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INTRODUCTION

In a relatively early article,[1] Richard Epstein defended the concept of adverse possession. This position might have been at odds with his championship of first possession as the root of all property rights.[2] Nevertheless, he maintained that after the passage of time, proving who might have been the prior possessor or even the true owner would become more difficult.[3] Memories dim and the "owner" might die and leave fractionated shares.[4] However, as time passes it becomes easier to prove that the new party has possessed and used the land. Therefore, he argued, in order to have an orderly system of property rights, efficiency demands that the party in possession be treated as the new owner. The libertarian advocate[5] of private property rights therefore supports a statute of limitations because the statute reduces errors and lowers transaction and administrative costs. The passage of time moderates the sanctity of voluntary transactions which Professor Epstein otherwise espouses.

Richard Epstein's article in defense of adverse possession showed an awareness of time's ability to transfer and change property rights, but it does not go far enough. As he stated,

> Temporal issues arise with evident urgency in the law of real property. Land itself lasts forever, and the improvements upon it can last for a very long time. The durability of the asset means that no one person can consume it in a lifetime, so that any legal relations with respect to land will of necessity involve a large number of persons over a long period of time.[6]

Because of the length of time in which both physical land and human property concepts interact, the latter must evolve as human understanding of the physical land evolves. This influences the determination of when regulation could effectuate a taking.

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* Professor of Law, The University of Tulsa College of Law.

1. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667 (1986).

2. *See e.g.* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harv. U. Press 1985).

3. Epstein, *supra* n. 1, at 675.

4. *Id.*

5. Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QLR 783 (2000).

6. Epstein, *supra* n. 1, at 669.

Richard Epstein, however, has a different, but coherent theory of takings law–if his major premises are accepted. Among these premises are that possession is the precursor to property rights and such rights predate law. Law, in turn, is designed to protect private rights from fraud and force. Government operates through consent and in congruity with what a private party could do *vis-à-vis* another's property. One big problem with this analysis is that, prior to law, any property "right" would have been based in power; only with law can property truly be based in right. Therefore, Richard Epstein's takings analysis misses a dynamic element in takings and property rights; namely, the role of expectations and how these expectations can change through time and thus modify and recast the role of law and private property.

In order to explain these premises, there first must be some simplified summaries of Richard Epstein's principles. These include his concept of the origin of property and his theory of takings. Next, this article considers expectations and law as central to property rights. From here, Richard Epstein's critique of the role of expectations is shown to have ignored the temporal element of property rights, namely that practicality and necessity over time fuel changes in property rights. An example is the evolution of water law. Finally, this article examines how changing views on necessity influence takings analysis.

OVERVIEW OF PROFESSOR EPSTEIN'S PROPERTY AND TAKINGS THEORY

Throughout his academic scholarship, Richard Epstein has returned to one or two simple rules. These principles are used to create an internally cohesive property theory, including when the government should compensate a property owner for interfering with private property rights. Any short explication will, by definition, lack nuance, but will provide sufficient context.

First, Richard Epstein has long argued that first possession is the predicate for property law.[7] He does not argue it as historical fact, but as a founding predicate for rights that have undergirded many legal systems. He takes a definite philosophical stance on the chicken and the egg dilemma, with the chicken being property and the egg being law. To him, the chicken came first. Harking to John Locke, Richard Epstein adds that labor, be it only the labor of possessing, adds to the rationale for granting property rights to the possessor.[8] With property pre-dating law, law exists to protect private property and arises from at least implicit consent, although there would never have been consent from each and every individual.[9] Law's appropriate venue is to protect property from fraud and force.

Second, Richard Epstein guides his definitions of property and government into a logically cohesive interpretation of Fifth Amendment takings. Initially, he posits that the government's relationship to the property its citizens own is derived from these citizens.[10] Therefore, in most instances the government could not have any rights

7. *See e.g.* Epstein, *supra* n. 2, at 10.
8. *Id.* at 11, 61.
9. *Id.* at 14.
10. *Id.* at 36.

greater than a private party's rights to the property of others.[11] Other than adverse possession, a private party could only gain rights through consensual transfers. The government, however, could take private property without consent for public use with compensation. If there is no public use, the government cannot condemn private property.[12] If there is public use, the government–like a private party–must compensate the private property owner from whom the property is taken.

From these premises, Professor Epstein draws several conclusions. William Shakespeare had his Juliet conclude that a rose by any other name may be as sweet;[13] Richard Epstein concludes that a taking by any other name is still a taking. Therefore, a so-called partial taking is a taking and should generate the need for compensation.[14] Often, governmental regulation of property may decrease its value by forbidding use of a portion of the property in area[15] or prohibiting specific types of use.[16] Although these situations generate a "partial taking" label to many, Richard Epstein will not distinguish between total or partial takings. To him, forbidding use of only a portion of a person's acreage is a taking of that particular affected acreage.[17] Additionally, he equates a governmental restriction on use to a restrictive covenant.[18] One private party would pay another private property owner for the encumbrance. The same requirement would generally apply to the government.

Nevertheless, Epstein recognizes two exceptions to requiring compensation from the government for diminution of property value from regulation:

1. No compensation at all is required if the government is abating a nuisance;[19] and

2. No additional express compensation is necessary if the regulatory scheme provides implicit compensation to the affected landowner.[20]

Implicit compensation is Richard Epstein's formulation of what others tend to term

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11. *Id.*

12. Richard Epstein's definition of public use would be narrower than the Supreme Court's decision in *Kelo v. New London*, 545 U.S. 469 (2005). *See* Epstein, *supra* n. 2, at 169–81. *See also* Marla E. Mansfield, *Takings and Threes: The Supreme Court's 2004-2005 Term*, 41 Tulsa L. Rev. 243 (2005) (providing an overview of the *Kelo* decision).

13. William Shakespeare, *Romeo and Juliet*, in *The London Shakespeare: The Tragedies* vol. 5, 115, 160 (John Munro ed., Simon & Shuster 1958).

14. He therefore decries the balancing test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (described *infra* note 26). *See* Epstein, *supra* n. 2, at 57–62.

15. Wetlands regulation is an example. A developer might be required to avoid disturbing the wetland but be able to develop the upland portion of a tract. Therefore, if the tract as a whole is considered, the inability to develop a portion would not be a "total" diminution of value. *Palazzolo v. R.I.*, 533 U.S. 606, 621–22 (2001). *See* Epstein, *supra* n. 2, at 121. The Supreme Court noted that property has a spatial as well as temporal dimension. *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regl. Plan. Agency*, 535 U.S. 302, 332 (2002) (rejecting a *per se* finding of a taking when a moratorium denied all economic use of property for a limited time).

16. This would be the third potential way to segment property, which would take a functional approach. The Supreme Court rejected this approach and has required that "property as a whole" be examined. Therefore, a prohibition on surface mining would not be a taking if other uses of the property remained. *Tahoe-Sierra*, 535 U.S. at 327.

17. Epstein, *supra* n. 2, at 57.

18. *Id.* at 100–02.

19. *Id.* at 198–99.

20. *Id.* at 195–99.

"average reciprocity of advantage."[21] In other words, some regulations create overlapping benefits and detriments so that in the end, all are compensated and benefitted within the regulatory scheme itself.

Unless one of these two exceptions is present, the government should pay for a regulatory imposition on property regardless of whether the private party retains property of some value.[22] Hence, the whole dilemma of determining whether government action creates a total taking or a partial taking is a fool's errand to Richard Epstein.[23] For others, the distinction between a total taking and a partial taking leads to a distinction between a *Lucas* analysis[24] and a *Penn Central* analysis.[25] To Richard Epstein, the government must compensate for non-voluntary transfers of property interests to it, except in the limited scenarios he delineates.

CENTRALITY OF LAW AND EXPECTATIONS TO PROPERTY RIGHTS

The beauty and allure of Richard Epstein's thinking is how it emanates from a first principle–possession as the origin of property. It may be natural to a certain extent to recognize labor and possession as a source of rights, at least natural to reasonable monkeys and wolves, according to Felix Cohen.[26] However, an alternative view finds that individual action alone does not give rise to a Hohfeldian "right."[27] There must be recognition of the enforceability of the claim by others.[28] This, of course, echoes Jeremy Bentham's assertion that "[p]roperty and law are born together, and die together. Before

21. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Holmes recognized this rationale for not declaring a regulation a taking in the very case that is credited with "creating" regulatory takings. *Id.* at 415 (discussing the reciprocal benefits of every coal producer leaving coal at the boundaries of their property). Richard Epstein uses the same phrase to describe a "nuisance" situation in which neither an injunction nor damage remedy is made available: "[t]he benefits to each side from undertaking its preferred activities are the compensation that each side receives from bearing the small slights caused by others." Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 Yale L.J. 2091, 2103 (1997). In the private arena, however, these situations fit more into what Richard Epstein refers to as "live and let live" situations, rather than what Justice Holmes was referring to in the regulatory realm. *Id.*

22. Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1376 (1993) ("What is taken is what counts; what is retained, or the ration between retained and taken property, is irrelevant (except for determining any potential severance damages).").

23. *Id.*

24. In *Lucas*, the Supreme Court found that a regulation that rendered property valueless or without any economic use would "categorically" be a taking unless the regulation was abating a nuisance or was otherwise inherent in the background principles of law. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

25. The analyses are named after the relevant cases explicating the approaches. If a regulation did not deny either all use or all value, the Court in *Lucas* returned to the "ad hoc" appraisal of factors–namely, the nature of the governmental purpose, the degree of impact on the regulated, and the interference with the claimants' reasonable, investment-backed expectations. *Penn Central*, 438 U.S. at 124. *See* Marla E. Mansfield, Tahoe-Sierra *Returns* Penn Central *to the Center Track*, 38 Tulsa L. Rev. 263, 295–97 (2002) (arguing the benefits of flexibility in assessing whether a taking exists).

26. Felix Cohen, *Dialogue on Private Property*, 9 Rutgers U. L. Rev. 357 (1954).

27. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 43–44 (1913).

28. For example, an article directly responding to Epstein (see *supra* n. 1) provides a rejoinder to solely relying on possession for the origin of property rights. David D. Haddock, *First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value*, 64 Wash. U. L.Q. 775, 777 (1986) ("First possession presupposes standing to call on the enforcement powers of the law, so again, as a practical matter, an effective coercive legal authority (mightiest possession) is a prerequisite for a rule of first possession.").

laws were made there was no property; take away laws, and property ceases."[29] Bentham also stated that "[t]he idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed . . . . Now this expectation . . . can only be the work of law."[30] In looking at how expectations may trigger new ways of looking at property rights, we should perhaps add the adjective "reasonable" to these expectations.[31] "Reasonableness" encompasses some objective criterion, which is important when considering whether interference with those expectations would destabilize society, which in turn leads to the question of how the expectations should be reflected in societal definitions of property.

Richard Epstein would argue that there is circularity in looking to expectations for property rights[32]–and there is.[33] Law and property are entwined in expectations as a part of the process of creating property rights. Law and property, however, are also entwined in Richard Epstein's universe; his model of private property was admittedly embraced because of the model's ability to create a coherent legal theory and he uses ancient law to bolster his view.[34] To create his coherent whole, he begins by positing an "initial presumption of unrestricted property rights."[35] From this point, with limited exceptions, only voluntary actions should change property rights.[36] What role, if any, would either private or collective expectations play in property rights? Should they influence whether or not compensation is required if the government asserts a regulation promoting public use?

A CRITIQUE OF EPSTEIN'S CRITIQUE OF THE ROLE OF EXPECTATIONS

Richard Epstein has limited use for expectations in defining property rights. In fact, he posited two examples in an article written in 1993 to underscore how misplaced such use of expectations would be.[37] However, his asymmetrical awareness of time marred his examples. He would allow property rights to be modified only in one instance: when the private acquisition of rights was at issue.

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29. Jeremy Bentham, *Theory of Legislation* 113 (C.K. Ogden ed., 4th ed., Fred B. Rothman Publications 2000).

30. *Id.* at 112.

31. *Penn Central* referred to the importance of the "distinct investment-backed expectations" of private parties. 438 U.S. at 124.

32. *Compare* Epstein, *supra* n. 22, at 1371 *with* Epstein, *supra* n. 2, at 154–56 (criticizing Frank Michelman's treatment of notice of potential regulation affecting the need to compensate for diminished value for a purchaser buying with such notice).

33. As Justice Kennedy phrased it,

> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

Lucas, 505 U.S. at 1034–35 (Kennedy, J. concurring) (citation omitted).

34. *See* Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 S.C. L. Rev. 243 (1997).

35. Epstein, *supra* n. 22, at 1386.

36. *Id.* at 1387.

37. *Id.* at 1385–86.

The example in which time and expectations could modify rights involved one neighbor generating pollution that migrates to another's land.[38] What if a neighbor of the polluter knows of the pollution and might, therefore, expect the pollution to continue? Richard Epstein asks whether such a neighbor of a polluter could be deemed to waive compensation if this knowing neighbor predicts that the pollution would continue. He responded that the neighbor did not initially "assum[e] . . . the risk" of pollution and the polluter gained no initial right to pollute.[39] That is, no rights for the polluter would arise without the element of time. But after time passes, the use of another's property could ripen into a prescriptive right to use that neighbor's land for the deposit of pollution.[40]

The second scenario that Epstein posits is one in which a landowner does not object to a minor setback requirement.[41] In fact, if he or she had objected, the setback would not have required compensation.[42] But if this regulation allows the landowner to predict additional regulation, a conundrum arises: some would say the "pervasive nature of uncompensated government regulation of land use leads landowners to expect further regulation."[43] Epstein then asks,

> But suppose now that the first round of regulation clears the path for sustaining the constitutionality of a second, more intrusive regulation. If initial regulation at once anticipates more to come, it is then incorrect for the state to balance only the cost of upholding the initial regulation (which may only minimally affect private interests), for now the government's success in the initial foray increases its ability to enact subsequent, more restrictive regulations without violating private expectations.[44]

To Richard Epstein, compensation would clearly be needed. The fact that one regulation was passed could not create expectations of more regulation that would negate the need for compensation.[45]

There is, however, a missing element from the second scenario–and that missing element is time. Presume the first regulation is a valid regulation justified by the police power. Perhaps the amount of burden on the landowner is within the "live and let live" level,[46] or there is implicit compensation.[47] Therefore, no compensation would be needed for this regulation. The passage of time with this regulation in place, however, begins to alter perceptions about the physical nature of the property involved. The property changes in three ways: how the property looks, how the property is used, and how the use affects other property. For example, if the regulation was a setback requirement, the public would be used to open space in between the street and any

38. *Id.* at 1385.
39. *Id.*
40. Epstein, *supra* n. 22, at 1385.
41. *Id.*
42. *Id.*
43. *Id.* (citing *Prah v. Maretti*, 321 N.W.2d 182, 189 (1982)).
44. *Id.* at 1385–86.
45. Epstein, *supra* n. 22, at 1385.
46. Richard Epstein maintains that some impositions are so trivial as to not require either a private party or the government to compensate impacted landowners. He calls these intrusions "live and let live" matters. Epstein, *supra* n. 2, at 231–32.
47. *Id.*

building. This would allow for sunshine and air. All other property owners and even non-owners could appreciate these amenities. In a manner parallel to a private prescriptive easement that arises over time, public or collective expectations could also mature.

The term "public," however, is not self-definitional; nor is the term "public" invariably contrasted with the term "private." Each and every individual, while a "private" person, is also part of the "public." There can be no public without individuals. Nevertheless, some so-called "public" values actually generate "public goods." A public good has two identifying features: 1) it requires collective action to achieve; and 2) the benefits of the activity cannot be parceled out individually.[48] National defense is a frequent example of a public good. Another example might be migrating birds: they benefit those who view them nesting as well as those who see them flying overhead. The birds also benefit those who just like knowing that nature continues to take wing in the proper season each year. Ecologically sound land management benefits all, but is beyond capacity of any one person to control. Ecologically sound land management, therefore, may be a public good.[49]

Additionally, maintaining environmental integrity–preserving wilderness, wetlands, or biological diversity–often means foregoing development. This may make the preservation option align against general consumer desires, because consumers generally want concrete things to be produced. The values of ecological preservation also do not lend themselves to traditional economic or even multiple-use analyses.[50] Individuals, of course, are more than mere consumers or economic maximizers. They each have morals and policy preferences that are not explained in this manner.

The nature of these concerns leads to a relabeling of some aspects of environmental protection as "collective" uses, or alternatively, as "non-consumptive" uses. The label "non-consumptive" recognizes that the majority of conflicts between goals take place when development is proposed. The so-called "private" rights should be considered either "consumptive," because resources are to be developed, or "exclusionary," because the "private" owner wants exclusive control over the resource.[51]

Generally, expectation analysis is done when determining if a regulation would

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48. *Id.* at 166.

49. Richard Epstein argues that it is pointless to argue for "the environment" as if it is a separate entity capable of being abused by a nuisance. *Id.* at 123 (for a tort to be actionable, damage must be to the land of another). If the government desires to preserve aesthetic or other amenities of undeveloped land, the government should pay compensation.

50. It is this fact that creates difficulty for Richard Epstein. He would not sanction governmental action without a showing that the rearrangement of property rights fosters a Pareto optimal result, namely that "shifts in legal entitlements are possible only if at least one person is made better off, and no person is made worse off." *Id.* at 201. The desire to prove Pareto optimality, or even an overall increase in societal wealth, requires monetizing or otherwise converting all values to some uniform measure. There are some measures to value environmental amenities, such as through willingness to pay surveys. John Martin Gillroy, Breena Holland & Celia Campbell-Mohn, *A Primer for Law & Policy Design: Understanding the Use of Principle & Argument in Environmental & Natural Resources Law* 282–83 (West 2008). Ecological services, such as water purification or erosion control, could be valued by considering the cost of alternative providers of such services. Nevertheless, there will never be a way to prove that society as a whole is improved in a monetary sense from preservation. Alternative analyses are needed. *Id.*

51. For an examination of this duality on public lands, *see* Marla E. Mansfield, *When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings*, 65 U. Colo. L. Rev. 193 (1994).

take private property and the determination of whether expectations existed concentrated on the mindset of the holder of the consumptive or exclusionary private interest. Cases asked questions such as: Should a regulated industry expect regulation?[52] Did the builder of a marina expect to be able to keep people out of the marina?[53] But expectation analysis could also look at the collective side of the equation. If property values feed collective public needs, then there may be an expectation that these values will be maintained.[54]

As Richard Epstein acknowledges, no person was ever allowed to use his or her property without regard to others. There are some impositions that other landowners might create that would not be compensable; these are the live-and-let-live irritations arising out of any community setting.[55] There is also the overriding obligation not to harm others through land use. Lateral and subjacent support are duties each property owner owes to his neighbors.[56] There also is a duty to not commit a nuisance. What a nuisance is, however, can be a crucial question.

Richard Epstein apparently defines "nuisance" narrowly. Most of the time, he defines nuisance as the "creation of noxious conditions–discharges, odors, noise, and the like[–]that starts on the property of one owner and migrates over to that of another."[57] This is a time-frozen definition, one which is tied to old beliefs that apparently required a close spatial relationship between lands in order to recognize potential damage. His definition also limits nuisance to actions with concrete, sensual impact on the plaintiff's land.[58] Nuisance is a much more flexible concept, one that could be summarized as the unreasonable use of property that unreasonably interferes with another's use of property.[59] A use of one property distant from another property could cause

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52. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983) (regulated industry should anticipate additional regulation).

53. *Compare Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) (taking results from mandating public access to a marina that was not navigable until investments were made in anticipation of the marina being private) *with Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no taking results from mandating public rights to collect petition signatures in shopping center when there is no interference with shopping). Richard Epstein argued that expectations were irrelevant in these cases; any interference with the right to exclude would be a taking. Epstein, *supra* n. 2, at 65.

54. *Compare* Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U. Cal. Davis L. Rev. 185, 188 (1980) (arguing public trust doctrine "prevent[s] the destabilizing disappointment of expectations held in common") *with* Epstein, supra n. 2, at 325–26 (Richard Epstein's cautious admission that the reliance interest of those who have received the benefits of social welfare payments may prevent the practical result of a finding that they are unconstitutional).

55. Epstein, *supra* n. 2, at 231–32.

56. *Id.* at 238.

57. Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 Ala. L. Rev. 741 (2007) (invasion of another's property could provide a justification for a prohibition of development); Epstein, *supra* n. 2, at 134 ("Certain lands may well have to be left undeveloped because they contain toxic substances that, if moved or disturbed, could contaminate nearby underground water supplies.").

58. Richard Epstein fears treading into scientific uncertainty for causation. Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* 99–100 (Perseus Books 1998).

59. *See Restatement (Second) of Torts* § 821D (1979) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."). *See also id.* at cmt. B:

> The phrase "interest in the use and enjoyment of land" is used in this Restatement in a broad sense. It comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition. Thus the

unreasonable interference with that second property. The two properties involved do not need to be abutting to be ecologically connected. Increased hurricane damage arises from coastal development.[60] Swamps once were to be busted and drained.[61] Swamps–relabeled as wetlands–are now the valuable providers of ecological services.[62] Scientific knowledge has evolved.

What private use of property is or is not a nuisance that unreasonably interferes with other property or collective values changes through time. Necessity and custom mold different responses to land use as the knowledge of ecology increases.[63] The term "necessity" is used more broadly here than in Richard Epstein's writing on takings.[64] In writing of people's rights to use the land of another, he recounts the scenario of a boater being able to moor at another's dock during a storm. Justification for the intrusion was necessity, which was tied to saving the boater's life; the boater would have to compensate the dock-owner, but would have a property interest in tying up at the dock for the duration of the necessity.[65] Necessity as I am using the term is more the need for society to react to new-found reality and conditions. It therefore resembles Richard Epstein's "necessity" in his explanation of why property rights initially emerged. As Richard Epstein's quote of Blackstone reveals: "[n]ecessity begat property."[66] In more Lockean terms, if the gatherer of acorns had to wait for the consent of all mankind to make the acorns his, the acorn gatherer would have starved.[67] Necessity in today's world is different than in the world of the nut gatherer. Property rights must, and do, evolve in response to changing necessities.

An example of this evolutionary pattern in property rights would be how rights to use water have developed through time. In merry old England, rights to water were linked to ownership of riparian land. Each owner of riparian land had the right to the "natural flow" of the waters.[68] No owner could consume much water in this regime. It

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destruction of trees on vacant land is as much an invasion of the owner's interest in its use and enjoyment as is the destruction of crops or flowers that he is growing on the land for his present use. "Interest in use and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself.

60. Natasha Zalkin, Student Author, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 212–16 (1991).

61. The Swamp Land Act, Pub. L. No. 31-84, § 1, 9 Stat. 519, 519 (1850).

62. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 255 (1992).

63. Additionally, many have proposed that the "precautionary principle" is the wisest approach in the face of scientific uncertainty. International environmental law has embraced this idea, which requires any risk anticipated to be avoided. Lakshman D. Guruswamy, *International Environmental Law in a Nutshell* 658 (3d ed., West 2007).

64. Epstein, *supra* n. 2, at 110; Epstein, *supra* n. 21.

65. Epstein, *supra* n. 21, at 2109–10.

66. Epstein, *supra* n. 58, at 28 (quoting William Blackstone, *Commentaries* vol. 1, *8).

67. *Id.* at 26 (quoting John Locke, *The Second Treatise of Government* 18 (Thomas P. Peardon ed., Liberal Arts Press 1952)).

68. *Wright v. Howard*, 1 Sim. St. 190, 204, 57 Eng. R. 76, 82 (1823). For a definition of the common law doctrine, *see Black's Law Dictionary* 1441–42 (Bryan A. Garner ed., 9th ed., West 2009). *See also U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 751 (1950) (noting traditional doctrine allowed for rights to exist without exercise thereof and thus impair other users).

was well suited to an environment without drought and to industrial development based on a waterwheel. As Europeans moved to New England, the riparian law was brought with them. However, as industry turned to the steam engine, the need to consume water became more crucial. Therefore, states incorporated the reasonable use doctrine into riparian water law.[69] Each owner of land abutting the water source could make reasonable use of the water, which would allow for some consumption. However, each riparian owner had the right of reasonable use; therefore, no one owner could consume water without addressing the impact on other riparian owners.[70] This was not enough modification of the riparian system once European settlers entered the more arid regions of the West.

Even with the law of reasonable use, the riparian system allocated rights pursuant to land ownership abutting waters. In time of scarcity, all shared the shortage. In the western United States, the need to use water did not always align with uses of riparian land. Water had to be brought to the locale of use, which sometimes was a mining claim. Therefore, the system of prior appropriation arose.[71] Rights were allocated pursuant to a modified first possession rule: the first appropriator would have rights to the water, provided the water was put to beneficial use. Beneficial use was a part and parcel of the water right. In time of scarcity, the shortage was allocated to later or so-called junior users. Some states physically straddled dry and wet regions. In these states, a blended system arose, combining both riparian and appropriation systems.

The various regimes of water law discussed were applied to referee private rights to water. To a large extent, the bare bones of each regime could fit into Richard Epstein's rational for government intervention: the choice of water law system maximized the wealth of the citizens.[72] In the twentieth century, however, more and more public values were superimposed on the water resource. State agencies were required to consider the public interest when confirming water rights.[73] In California, a public trust was recognized which required a curb on private water use in order to preserve wildlife or other collective values.[74] In other states, in-stream rights were acknowledged, which could at first glance seem counter to the prime directive in an appropriation system–diversion and application to beneficial use is a predicate to a water right.[75]

While transitions toward incorporating public uses into the system have not been

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69. *Tyler v. Wilkinson*, 24 F. Cas. 472, 478 (C.C.R.I. 1827).

70. *Harris v. Brooks*, 283 S.W.2d 129, 133 (Ark. 1955). *See also Restatement (Second) of Torts* § 850A (listing nine factors used to determine the reasonableness of a particular use).

71. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882).

72. Epstein, *supra* n. 2, at 4 ("All government action must be justified as moving a society from the smaller to the larger pie.").

73. Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 Ariz. St. L.J. 681, 683 n. 16 (1987).

74. *Natl. Audubon Socy. v. Super. Ct. of Alpine Co.*, 658 P.2d 709, 712 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983); *but see* Idaho Code Ann. § 58-1203 (Lexis 2002) (declaring public trust doctrine only applied to transfer or encumbrance of beds of navigable rivers and forbidding its application to water rights); Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 Ecol. L.Q. 461 (1997) (discussing Idaho's public trust doctrine).

75. Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. Denver Water L. Rev. 177, 180–91 (1998).

seamless, changes have occurred and have not been deemed to be takings of private property interests in pre-existing water rights. For example, some states had dual or blended water systems, in which both riparian and appropriative rights were recognized.[76] Riparian owners were then required to register their rights so as to integrate the two systems. In all but one state, the change was not considered a taking of private riparian rights.[77] Necessity and practicality overrode any reliance on older systems of allocating property. Similarly, in oil and gas law, even the recalcitrant state recognized that surface damage laws, which required an oil or gas developer to pay for reasonable use of the surface estate, would not be a taking.[78] The payment requirement would not be a taking even though the oil and gas estate had an existing implied easement to use so much of the surface as was reasonably required for oil and gas development.[79]

Private expectations *vis-à-vis* other private interests and what can be done on split-estate land or with water have changed through time. More generally, expectations about the relationships of various parties to a particular piece of land have changed through time. Additionally, public expectations have changed about what should be allowed to take place on lands that are now known to be interrelated with other lands and public goods. In other words, private development creates newly understood externalities. As with the gatherer's dilemma with the acorns, necessity requires property rights to respond.[80]

TIME, NECESSITY, AND TAKINGS

It is this need, or this necessity, that has provided a subtext for the Supreme Court's jurisprudence on takings. This jurisprudence is far from perfect or clear. However, the Supreme Court's recognition of the role of expectations in takings and property law is not erroneous.[81] Expectations factor into the Supreme Court's precedents in two ways.

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76. This doctrine is also referred to as the "California Doctrine" and at one time was followed in all the states on the West Coast, as well as in the Great Plains from North Dakota south to Texas. *Franco-American Charolaise, Ltd. v. Okla. Water Resources Bd.*, 855 P.2d 568, 572 n.15 (Okla. 1993).

77. Modifications were upheld using various rationales. *See In re Waters of Long Valley Stream Sys.*, 599 P.2d 656, 663–65 (Cal. 1979); *Stone v. Gibson*, 630 P.2d 1164, 1168–74 (Kan. 1981); *Baeth v. Hoisveen*, 157 N.W.2d 728, 733–34 (N.D. 1968); *Belle Fourche Irrigation Dist. v. Smiley*, 176 N.W.2d 239, 246 (S.D. 1970); *In re Adjudication of Water Rights of Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 442–46 (Tex. 1982). Oklahoma, however, found that to modify riparian rights would be a taking of private property. *Franco-American Charolaise, Ltd.*, 855 P.2d at 571, 576–78.

78. *Davis Oil Co. v. Cloud*, 766 P.2d 1347, 1349–51 (Okla. 1986).

79. *Id.* at 1350 (characterizing the change as a change in liability rules, not in property rights).

80. Judges in Colorado openly justified rejection of riparian law by appeal to necessity:

> Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.

Coffin, 6 Colo. at 447.

81. As an aside, I note that the Supreme Court also correctly looks at the "property as a whole" when it assesses a regulation's impact on a private party. There is but one physical tract of land regardless of lawyering ingenuity that very well may increase the value of the parts above the whole. *See* Mansfield, *supra* n. 25, at 290–94.

As currently exposited, the Supreme Court recognizes regulatory takings of three kinds.[82] Each, as Justice O'Connor phrases it, examines "the severity of the burden that government imposes upon private property rights."[83] The first type of takings is when governmental regulation results in a permanent physical invasion of property; no matter how small the economic infringement might be, the regulation would be a taking requiring compensation because the restriction on the right to exclude resembles physical appropriation of property.[84] Physical appropriation of property is the "paradigmatic taking requiring just compensation."[85] The next two types of takings are distinguished by the amount the regulation devalues property. A taking potentially may be "partial" or "total." [86]

Both constructs require examination of what current expectations of land use might be. This is more obvious in a partial taking, when the government regulation has not rendered the exclusive or consumptive right "valueless."[87] In this situation, the so-called *Penn Central* test is applied.[88] This test expressly considers interference with the private party's reasonable expectations.[89] These expectations are balanced with the governmental interest being forwarded and the economic impact on the regulated.[90] What results is a flexible, ad hoc approach to partial takings. The greater the impact on core communal values, the more economic impact on the regulated could be required without compensation.[91] Moreover, the prior existence of regulation could also influence the reasonableness of any developmental expectation that the private party may have. [92]

The Supreme Court, in *Lucas*, posited a second analysis if a regulation removes all value from the private interest. In such rare circumstances, compensation would be necessary unless the prohibited use was already prohibited by background principles of property law.[93] These background principles of property law include the prohibition against creating nuisances,[94] the customary rights of the public,[95] the navigation

82. These are explicated succinctly in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005).

83. *Id.* at 539.

84. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (taking arises from state law requiring landlords to permit cable companies to install cable connections).

85. *Lingle*, 544 U.S. at 537.

86. *See Lucas*, 505 U.S. at 1030 (employing the term "total taking" to refer to the situation in which no value or economical use is left after a regulation).

87. *See Tahoe-Sierra*, 535 U.S. at 332 (the majority reads the requirement to invoke a *Lucas* categorical taking to be when property is rendered valueless). In *Lucas* itself, Justice Scalia wrote both of a situation that forbids economic use of property and of one that renders the property valueless. *See* Mansfield, *supra* n. 25, at 284–86.

88. *Penn Central Trans. Co.*, 438 U.S. at 124–28.

89. *Id.*

90. *Id.*

91. Mansfield, *supra* n. 25, at 296–97.

92. *Palazzolo v. R.I.*, 533 U.S. 606, 625–27 (2001) (the Court rejected a *per se* finding of unreasonableness only); *see* Marla E. Mansfield, *"By the Dawn's Early Light": The Administrative State Still Stands after the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings)*, 37 Tulsa L. Rev. 205, 289–94 (2001).

93. *Lucas*, 505 U.S. at 1027–28.

94. *Id.*

95. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (customary rights to use the dry sand beach foreclosed a takings action; "the common-law doctrine of custom

servitude,[96] and the public trust doctrine.[97] All of these background principles are fluid. These background principles all gain definition through the public's expectation of what is or is not appropriate in land use in general. New regulatory actions or scientific knowledge may inform these expectations and thus the background principles.[98]

CONCLUSION

Because land could last forever, the temporal dimension in property law must recognize not only private efficiency and expectations, but also the expectations that have arisen about the public interest in private property. These expectations may change and they may tip the balance in a new direction, just as Richard Epstein acknowledged that time passing could tip the balance to favor an adverse possessor over an original–or prior–possessor. Richard Epstein's seductive takings analysis, however, does not adequately account for changes in knowledge and ethics. He recognizes the power of language and context, but does not allow for time's impact on the central concepts.[99] Perhaps the world is too complex for simple rules.

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as applied to Oregon's ocean shores in *Thornton* is not 'newly legislated or decreed'; to the contrary, to use the words of the *Lucas* court, it 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership'." (quoting *Lucas*, 505 U.S. at 1029)). Justice Scalia provided a scathing critique of the doctrine in his dissent to the denial of *certiorari*. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting). *See also* Epstein, *supra* n. 58, at 37.

96. *See e.g. Boone v. U.S.*, 944 F.2d 1489 (9th Cir. 1991).

97. *See* Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 Loy. L.A. L. Rev. 123, 157 (2002).

> The public trust doctrine deals with the converse situation [of eminent domain], when public property is transferred for private use. Here the analogous concern is with the prevention of transactions that enrich a single individual or a small group of people at the expense of the public at large. That result occurs whenever public property (including public domain property) is given away or sold for less than it is worth. The applicable provision should be understood as providing: "Nor should public property be given for private use, without just compensation."

Id.

98. Mansfield, *supra* n. 92, at 289–94.

99. While interpreting the terms of the eminent domain clause, Richard Epstein states: "The community of understanding that lends meaning to the Constitution comes of necessity from outside the text, in the way these words are used in ordinary discourse by persons who are educated in the normal social and cultural discourse of their own time." Epstein, *supra* n. 2, at 20. However, he vehemently opposes "a changing constitution" in which the meaning of the term property could change over time. *Id.* at 24–25.