

Michigan Law Review


Volume 107 | Issue 6

2009

Supreme Neglect of Text and History

William Michael Treanor
Fordham Law School

Follow this and additional works at: <http://repository.law.umich.edu/mlr>

 Part of the [Constitutional Law Commons](#), [Legal History Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

William M. Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059 (2009).
Available at: <http://repository.law.umich.edu/mlr/vol107/iss6/11>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SUPREME NEGLECT OF TEXT AND HISTORY

*William Michael Treanor**

SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY. By *Richard A. Epstein*. Oxford and New York: Oxford University Press. 2008. Pp. xiv, 169. \$19.95.

INTRODUCTION

Since his classic book *Takings*¹ appeared in 1985, Richard Epstein's² ideas have profoundly shaped debate about the Fifth Amendment's Takings Clause³ to a degree that no other scholar can even begin to approach. His broad, original, and stunningly ambitious reading of the clause has powerfully influenced thinking in academia, in the judiciary, and in the political arena. The firestorm of controversy that followed the Supreme Court's recent decision in *Kelo*—in which the Supreme Court upheld the constitutionality of a municipal urban renewal plan that displaced long-time homeowners and conveyed their land to developers⁴—is in critical part a testament to the way in which the intellectual framework and normative arguments pioneered and championed by Professor Epstein have entered, not just the mainstream of legal thought, but the mainstream of politics.

In *Supreme Neglect*, Epstein has produced a clear and elegant synthesis of his lifetime of thinking about the Takings Clause and, more broadly, about the role of property in our constitutional system. In a book consciously aimed at a popular audience (p. xvii), Epstein advances his view that strong protection for private property must be a core value of our constitutional system because that was the conception of the Framers, because the constitutional text dictates such protection, and because strong protection for private property safeguards liberty and advances general economic well-being. For Epstein, the Takings Clause is the Constitution's primary mechanism for protecting private property against government overreaching. He argues that, if courts read the clause correctly, they will not only invalidate much land-use regulation, the area involved in most takings litigation today, but also the statutory regimes that create the modern regulatory state. In essence, for Epstein, the Takings Clause bars government from acting in ways

* Dean and Paul Fuller Professor, Fordham Law School.

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

2. James Parker Hall Distinguished Service Professor of Law and Director, Law and Economics Program, The University of Chicago Law School.

3. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

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

that diminish the value of private property (with the exception of a highly constrained category of police-power regulations).

Under modern Supreme Court caselaw, the Takings Clause constrains government actions in two ways. First, it bars the government from physically “taking” private property (as when it uses the power of eminent domain to acquire property for schools or roads) unless compensation is provided⁵ and unless the taking is for a public benefit.⁶ Second, it prevents “regulatory takings”—regulations that go “too far”⁷ in diminishing the value of private property without providing compensation. Although Supreme Court decisions do not reflect a consistent position on precisely when regulations go so “far” in diminishing value as to constitute a taking, only dramatic diminutions in value have been found to go “too far.”⁸

Epstein sees the clause as a dramatically more powerful limitation on government. According to Epstein, the Takings Clause is a “twelve-word distillation of social contract political theory” (p. 34). The just-compensation principle that the clause embraces ensures that the individual will not suffer when his or her property is taken. Central to Epstein’s position are the notion that “[t]he use of compensation . . . prevents any single individual or small group from being ‘singled out’ for special adverse treatment, for the cash paid is meant to be a perfect equivalent of the property surrendered” (p. 32) and his belief that “forced transactions” resulting from “the use of state power . . . should yield proportionate gains to all individuals” (pp. 32–33). This principle of proportionate gain accords with “intuitive grounds of fairness” (p. 33). It also promotes efficiency, a point on which Epstein places great stress:

Forcing the government to supply proportionate gains necessarily shrinks the level of factional intrigue. . . . [S]truggles [to win a disproportionate share of the gain from governmental actions] cost a lot of time and money to wage, generating backstabbing and conflict along the way. The combined effect of these political maneuvers is to eliminate much of the . . . gain that the social project originally promised. The proration requirement offers an effective way to counter that risk . . . (p. 33)

Epstein applies this principle of proportionate gain to a wide range of doctrinal areas. He would, for example, carefully scrutinize government actions to determine whether they satisfy the “public use” requirement of the Takings Clause, rather than applying the deferential standard of review of

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

6. *Kelo*, 545 U.S. 469. The public benefit standard is, in practice, easily satisfied.

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

8. For an analysis of *Mahon*, see William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998). For more recent cases involving regulatory takings, see *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), a decision upholding the designation of Grand Central Station as a landmark and the leading example of a deferential view of the constitutionality of government regulations, and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a decision finding beachfront regulation to be a taking—the leading example of a decision reflecting a more aggressive standard. For further discussion, see *infra* Part II.

“public use” reflected in the Court’s decision in *Kelo*. Even when compensation is provided, takings to advance an urban renewal project would pass constitutional muster “only when the loss in subjective value is small and the locational necessities are great” (p. 85). He argues that rent control is unconstitutional, as well, because of its disproportionate impact, benefiting current renters while disadvantaging everyone else (p. 73). The Supreme Court’s determination in *Village of Euclid v. Amber Realty Co.*⁹ that zoning is constitutional similarly runs afoul of the proportionate-advantage rule, since the zoning ordinance that the Court upheld made some property owners big winners and others big losers (pp. 117–19). Endangered species legislation also runs afoul of the Takings Clause because such legislation “converts the discovery of any valuable species on private lands from a source of new wealth to its owner into a mortal threat to the land’s productivity” (pp. 133–34). To take yet another example, progressive taxation (definitionally) also fails to pass muster under the principle of proportionate gain (pp. 167–68).

Epstein’s vision of the Takings Clause thus narrowly circumscribes governmental action. He allows government to prevent property owners from engaging in common law nuisances since common law nuisance law reflected the principle of reciprocity: “each person will gain more from these restrictions imposed on others than he will suffer when like restrictions are imposed on him” (p. 23). Thus, the regulation is permissible because it benefits property owners in general. He also allows rate regulation to the extent it is necessary to end monopoly profits: rate regulation permissibly limits “the natural monopolist [such as the railroad owner] to competitive prices” (p. 151). Here, regulation is permissible to the extent it addresses a situation of market failure. In general, however, compensation is mandated if the individual has not gained proportionally from governmental action, and the strict public-use requirement bars some governmental actions even when compensation is paid.

The real question posed by the book, however, is not what the proportionate-gain approach entails, but whether it is constitutionally mandated. Epstein makes two arguments here. One argument is historical: he claims that the Takings Clause should be understood to embody the Founders’ conception of the inviolability of private property. The second argument is textual: he contends that a proper reading of the words of the clause would lead courts to the view that government cannot diminish property value (except in very limited circumstances). The remainder of this Review will be devoted to these arguments. I will argue that proper regard for the Framers’ conception and constitutional text—the two primary anchors of Epstein’s theory—leads to a limited amount of judicial protection for private property; original understanding and constitutional text indicate that the purpose of the Takings Clause is simply to provide compensation in cases of government seizure of property, a position dramatically different from Epstein’s. More broadly, if one were to apply the text according to the original

9. 272 U.S. 365 (1926).

meaning of the words or to follow the concrete understanding of the founding generation, one would reject not only Epstein's approach to the clause, but the entire modern regulatory-takings doctrine.

I. HISTORY AND THE TAKINGS CLAUSE

With respect to history, Epstein's account is a story of decline. The subtitle itself, "How to Revive Constitutional Protection for Private Property," embodies the notion that we have lost what we once had—adequate protection for private property—and that we must recover what we have lost. The halcyon days were the days of the Framers, the moment in which we departed from the original understanding was the New Deal, and the culprit was the Supreme Court. It is the Court's disregard of the Framers' vision that is the "Supreme Neglect" the book addresses and seeks to remedy.

This point—that the Framers put forth a Constitution that provided strong protection for private property, while the New Deal Supreme Court led us astray—is announced at the very beginning of the book in Professor Geoffrey Stone's Editor's Note: "Over the past seventy years, the Supreme Court has abandoned the strong version of the takings clause championed by the framers of the Fifth Amendment in favor of the much weaker version of the clause advocated by early twentieth-century Progressives and supporters of the New Deal" (p. xii). Epstein restates the point in his autobiographical preface, in which he describes how, at the outset of his career, he came to be interested in the Takings Clause:

When I completed my legal studies in the United States, the study of American constitutional law loomed large. Immediately, I was struck with the major transformation from the property-protective regime that had been championed by the framers of our Constitution to the weak property regimes championed by the Progressive politics of the early twentieth century, which were turned into constitutional law during the New Deal. (p. xvi)

He returns to the point in his Introduction as he states the purpose of the book:

Our founding fathers had a keen appreciation of the central role of private property in social life, which is why they included the "takings clause" in the Fifth Amendment to the United States Constitution The evident partiality for limited government that animates that provision has not held firm throughout our nation's history. Indeed the revolution of Franklin D. Roosevelt's New Deal was made possible by the conscious choice of the United States Supreme Court to make sure the takings clause did not hamper or overturn any of Roosevelt's comprehensive legislative reforms, which imposed greater government control over the nation's economic activity. . . . The purpose of the book is to offer a roadmap for the revival of property rights in the United States and for the social improvement that this constitutional change should usher in. (p. 2)

Epstein thus proclaims with enthusiasm and vigor that recovering the vision of the Framers is his basic mission. And yet the actual Framers are almost literally absent from the book. To be precise, the following is a complete enumeration of all references to individual Framers in *Supreme Neglect*: Madison is mentioned once, in passing. Madison appears as the sole American (along with four Scottish and English writers) on a list of the “key writers who set the intellectual framework for our Constitution . . . [who] all treated private property as a bulwark of the individual against the arbitrary power of the state.”¹⁰ That’s it. There is no discussion of Madison’s thought, not even a mention of anyone else involved in drafting or ratifying the Constitution or the Takings Clause, no discussion of drafting or ratifying history, and no mention of the circumstances that gave rise to the Takings Clause. Epstein has fairly extensive discussions of the role of private property in the thinking of John Locke (pp. 6, 17–18, 27, 29–30), William Blackstone (pp. 6, 18–19, 90), David Hume (pp. 6, 27), and Adam Smith (pp. 6, 18, 30, 31, 167), but (with the exception of including Madison’s name on a list), no Americans figure in Epstein’s analysis of the original understanding.

The ideological background of the founding generation was complex. While thinkers such as Locke and Blackstone were part of that background, so was a republican worldview, descended from English opposition thought, in which the purpose of the state was seen as promoting virtue and in which the individual pursuit of self-interest was decried.¹¹ As the Founders thought through questions of private property, this approach often manifested itself. Thus, at the Constitutional Convention, delegate John Dickinson declared that he “doubted the policy of interweaving into a Republican constitution a veneration for wealth” and “had always understood that a veneration for poverty [and] virtue[] were the objects of republican encouragement.”¹² Similarly, Benjamin Franklin observed, “Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing.”¹³ Given the competing ideological influences shaping the thought of the founding generation, Epstein’s account is irretrievably flawed because he simply cites one set of influences (and does so in a very broad-brush way) while ignoring both competing influences and the way in which the Founders worked through concrete problems.

10. P. 6. The others who established the intellectual framework for the Constitution are John Locke, David Hume, William Blackstone, and Adam Smith. P. 6.

11. For further discussion of the argument briefly advanced here, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 819–25 (1995).

12. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 118, 123 (Max Farrand ed., rev. ed. 1966).

13. Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania* (1789), in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (Albert Henry Smyth ed., 1907).

The omission of analysis of the Framers is not a product of the fact that *Supreme Neglect* is a quasi-popular book. Rather, it reflects Epstein's disregard for what the Framers thought (although he claims to be their champion). *Takings*, his primary scholarly book on the Takings Clause, takes precisely the same approach as *Supreme Neglect*. It has a chapter focusing on the views of specific British thinkers—"Hobbesian Man, Lockean World"¹⁴—yet Hamilton is the only Founder to earn even a mention, and the reference to him is in passing and not concerned with the Takings Clause.¹⁵ Looking at English and Scottish thinkers associated with classic liberalism (with Locke having the pride of place), Epstein finds historical basis for a view of property that includes the "rights to use, transform, develop, consume, or dispose of property," as well as the right of "exclusion" (p. 20), and that has the dual goals of serving "as a bulwark of the individual against the arbitrary power of the state" (p. 6) and promoting economic gain (p. 19). Yet, as Epstein develops his historical claims, there is no attention to how Americans of the founding generation and the generations before the founding grappled with both the level of protection to be afforded private property and the limits on that protection. I am willing to accept that Locke was a strong champion of private property (although the extent of the protection he would have afforded private property is a subject of debate among academics). That fact, however, is of limited relevance to an inquiry about the original understanding of the Takings Clause. Epstein's originalism is irretrievably flawed because it is originalism without Americans.

Epstein might respond to this critique by arguing that his concern is with the original meaning of the text, not the original understanding of the people who wrote and adopted that text, and that his approach is textualist.¹⁶ That claim, however, is belied by his repeated invocation of the Framers—which reflects the view that what they thought matters and that he is claiming their mantle—and by his invocation of Locke, Hume, and other British thinkers—which suggests that background is relevant to understanding text. Indeed, Epstein writes: "[T]o figure out what these words [of the Takings Clause] mean[,] we must turn to extrinsic material that runs the gamut from popular usage to historical practice and learned commentary" (p. 5). But his use of background understanding omits centrally important evidence.

While Epstein's vision of the Takings Clause bars both physical seizures of property by the government *and* regulations that diminish the value of property, the few precursors to the Takings Clause were all concerned only with physical seizure. Even this point should be placed in context: Takings clauses were generally not present in colonial-era documents of government, and, prior to the Fifth Amendment, there were many instances of

14. *TAKINGS*, *supra* note 1, at 7–18.

15. *Id.* at 17.

16. *See, e.g.*, p. 6 ("In dealing with the takings clause, we have to track the text."); p. 39 ("[T]he acid test is . . . [whether courts] have . . . read constitutional terms in accord with their ordinary usage at the time of their adoption, as elucidated—and here is the rub—by traditional principles of interpretation.").

uncompensated takings.¹⁷ The clauses that existed were limited in scope to seizure. The Magna Carta prohibits a crown official from “tak[ing] the corn or other chattels unless he pays on the spot cash for them.”¹⁸ Similarly, the only colonial charter to have a takings provision was the 1641 Massachusetts Body of Liberties, which provides that “[n]o man[']s Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service” without compensation.¹⁹ The 1669 Fundamental Constitutions of Carolina, which John Locke drafted but which never fully went into effect, was also concerned with physical seizures, requiring compensation when the colonial government built structures and constructed highways on private land.²⁰

The handful of revolutionary-era takings clauses were also limited to physical seizures. Vermont’s 1777 Constitution provided “[t]hat private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”²¹ While we have no legislative history for the clause, the contextual evidence from Vermont’s history sheds light on the drafters’ intent. Vermonters had declared their independence from New York after the New York governor had invalidated the New Hampshire land claims on which most land claims in what became Vermont rested.²² The Vermonters were thus rebelling because of a government action that took away their land and gave it to others. The takings clause ensured that, in the future, the state government could not deprive property owners of their land in this way because it barred the state from transferring land from one individual to another without compensation.²³ The Massachusetts Constitution of 1780²⁴ and the Northwest Ordinance of 1787²⁵ both had takings clauses that used language suggesting

17. For further discussion, see *Treanor*, *supra* note 11 at 787–91.

18. KATHERINE FISCHER DREW, *MAGNA CARTA* 133 (2004) (translated from Latin). (Although the chapters of the original text were unnumbered, this chapter is conventionally numbered 28 in modern discussions of the original text.) A broader provision of the Magna Carta mandates adequate procedure, without requiring compensation. *Id.* at 134 (chapter conventionally numbered 39) (“No free man shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land.”).

19. MASSACHUSETTS BODY OF LIBERTIES OF 1641, § 8, *reprinted in* 1 *THE COLONIAL LAWS OF MASSACHUSETTS* 29 (Boston, Rockwell & Churchill 1889).

20. Fundamental Constitutions of Carolina of 1669, art. 44, *reprinted in* JOHN LOCKE POLITICAL ESSAYS, at 160 (Mark Goldie ed., University Cambridge Press 1997) (1669) (“The Damage the Owner of such Lands (on or through which any such publick thing shall be made) shall receive thereby, shall be valued, and Satisfaction made by such ways as the *Grand Council* shall appoint.”).

21. VT. CONST. OF 1777, Declaration of Rights, art. 2.

22. *Treanor*, *supra* note 11, at 827–30.

23. *Id.*

24. MASS. CONST. OF 1780, Declaration of Rights, art. X (“[W]henver the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”).

25. Act to Provide for the Government of the Territory North-west of the River Ohio (Northwest Ordinance of 1787), ch. 8, art. II, 1 Stat. 50, 52 n.(a) (1789) (“[S]hould the public

concern with impressments of goods by the military, and the relevant early caselaw (the most relevant history) supports the reading that the clauses were limited to physical seizures.²⁶

Thus, whereas Epstein pictures Framers who had a strong conception of the inviolability of private property, the actual historical record is more nuanced. As we have seen, most state constitutions did not bar uncompensated takings; where there was a requirement of compensation, it was limited to physical seizures. This does not mean that the founding generation did not see the protection of private property as of fundamental importance. It does mean that they were aware that government actions could affect property and its value and that, outside of the context of physical seizures, they did not want a bright-line rule that would prohibit important governmental actions in the absence of compensation; it also means that, even in the area of physical seizures, support for an inviolable compensation principle was limited.

Not surprisingly given this background, there was no demand that a takings clause be included in the Bill of Rights. Of all the clauses in the Bill of Rights, it alone was not requested by a state ratifying convention.²⁷

Epstein writes: "Our founding fathers had a keen appreciation of the central role of private property in social life, which is why they included the 'takings clause' in the Fifth Amendment to the United States Constitution" (p. 2). This suggests a broad-gauged historical movement coalescing around the necessity for the clause, but the reason why we have a takings clause is simpler: when he proposed the Bill of Rights, Madison included a takings clause. There is no surviving history of debate among members of the Congress or the state legislatures about what the clause meant. Perhaps the most relevant evidence is found in the first constitutional law treatise, in which St. George Tucker in 1803 suggested that the clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war."²⁸ Madison, in his private writings, indicated another area in which the clause would have effect: it would re-

exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.").

26. *Renthorp v. Bourg*, 4 Mart. (o.s.) 97, 132–33 (La. 1816) (holding that the Northwest Ordinance only mandated compensation when a person's property or services were used to advance the war effort); *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823) (requiring no compensation for consequential damages); *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846) (requiring no compensation to owner barred from taking sand and gravel from his land). For further discussion, see Treanor, *supra* note 11, at 830–32.

27. EDWARD DUMBAULD, *THE BILL OF RIGHTS: AND WHAT IT MEANS TODAY* 161–63 (1957) (listing sources for the amendments).

28. ST. GEORGE TUCKER, *Appendix to 1 WILLIAM BLACKSTONE, COMMENTARIES* 1, 305–06 (St. George Tucker, ed., Philadelphia, William Young Birch & Abraham Small 1803). As Tucker suggested, property owners whose goods had been impressed by the military during the Revolutionary War did not have a judicially enforceable right to compensation for these losses. *See Republica v. Sparhawk*, 1 Dall. 357, 362–63 (Pa. 1788) (finding no right to compensation for goods seized by the military during Revolutionary War).

quire compensation if the national government were to abolish slavery.²⁹ Neither writing suggests that the clause covered regulations.³⁰

The early caselaw on the just-compensation principle, primarily in state courts interpreting state constitutions, is to the same effect: the clause did not encompass regulations.³¹ Treatise writer Theodore Sedgwick wrote in 1857: “It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word.”³² The protection provided in federal courts was limited in another way. Until after the Civil War, only Congress, and not the courts, could resolve claims for takings payments.³³

In sum, one of Epstein’s central claims—that he is reviving the Founders’ vision of the Takings Clause—is completely unfounded. His book’s textual argument is equally flawed and is considered next in Part II.

II. TEXTUALISM AND THE TAKINGS CLAUSE

Epstein states that following the text of the clause is an imperative: “In dealing with the takings clause, we have to track the text” (p. 6). His textualist argument begins, quite correctly, by looking at constitutional text and the key terms of the Takings Clause: “What do we mean by ‘private property’? How is it ‘taken’? What is ‘just compensation’? And what is a taking ‘for public use’?” (p. 39).

So far, so good. A textualist approach to the Takings Clause that answers these questions leads to the same place as the originalist approach outlined above: regulation falls outside of the scope of the Takings Clause. While the government has to pay the property owner when it physically “takes” her property for a public use, in contrast, it does not have to pay compensation when it bars her from using it in a certain way because, under both eighteenth-century and current usages, it has not “taken” her “property.”³⁴ To use an example I have used before: If I tell my daughter Katherine that she

29. Letter from James Madison to Robert Evans (June 15, 1819), in *THE MIND OF THE FOUNDER* 315 (Marvin Meyers ed., rev. ed. 1981). For further discussion, see *supra* note 26 and accompanying text.

30. See James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in 14 *THE PAPERS OF JAMES MADISON* at 266, 267 (Robert A. Rutland et al. eds., 1983) (using the Takings Clause principle that no property “shall be taken *directly* even for public use without indemnification to the owner” as reflecting support for “the inviolability of property” and criticizing Hamiltonian economic policies for their failure to reflect the same support for the inviolability of property). Thus, for Madison, the clause reflected a larger principle and had significance beyond its legal scope, which was limited to direct takings. Treanor, *supra* note 11, at 838–39.

31. Treanor, *supra* note 11, at 792–94.

32. THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 519 (New York, John S. Voorhies 1857).

33. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward A Judicial Model of Payment*, 45 *LA. L. REV.* 625, 627–64 (1985).

34. For further development of this argument, see William Michael Treanor, *Take-ings*, 45 *SAN DIEGO L. REV.* 633 (2008).

cannot play with her ball in the apartment, she will not accuse me of having “taken” her ball (or of having “taken” anything else, for that matter). She has been deprived of something of value to her: there is nothing she likes better than playing ball in the apartment. But we don’t think of this prohibition as a taking of property. The Supreme Court has recognized the regulatory-takings doctrine for over one hundred years, but a committed textualist, like a committed originalist, sees this line of precedent as an error.

Epstein’s textualism, however, ultimately rests on non-textual concerns and moves him dramatically away from the plain-language textual approach above. After enumerating the four questions addressing the “key terms of the takings clause” (p. 39)—“What do we mean by ‘private property’? How is it ‘taken’? What is ‘just compensation’? And what is a taking ‘for public use’?” (p. 39)—he adds “it would be a grievous error to assume that these textual questions, critical as they are to the overall enterprise, constitute the entire picture” (p. 39). He then introduces “two key *non*textual principles of interpretation” (p. 39) which he says are “wholly consistent with the rule of law . . . [and] an integral part of a uniform interpretive tradition since the days of the Bible” (p. 39).

One is “justification”: the government can intervene to prevent harms without providing compensation; Epstein conceives of this power narrowly, equating it with unauthorized entry onto private property and nuisances (p. 42). More significant for Epstein’s analysis is the second non-textual factor, the “anticircumvention principle”: the government cannot “circumvent [the prohibition’s] literal language in ways that undermine its broad purpose” (p. 40). This non-textual principle is the key to Epstein’s conception of the Takings Clause exercise.

In a critical passage on anticircumvention and its scope, Epstein notes the textualist argument that “[i]n its ordinary sense, the term ‘taking’ requires dispossession of property” (p. 98). His response is not to counter with a textualist argument of his own, but to move through a series of analogies. First, he observes that “the categorical refusal to compensate regulatory takings has been rejected even by writers who think that the historical and textual evidence confines the takings clause to physical occupations” (p. 98). This is a surprising argument for a scholar such as Epstein to make: the positions he advances were novel when he made them, so a claim that no one today would limit the Takings Clause to physical occupations should not have a great weight with him, if that is what the text and history (but not the precedent) would warrant.

In any event, he then moves through a series of analytic steps that lead him to his broad reading of the clause. He offers the example of a regulation that takes away all the property owner’s rights except the right to exclude. “Surely, courts should invoke the anticircumvention principle to stop this abuse, for nothing in principle requires or allows for the artificial separation of occupation from land-use regulation, when both wipe out [the property owner’s] value in his land” (p. 99). In other words, a regulation that is tantamount to a physical occupation should be treated the same as a physical occupation would be: compensation is owed. He then moves from a

regulation affecting one property owner to a regulation of broader effect and argues that they should be treated the same way: “the law cannot erect an iron wall between restrictions directed toward a single person and those directed toward many people” (p. 99). Earlier in the book, Epstein had made the argument that government acts that affect a particular right in the bundle of sticks are as much takings as acts that affect all of them: “[I]magine that the bundle of rights in a piece of land—in space, over time, and against neighbors—is a salami. Any slice of that salami is still salami, so that the state has to pay for each slice of salami it cuts for itself, no matter how thin” (p. 46). This same approach is now applied in the regulatory-takings context: “[T]he central analytical inquiry asks whether the pattern of benefits generated by the government matches its dislocations, be they large or small. If it does, the measure is constitutional. If not, then it is *prima facie* unconstitutional” (p. 99). Everything else Epstein argues for follows. Government acts under which some individual or group of individuals does not receive proportionate gain—whether zoning rules, or environmental statutes, or progressive taxation, or any of a host of other statutes—are unconstitutional.

It is hard to think of a better example of the tail wagging the dog. As the historical discussion above indicates, the Takings Clause did not originally apply to regulations, and the text itself is clear: the government cannot physically take your property for a public use without paying for it. The clause itself was sought by no one other than Madison, and, although there is no legislative history for it, the leading constitutional scholar of the early republic, St. George Tucker, thought it was intended to require compensation when the military impressed goods during wartime.³⁵ But, by deftly moving through a series of analogies, Epstein transforms this clause of limited scope into a prohibition on the regulatory state.

III. TEXT, HISTORY, AND THE SUPREME COURT

Epstein’s thesis is that the Supreme Court has “supreme[ly] neglect[ed]” the history and text of the Takings Clause. In the previous sections, I have shown that, in fact, Epstein himself disregards the text as the founding generation understood it and he disregards history. At a fundamental level, however, I agree with Epstein: I also think the Supreme Court caselaw departs from the text and the history, and in this final section I would like to explore that insight, very briefly.

The Supreme Court first embraced the position that a regulation could be a taking in 1898 in the case of *Smyth v. Ames*.³⁶ The central controversy in modern caselaw concerns how broadly to read the regulatory-takings doctrine. The leading pro-regulation case is *Penn Central Transportation Co. v. New York City*, in which a closely divided Court upheld a New York City

35. See *supra* note 28 and accompanying text.

36. 169 U.S. 466 (1898). For discussion of *Smyth* and its place in the caselaw, see Treanor, *supra* note 8, at 837.

land-use regulation that cost the owners of Grand Central Station a minimum of three million dollars a year (and gave them in return only transferable development rights of indeterminate value).³⁷ The leading case reflecting a much more searching analysis is *Lucas v. South Carolina Coastal Council*.³⁸ While the regulation at stake in *Lucas* deprived the property owner of *all* value of his property, Justice Scalia's opinion indicates that some regulations taking all value from discrete property interests—individual sticks in the bundle of sticks—will be compensable takings.³⁹ As we have seen, Epstein would push the doctrine of regulatory takings even further.

My textual and historical analysis above indicates that this dispute is beside the point. Neither the text nor the history supports the view that regulations can be takings. The text of the Takings Clause and the early history limit it simply to physical seizures by the government—situations where the government physically “takes” property by, for example, building a road or a school on it. So, under this analysis, the whole regulatory-takings doctrine—and the century-long line of precedent that reflects it—is a mistake.

Of course, not everyone is an originalist or a textualist. One can legitimately disregard the text and the original understanding and embrace the regulatory-takings doctrine because of respect for precedent or because she sees the protection of private property as a fundamental value in our constitutional system that merits protection beyond that provided for by the text or history. But if one applies the text in accordance with the original meaning of the words or if she wishes to apply the concrete understandings of the founding generation, she will reject the whole idea of regulatory takings.⁴⁰

CONCLUSION

Supreme Neglect powerfully highlights the costs of government regulation and the ways in which logrolling and the power of special interests both dissipate the benefits of government action and cause the government to act even when the action occasions more harm than benefit. Such arguments can have great influence politically. At the outset of this Review, I

37. 438 U.S. 104, 116 (1978) (proposed use would have provided property owner three million dollars in rent annually); *id.* at 137 (holding that, while the transferable development right may not have been “just compensation” if there had been a taking, they “undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation”); *see also id.* at 141, 151–52 (Rehnquist, J., dissenting) (questioning whether the transferable development rights were adequate compensation and indicating that the case should have been remanded to determine the adequacy of compensation).

38. 505 U.S. 1003 (1992).

39. *Id.* at 1016 n.7.

40. Another approach would be to “translate” the underlying concerns of the founding generation into a modern context. I have used this approach in arguing for a process-based approach to the Takings Clause. Treanor, *supra* note 11, at 873–88. That approach, however, is not a textualist approach or an attempt to interpret the clause to reflect the concrete understandings of the Founders.

mentioned the outcry that followed the Supreme Court's decision in *Kelo*: as Epstein notes, by early 2007, thirty-four states had enacted statutes or constitutional provisions designed to prevent the use of urban renewal plans to seize private property and convey it to developers (p. 3). But *Supreme Neglect* is principally a book of constitutional law, not a book of public policy, and the metrics on which Epstein relies—history and text—dramatically undercut his thesis. History and text indicate that the clause is concerned only with physical seizures by the government. For more than one hundred years, the Supreme Court has held that some regulations run afoul of the Takings Clause. But one who embraces the constitutional commitments to text and history that Epstein espouses should reject this line of precedent, rather than seeking to expand it dramatically in the way that Epstein does. It is fair to say that the modern Court's takings jurisprudence "supreme[ly] neglect[s]" the text and history of the Takings Clause. But the same criticism is equally applicable to Epstein. Epstein would dramatically expand the scope of the Takings Clause beyond that provided under current caselaw. Serious regard for text and history would, however, dramatically move the law in precisely the opposite direction. It would lead to rejection of the principle that regulations are takings within the meaning of the Takings Clause and it would limit the clause to mandating compensation for physical takings for public use.