* note 1, at 143-45, with reference to *Clover Leaf Creamery Co. v. State*, 289 N.W.2d 79 (Minn. 1979).

n40. See *An Outline of Takings*, *supra* note 34, at 3-18.

n41. See Epstein, *supra* note 1, at 57-58.

n42. See Epstein, *supra* note 1, at 263-329; *Simple Rules*, *supra* note 34, at 112-48.

n43. See, e.g., the contributions to the Symposium on Richard Epstein's *Takings: Private Property and the Power of Eminent Domain*, 41 U. Miami L. Rev. 49 (1986); Lawrence Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. Miami L. Rev. 223 (1986); Thomas C. Grey, *The Malthusian Constitution*, 41 U. Miami L. Rev. 21 (1986); Margaret Jane Radin, *The Consequences of Conceptualism*, 41 U. Miami L. Rev. 239 (1986); Cass R. Sunstein, *Two Faces of Liberalism*, 41 U. Miami L. Rev. 245 (1986); see also Frank Michelman, *Takings 1987*, 88 Colum. L. Rev. 1600 (1988); Radin, *supra* note 2.

n44. Hohfeld in fact insisted that only one of these four incidents - the claim - is properly called a "right." I follow Judith Jarvis Thomson, *The Realm of Rights* 200 (1990), in saying that each of the four Hohfeldian incidents is a right in and of itself.

n45. See Leif Wenar, *The Concept of Property* (1997) (unpublished manuscript, on file with author).

n46. Of course individuals have a right (perhaps a "natural" right) to promise to other individuals that they will not use their rights of transfer in various ways, and so in this way they can alter their own second-order rights. But this right to promise is unlike the power to modify individual rights of transfer that the state ends up with. Unlike a promisor, the state in exercising its power to limit the right to transfer does not end up with a duty toward any other party (*viz.*, to keep a promise). And unlike a promisor, the state can annul a right to transfer (e.g., to transfer hazardous materials) - while a promisor merely commits herself not to exercise rights of transfer that she still holds. Moreover, Epstein explicitly rejects any appeal to a universal promise as the legitimation of the state. See Epstein, *supra* note 1, at 14-15.

n47. The "speed limit" example is discussed further in Ackerman, *supra* note 17, at 359-66.

n48. See, e.g., Epstein's dismissive review of Ackerman's *Private Property and the Constitution*, which introduced the terminology of the "Scientific" perspective:

Any diminution of rights in the bundle of any holder, no matter what becomes of those rights, amounts to a taking under the law. We now have found out in *Scientific Talk* what the property clause means. The Scientist first identifies the rights in the claimant's bundle before the intervention of the governmental activity; taking then means the deprivation of any rights in the bundle. To me, this is common sense; to Ackerman, science.

Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 *Stan. L. Rev.* 635, 640 (1978) (footnote omitted) (reviewing Bruce A. Ackerman, *Private Property and the Constitution* (1977)).

n49. Although it may well be (as I strongly suspect) that there is no reason that sensible laws in these latter areas should be forced into the domain of the Takings Clause.