A BRIEF RESPONSE TO RICHARD EPSTEIN

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Richard Epstein, from whom I have learned a lot over the years, is persuasive about some things but not about everything. Here are some things he is right about: Regulatory restrictions on the use of land sometimes leave affected landowners considerably less well off than they would have been without the restrictions. In many such cases, considerations of fairness (certainly) and political-systemic prudence (maybe) argue strongly for the payment of compensation. It would be good if we could devise legal procedures for assuring compensation in those cases —but, I would stipulate, in not too many others—where fairness and prudence require it. Granted.

Now consider a legal rule that would require compensation at taxpayer expense whenever the market value of any "portion" of land would be increased by at least X percent by setting it free of a legal restriction to which it is actually being subjected. "Whenever" means *whenever*. It means any restriction that oversteps what is already implicit in the common law of nuisance—a wilderness preservation law, civil rights law, or workplace regulation law, for some examples. Is there any persuasive public justification for enacting a rule of that kind? Would it be a just, prudent, and otherwise defensible legal arrangement? Might it perhaps be just another instance of pork-barrel legislation? Would it be carefully matched to the problem of injustice, or would it in many cases force lawmakers and regulators to a choice between either foregoing responsible government or else handing over public funds to those who have no just claim to receive them?

Those and those alone were the questions to which my testimony was directed. I was especially concerned with one line of claimed justification for such a rigid, sweeping, and governmentally crippling

rule: Namely, that it is demanded by an American constitutional commitment to respect and protect private property. Implicit in that claim, I said, is the premise that, "the freedom of owners to do with their property whatever they choose (short of [committing a common-law nuisance]) takes a clear precedence over [the government's responsibility] . . . to identify and . . . defend important other interests of individuals and the public."[1] Surely that premise *is* implicit, because without it there is no basis for relief in every case where a "portion" of privately-held land would be worth substantially more in the absence of public regulation. And surely the premise is, as I said, "absolutist" as compared with the view I uphold regarding the actual, historical American constitutional understanding, which is, for better or for worse, that private landholdings are broadly if not limitlessly liable to uncompensated restriction in the public interest.

In support of my understanding of the actual historical "compact," I cited the judicial history culminating in Justice Scalia's recent opinion for the Court in the *Lucas* case. Professor Epstein finds wanting in rational defensibility the "per se" taking categories—permanent physical occupation, total destruction of economic viability—that the Court has apparently found it necessary to hatch in search of a regulatory-taking doctrine that pays a decent respect to all the terms of the actual compact, yet retains some semblance of justiciability or formal realizability. He may well be right about this.[2] Supposing he is right, then what follows? Quite arguably, what follows is that the whole idea of a "regulatory taking" should be altogether jettisoned from the judicial vocabulary. Such might, at any rate, be the lesson drawn by those who maintain that the judiciary ought not to intervene in affairs of government except on the basis of clearly defined and decisive rules. To them, it may very well seem that *judicial* vindication of justice and prudence in this particular field is by now a provenly misbegotten venture on which Justice Holmes and his brethren ought never to have launched the country in the first place.[3]

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1. *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Environment and Public Works*, 104th Cong., 1st Sess. 34 (1995) (prepared testimony of Frank I. Michelman, Harvard Law School Professor). A slightly edited version of that testimony appears earlier in this issue. Frank I. Michelman, *Testimony Before the Senate Comm. on Environment and Public Works*, 49 WASH. U. J. URB. & CONTEMP. LAW 1 (1996). For convenience, we cite in this Response to Professor Michelman's testimony as it appears in this issue.

2. On this point, he has excellent company to his left. *See* Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-84 (1988).

3. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[I]f regulation