THE SIGNIFICANCE OF PUBLIC PERCEPTIONS OF THE TAKINGS DOCTRINE

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The Supreme Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles* [1] and *Nollan v. California Coastal Commission* [2] were greeted by a spate of articles and editorials in newspapers and popular periodicals hailing them as "major victories for property owners." The refrain of the notices was that the Supreme Court had accorded landowners much greater protection than they had previously enjoyed against "unreasonable" or "excessive" governmental regulations.[3] In the ensuing weeks, however, more nuanced assessments of the decisions began to appear. This new group of commentators argued that, upon close examination, neither of the Court's rulings proved necessarily revolutionary; although the decisions portended some shift in the constitutional balance, they did not materially curtail the power of zoning boards and other officials to determine how property may and may not be used.[4]

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1. 107 S. Ct. 2378 (1987) (holding that when a land-use regulation is invalidated on the ground that it deprives an owner of all use of his land, the owner is constitutionally entitled to compensation for the "taking" of his property during the period in which the regulation was in effect).

2. 107 S. Ct. 3141 (1987) (holding that the government may not condition grant of a rebuilding permit on the applicant's surrender to the public of a permanent right of way across his land, unless opening the right of way would advance the same "legitimate state interest" that would be served by denying the permit outright).

3. See, e.g., Kamen, Property Rights Are Bolstered: Supreme Court Rules Owners Due Damages If Denied Use of Land, Wash. Post, June 10, 1987, at A1, col. 1; Taylor, High Court Backs Rights of Owners in Land-Use Suits, N.Y. Times, June 10, 1987, at A1, col. 6; Perry, Could Gut Growth Management: City Hurries to Assess Key Land-Use Ruling, L.A. Times, June 10, 1987, § II, at 1, col. 5; Sitomer, Property Owners Win New Protection in Land-Taking Case: U.S. Supreme Court Widens Requirement for Compensation, Christian Sci. Monitor, June 10, 1987, at 3, col. 1; Sanders, No Taking Without Paying: From the Supreme Court, A Sweeping Decision on Confiscation, Time, June 22, 1987, at 64; Swallow, Court Again Rules for Developers: Justices Limit Extraction of Concessions for Building Permits, Wash. Post, June 27, 1987, at A12, col. 1; Noble, Beach Property Owners Win High Court Ruling, N.Y. Times, June 27, 1987, at A33, col. 5; Compton, Restoring Rights to Property Owners: Supreme Court Curbs Abuses by Planners, Zoners, Regulators, L.A. Times, July 7, 1987, § II, at 5, col. 3; Epstein, Private Property Makes a Comeback, Wall St. J., July 23, 1987, § 1, at 30, col. 3.

4. See, e.g., Merina, City, County Officials Differ On Effect of Land-Use Rule, L.A. Times, June 11, 1987, § II, at 2, col. 3; Haar & Kayden, Private Property vs. Public Use,

Frank Michelman's discussion of the cases[5] replicates the pattern just described. His examination of each decision begins with an identification of the potentially radical implications of the Court's reasoning,[6] but ends with an assurance that the ruling turns upon an idiosyncratic circumstance and thus poses little threat to the efficacy and continuity of everyday land use planning.[7]

As an explication of the conceptions of property and sovereignty underlying the decisions, and as a prediction of how the Supreme Court and lower courts are likely to resolve future takings cases, Michelman's analysis is helpful.[8] His argument, however, risks deflecting our attention from two related questions implicitly posed by the initial press coverage of the rulings: (a) How have the Court's decisions affected public opinion regarding the vulnerability of private property to regulation or devaluation by the government? (b) To what extent did the rulings draw upon or affect popular views regarding the protections that private property *should* enjoy?

This Article argues that, for three reasons, it would be unfortunate to neglect the foregoing questions. First, the adherents of each of the currently popular approaches to the takings problem could profit from increased sensitivity to public attitudes. Second, the capacity of the judiciary to shape popular beliefs concerning the sanctity of private property poses problems for the devotees of some of those approaches. Third, recognition of the importance of public perceptions of the takings doctrine has potentially far-reaching implications for the sincerity and practicability of the ways in which contemporary legal scholars are attempting to make sense of many other fields.

I. Takings Theories and Public Attitudes

It is clear enough why a judge or theorist who approaches the tak-

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N.Y. Times, July 29, 1987, at A23, col. 2; The Washington Scene: Rulings Strengthen Landowner Rights, L.A. Times, Aug. 16, 1987, § VIII, at 14, col. 1.

5. Michelman, Takings, 1987, 88 Colum. L. Rev. 1600 (1988).

6. Thus he notes that Chief Justice Rehnquist's opinion in *First English* might seem to endorse the analytic strategy of "conceptual severance," id. at 1617–18 (i.e., assessment of the impact of a statute upon each of the individual entitlements that together comprise a property right rather than on the aggregate "bundle")—an approach that Richard Epstein rightly believes would lead to a takings doctrine much stricter than that currently in force—and that Justice Scalia's call in *Nollan* for stricter scrutiny of the connection between a land use regulation and its stated end would seem to portend a dramatic change in constitutional doctrine. Id. at 1608.

7. Thus, for Michelman, *First English* turns out to support not "conceptual severance," but only the well-worn proposition that for every right there exists a remedy, id. at 1619–20, whereas the *Nollan* doctrine governs only cases in which the government requires a landowner to accept a "physical invasion" of his property or forego a significant privilege. Id. at 1613–14.

8. The Supreme Court's decision in Pennell v. City of San Jose, 108 S. Ct. 849 (1988), which was handed down after both Michelman's essay and this Article were written, confirms several of Michelman's predictions.

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ings doctrine in the guise of an "Ordinary Observer," to use Bruce Ackerman's memorable phrase,[9] should be interested in public attitudes; if one is "committed to the notion that law should support dominant social expectations as these are expressed in ordinary language,"[10] one plainly must know what those expectations are and how judicial decisions affect them.[11] It is also apparent why a scholar concerned with the reasons the Court decides cases the ways it does should care about popular beliefs and what the justices think of them.[12]

Relatively few contemporary scholars, however, examine the doctrine from either of the angles just described. The large majority instead adopt the stance of what Ackerman would call a "Scientific Policymaker";[13] they concern themselves primarily with the question of what the takings doctrine ought to look like (rather than why it looks the way it does), and they contend that its content can be sensibly prescribed only by reference to some comprehensive normative theory.[14] It is not obvious why analysts who take this tack should care about how the public apprehends and reacts to the Court's decisions. This section explains why; it summarizes the four variants of this general approach that currently dominate the takings literature and shows the relevance to each of public perceptions. With regard to some of the theories, the analysis exposes conceptual or practical difficulties that scholars need to address more forthrightly than they have as yet.

A. *Economic Analysis*

The most influential of the four perspectives is the version of utili-

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9. See B. Ackerman, Private Property and the Constitution 88–112 (1977).

10. Id. at 94.

11. For sensitive discussion of the difficulties of ascertaining the "dominant" views regarding the legitimate scope of governmental freedom to interfere with property rights, see id. at 94–100. The possibility that the content of those views will be altered by an important judicial decision interpreting the fifth and fourteenth amendments poses difficulties for the Ordinary Observer not considered by Ackerman. Cf. infra notes 31–34 and accompanying text (considering the difficulties the possibility poses for utilitarian theories).

12. It is in this connection that Michelman suggests in passing that the authors of the majority opinions in *First English* and *Nollan* may have made some effort to take into account extant popular conceptions of the legitimate scope of governmental regulations of private property. Michelman, supra note 5, at 1628 & n.145. Were they also attempting to *shape* public opinion? In view of Justice Scalia's conviction that the judiciary should play a modest role in governance in general, see Note, The Appellate Jurisprudence of Justice Antonin Scalia, 54 U. Chi. L. Rev. 705, 739 (1987); Comment, Justice Scalia and Judicial Restraint, 62 Tul. L. Rev. 225, 234, 256–57 (1987), it seems unlikely that he had such a project in mind. Chief Justice Rehnquist's position is harder to gauge. For further speculation on this issue, see infra note 51.

13. See B. Ackerman, supra note 9, at 10–15, 23–40.

14. For examples of works that fit this description, see sources cited infra notes 15, 35, 57, 71–72 & 74 and supra note 9. My assumption is that most of the participants in the conference fall into this broad category.

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tarianism originally developed by Michelman and Ackerman[15] and subsequently modified by a number of economists.[16] Drawing on the insights of David Hume, Michelman (followed by Ackerman) argued that a judge whose objective is to maximize welfare should resolve a takings case by estimating and comparing the following economic impacts: (i) the net "efficiency gains" secured by the governmental action in question (in other words, "the excess of benefits produced by [the] measure over losses inflicted by it");[17] (ii) the cost of measuring the injuries sustained by adversely affected parties and of providing them monetary compensation;[18] and (iii) the "demoralization costs" incurred by not indemnifying them. Michelman's definition of the third of these terms was original and critical; to ascertain the "demoralization costs" entailed by not paying compensation, the judge should measure

> the total of . . . the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and . . . the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.[19]

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15. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); B. Ackerman, supra note 9, ch. 3.

16. See Polinsky, Probabilistic Compensation Criteria, 86 Q.J. Econ. 407 (1972); Blume, Rubinfeld, & Shapiro, The Taking of Land: When Should Compensation Be Paid?, 99 Q.J. Econ. 71 (1984); Blume & Rubinfeld, Compensation for Regulatory Takings: An Economic Analysis, 72 Calif. L. Rev. 569 (1984); Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986); Fischel & Shapiro, Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law, 17 J. Legal Stud. 269 (1988); Rose-Ackerman, Against Ad Hocery, 88 Colum. L. Rev. 1697 (1988). At least for present purposes, economic analysis of the sort practiced in these works may legitimately be treated as a variant of utilitarianism rather than as a distinct normative theory. But cf. Kronman, Wealth Maximization as a Normative Principle, 9 J. Legal Stud. 227 (1980); Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487 (1980) (differentiating, in different ways, economic analysis and utilitarianism).

17. Michelman, supra note 15, at 1214. Though Michelman was not entirely clear on this point, if his formula is to make sense, "net efficiency gains" must mean gains exclusive of the "demoralization costs" discussed below.

18. Id. Not included in these so-called "settlement costs" are the compensation awards themselves, which, from an economist's standpoint, constitute "transfer payments" irrelevant to the calculation of net social utility. But cf. Baker, The Ideology of the Economic Analysis of Law, 5 Phil. & Pub. Aff. 3, 28–32 (1975) (suggesting ways in which transfer payments might affect economic efficiency).

19. Michelman, supra note 15, at 1214 (citations omitted); see also B. Ackerman, supra note 9, at 44–45 (discussing in similar terms the costs incurred by an increase in "General Uncertainty"); Johnson, Planning Without Prices: A Discussion of Land Use

Once the judge has calculated these impacts, Michelman and Ackerman contended, her job is straightforward. If (i) is the smallest figure, she should contrive some way to enjoin the action—for example, by declaring it to be violative of the constitutional requirement that private property be taken only for a "public use." If (ii) is the smallest figure, she should not enjoin the action but should require that the parties hurt by it be compensated. If (iii) is the smallest figure, she should allow the government to proceed without indemnifying the victims.[20]

In various recent articles, Lawrence Blume, Daniel Rubinfeld, Perry Shapiro, and Louis Kaplow argue that Michelman and Ackerman were wrong in suggesting that the judge, when measuring "demoralization costs," should include the diminution in investment and "productive activity" caused by not making the victims whole; indeed, assuring owners that they will be indemnified if and when the public needs their property causes them to *over*invest in capital improvements—a phenomenon economists refer to as "moral hazard."[21] Inducement of efficient kinds and levels of activity requires that economic actors "bear all real costs and benefits of their decisions,"[22] including the risk of future changes in pertinent legal rules. On this basis, Kaplow and others argue that, in most circumstances, efficiency will be enhanced by denying "compensation or other protection" to private actors adversely affected by governmental action, thereby forcing them either to self-insure or to obtain private insurance, the premiums for which will reflect the probability of such action.[23]

The economists' well-taken point[24] mandates a substantial modifi-

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Regulation Without Compensation, *in* Planning Without Prices 63, 76–78 (B. Siegan ed. 1977) (discussing external psychological effects on second parties).

20. B. Ackerman, supra note 9, at 45–49; Michelman, supra note 15, at 1215.

21. The literature is summarized in Fischel & Shapiro, supra note 16, at 270–74. In her contribution to this symposium, Professor Rose-Ackerman argues that owners' investment in capital improvements on property that is later expropriated is not problematic from an economic standpoint when the government will subsequently make use of rather than destroy the improvements. Rose-Ackerman, supra note 16, at 1703–04. The contention is persuasive but is likely to apply in only a minority of takings cases.

22. See Kaplow, supra note 16, at 529.

23. Id. at 529, 539–40. Kaplow recognizes the danger that people, for one or another reason, will not obtain insurance and acknowledges that, in contexts in which that danger is especially great, efficiency might be enhanced by providing persons either compulsory insurance or some degree of compensation. Id. at 602–04; see also Blume & Rubinfeld, supra note 16 (discussing compensation after a taking as a form of government-provided insurance); Rose-Ackerman, supra note 16, at 1704 (viewing government as an unpredictable enterprise justifies compensation as a form of insurance). But the principal thrust of Kaplow's argument is to undercut the case for "just compensation" insofar as it rests upon the notion of "demoralization costs." Kaplow, supra note 16, at 531.

24. The contention of Kaplow and others that the government should not ordinarily indemnify owners when a change in the legal regime deprives their property of some or all of its value has been criticized as according too little importance to the inefficiencies that may result from the so-called "fiscal illusion" effect—the tendency of govern-

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cation of the third (as well as the second)[25] term of the Michelman/Ackerman utility-maximization formula, but does not deprive it of content or significance. On the contrary, two types of "demoralization costs" that, in many contexts, will be substantial are unaffected by their critique. The first is what Michelman referred to as the "dollar value [of] outrage"[26] and what utilitarian theorists describe as the disutility associated with the frustration of "political preferences" or preferences for justice.[27] People unaware of or unconvinced by the argument that we will all be better off if owners are not reimbursed when a change in the legal regime devalues their property are

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ment officials to undervalue and thus overuse resources for which they do not have to pay. See, e.g., Blume, Rubinfeld, & Shapiro, supra note 16, at 88; Rose-Ackerman, supra note 16, at 1706. But cf. Kaplow, supra note 16, at 567–70 (arguing that elected representatives do not necessarily discount costs more than benefits). I think the noncompensation thesis stands up well to this line of criticism, but a defense of that proposition would take us far afield of the topics addressed in this Article.

25. Fischel and Shapiro argue that the moral hazard problem identified by the revisionist economists can and should be accommodated by treating overinvestment by private actors as a "settlement cost" associated with providing compensation. See Fischel & Shapiro, supra note 16, at 283–84. The argument is convincing but incomplete; it is also essential that the reduction in investment by private actors caused by warning them that they will not be indemnified if their property is taken *not* be treated (as it appears to have been by Michelman and Ackerman, see supra notes 19–20 and accompanying text) as a "demoralization cost" associated with noncompensation. A concrete example might sharpen the point: a judge using the Michelman/Ackerman formula to decide whether to compensate property owners who construct garages in places where they have reason to expect a government will soon build a road would make two errors: she would fail to treat the waste of resources caused by the construction of the garages as a cost associated with adoption of a rule that the owners should be compensated; and she would treat the reduction in garage construction caused by adoption of a rule that the owners should not be compensated as a "demoralization cost." The modification of the formula proposed by Fischel and Shapiro would prevent the first error, but not the second.

26. Michelman, supra note 15, at 1215; see also B. Ackerman, supra note 9, at 46–47 (discussing "the outrage and demoralization of good citizens who believe themselves [or others] victims of unprincipled behavior" and "the long-run disutility of citizen disaffection with the state's decision making processes").

27. This is a sore point in utilitarian theory. Understandably, many of its adherents are reluctant to take into account, when selecting utility-maximizing rules, people's especially obnoxious preferences regarding the fates of others (like sadism or racial bigotry). See, e.g., Harsanyi, Morality and the Theory of Rational Behavior, *in* Utilitarianism and Beyond 39, 56 (1982) (excluding from his calculus "antisocial preferences"). Most utilitarian theorists, however, are equally reluctant to confine lawmakers' attention to people's hedonistic desires and insist that pleasures and pains arising out of the satisfaction or frustration of "altruistic" feelings and convictions be accorded due weight when ascertaining the laws that would secure the greatest good of the greatest number. See, e.g., id. at 43, 54–55; R. Hare, Moral Thinking 104 (1981); J. Smart, An Outline of a System of Utilitarian Ethics 16–17 (1961). It is the latter stance that gives rise to the type of "demoralization cost" discussed in the text. For general discussion of the trouble utilitarians have on this score, see Dworkin, What Is Equality? (pt. 1), 10 Phil. & Pub. Aff. 185, 197–201 (1981); E. Rakowski, Equal Justice ch. 5 (forthcoming 1989) (draft of Aug. 7, 1987, on file at Columbia Law Review).

likely to view some sorts of governmental actions as immoral[28] and, when they witness what they regard as immorality, to experience a kind of discomfort that a judge who wishes to maximize efficiency must take into account in deciding whether to classify the actions in question as "takings."[29]

The second type of meaningful demoralization costs might be described as "search" costs. A judicial decision denying compensation in defiance of a popular perception that it should be forthcoming risks undermining people's faith that, by and large, the law comports with their sense of justice. Erosion of that faith, in turn, would reduce people's willingness to make decisions—the rationality of which depends upon the content of the pertinent legal rules—without taking the time to "look up" the rules. Think of the number and importance of the choices we make "on faith" in the foregoing sense: we purchase automobiles without ascertaining which of the manufacturer's waivers of liability are enforceable or whether the government is free in the future to tighten the rules governing emission of pollutants; we rent apartments without ascertaining the pertinent doctrines regarding implied warranties of habitability or the liability of landlords for injuries sustained by invitees; we accept employment without ascertaining the circumstances under which we may be discharged. The list is long. Generally speaking, our willingness to act in this fashion is efficient; as long as the rules are in fact consistent with our senses of justice, it is desirable, from an economic standpoint, that we trust our intuitions. Any material diminution in that willingness would give rise to deadweight losses that merit the attention of a conscientious economist.[30]

In sum, for two reasons, extant popular views regarding when justice requires that a government compensate persons adversely affected by its actions should and could be incorporated in a takings doctrine designed to maximize wealth. What of the possibility that a judicial decision (or, more plausibly, a pattern of judicial decisions) will *change* the public's view of what justice entails? An efficiency-minded judge can-

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28. Some of the bases of such perceptions of immorality are considered in Michelman, supra note 15, at 1217–18, and Fischel & Shapiro, supra note 16, at 281–83. Cf. M. Deutsch, Distributive Justice 196–204 (1985) (reviewing recent empirical work in social psychology concerning popular conceptions of legitimate and illegitimate criteria for distributing the fruits of collective projects); Hoffman & Spitzer, Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice, 14 J. Legal Stud. 259 (1985).

29. Cf. Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability, 85 Harv. L. Rev. 1089, 1112–14 (1972) (discussing "moralisms" and their bearing on economic analysis); Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L. Rev. 387, 398–400 (1981) (discussing "psychic externalities").

30. Such losses would take the form of either unnecessary expenditures of time and effort in law libraries or of consumer surplus foregone when uncertainty regarding the law causes people not to make decisions they were inclined to make. For discussion of similar issues as they arise in the context of copyright law, see Fisher, Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1659, 1782–83 (1988).

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not ignore such impacts, but will have more difficulty factoring them into her equations. Her objective, remember, is to devise a doctrine that will maximize the satisfaction of persons' desires—including their desires for justice.[31] The possibility that the position the judiciary takes on a particular issue will alter the very attitudes it is designed to accommodate considerably complicates prediction of the economic consequences of alternative rules. For example, in estimating the magnitude in a particular case of the two sorts of "demoralization costs" discussed above (not an easy job in any event), a judge would be obliged to consider the possibility that a decision denying compensation to plaintiffs of the type in question would alter the public's view of what justice entails—perhaps enough eventually to render those costs negligible. Even more seriously, the educative power of the judiciary creates the possibility that two or more decisions would be equally efficient. In other words, the judge might discover that the pattern of preferences created by adoption of rule *A* would render inefficient a change to rule *B*, while the pattern of preferences created by adoption of rule *B* would render inefficient a change to rule *A*.[32] In such contexts, economic analysis would seem to be, in a literal sense, indeterminate.

There may be ways out of such analytical canyons—for example, by ascertaining and deferring to persons' "second-order desires"[33] or by developing a theory of what people would desire if they enjoyed "autonomy . . . in the processes of preference formation"[34]—but economic theorists have not yet clearly mapped those routes. For present purposes, it suffices to observe that, in advocating changes in the takings doctrine, scholars who adopt this approach may not legitimately ignore the impact of judicial decisions on popular views regarding the circumstances in which compensation is appropriate.

B. *Epstein's Program*

Of the four contending theories, the second (in terms of notoriety, if not influence) is the classical liberal approach recently exhumed and amended by Richard Epstein.[35] At first glance, public perceptions may

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31. In the currently dominant form of economic analysis, those desires are measured by consumers' willingness and ability to pay for goods, services, and states of affairs, taking as given the distribution of wealth, income, and legal entitlements other than those whose content the analysis aims to prescribe. See, e.g., Bebchuk, The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?, 8 Hofstra L. Rev. 671 (1980).

32. Cf. A. Sen, Employment, Technology and Development 53–54 (1975); Sen, Plural Utility, 81 Proceedings of the Aristotelian Society 193, 211 n.41 (1980) (discussing an analogous problem).

33. See Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. Phil. 5, 7 (1971).

34. See Sunstein, Disrupting Voluntary Transactions, *in* Nomos: Market and Morals (forthcoming); see also J. Elster, Sour Grapes 135–40 (1983); Sunstein, Legal Interference With Private Preferences, 53 U. Chi. L. Rev. 1129 (1986).

35. See R. Epstein, Takings (1985). It may be an oversimplification to describe

seem to have little place in Epstein's universe. Central to his argument is the proposition that judges ought not defer to contemporary public opinion regarding the legitimacy of governmental interferences with private property. To be sure, the "moderate textualism" on which his theory is founded requires that judges pay attention to the conceptions of property rights that infused ordinary discourse *circa* 1790.[36] But the modified Lockean theory that Epstein contends would be produced by his interpretive method[37] demands that judges stand firm against all confiscations of property rights, no matter how consistent with contemporary values.

However, a review of the pertinent writings of James Madison (the author and principal promoter of the eminent domain provision of the federal Constitution[38]) suggests that Epstein (or a judge or scholar who

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Epstein's approach as "classical liberal." Although the argument presented in his book seems grounded primarily in conceptions of natural individual rights, he has more recently suggested that his theory is designed in part to advance the utilitarian objective of ensuring that governmental power is invoked only to maximize social welfare. See Epstein, A Last Word on Eminent Domain, 41 U. Miami L. Rev. 253, 256–58 (1986) [hereinafter Epstein, Last Word]; Epstein, Beyond the Rule of Law: Civic Virtue and Constitutional Structure, 56 Geo. Wash. L. Rev. 149, 169–71 (1987) [hereinafter Epstein, Rule of Law]. However, insofar as a significant number of libertarian theorists rightly regard Epstein's opus as the preeminent modern defense of their strict view of the legitimate scope of governmental power to interfere with private property, see, e.g., Paul, A Reflection on Epstein and His Critics, 41 U. Miami L. Rev. 235, 235–36, 238 (1986), it seems legitimate, at least for the purpose of blocking out the major contemporary perspectives on the takings doctrine, to locate Epstein's work in the Lockean rather than the Benthamite tradition.

36. See R. Epstein, supra note 35, at 20. For a criticism of Epstein's proposed technique of constitutional interpretation, see Note, Richard Epstein on the Foundations of Takings Jurisprudence, 99 Harv. L. Rev. 791, 793–97 (1986).

37. The plausibility of Epstein's derivation of his theory is debatable. On the strength of Epstein's reading and revision of Locke, compare Note, supra note 36, at 797–807 (contending that Epstein's efforts to cleanse the Lockean theory of acknowledgements of the rights of nonowners "are inconsistent with Locke's basic philosophy") with Epstein, Last Word, supra note 35, at 254–56 (responding to the criticism). On the accuracy of Epstein's assumption that Locke's arguments loomed large in the minds of the members of the Revolutionary generation, compare Bailyn, The Central Themes of the American Revolution, *in* Essays on the American Revolution 3, 4–10 (S. Kurtz & J. Hutson eds. 1973) (downplaying Locke's influence) with Kramnick, Republican Revisionism Revisited, 87 Am. Hist. Rev. 629 (1982) (arguing that the revisionist deemphasis of Locke goes too far).

38. See Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 708–10 (1985). The ensuing discussion of Madison's understanding of the function of the "takings" provision is not meant to suggest that Epstein is in any sense required to treat Madison's views as authoritative. Epstein's (sensible) repudiation of "intentionalism" as a mode of constitutional interpretation, see R. Epstein, supra note 35, at 26–27, renders such an argument pointless. Rather, it is meant to suggest how an appreciation of the symbolic role of the clause might figure in a classical liberal political theory that places a premium on shielding property rights from legislative tampering. That Madison is both the draftsman of the provision and the political theorist most sensitive to its educative power is coincidental.

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takes his lead) would do well to consider one connection between the takings doctrine and public opinion. Madison, like most Federalists, was intensely interested in reducing the risk that either the extant state legislatures or the proposed federal legislature would abrogate private property rights.[39] But he was skeptical of the efficacy of a Bill of Rights in preventing elected officials from exceeding their legitimate authority and chose instead to rely primarily on complex systems for "filtering" statesmanlike Congressmen from the mass of the people and pitting ambitious politicians against one another.[40] His eventual support for the Bill of Rights derived less from a new-found appreciation of its capacity to fetter the legislature than from a recognition of the beneficial impact it might have on the "sentiment" of the people (and thus, indirectly, on the actions of their representatives).[41] Arguably, during the early nineteenth century, the fifth amendment's ban on uncompensated "takings" had precisely the impact on popular attitudes that Madison had hoped it would have.[42]

Epstein's fears regarding the abuse of legislative power resemble in some striking respects Madison's nightmares.[43] In their terror of "democratic despotism"[44] and in their convictions that it is most likely

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39. See, e.g., G. Wood, The Creation of the American Republic 410–11 (1969); Nedelsky, Confining Democratic Politics: Antifederalists, Federalists, and the Constitution, 96 Harv. L. Rev. 340, 346-50 (1982). The Federalists were not alone in wishing to protect property rights from governmental interference. For an examination of the positions taken by other groups in the 1780s, see Fisher, Ideology, Religion, and the Constitutional Protection of Private Property, 67 N.C.L. Rev. (forthcoming 1989).

40. See, e.g., The Federalist Nos. 10, 51 (J. Madison) (1961); D. Epstein, The Political Theory of the Federalist 93–99 (1984); G. Wood, supra note 39, ch. 13.

41. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) [hereinafter Letter to Jefferson], reprinted in 5 The Writings of James Madison 269, 273 (G. Hunt ed. 1904) [hereinafter Writings] (asserting as an argument in favor of a bill of rights that "[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion"); Speech by James Madison in the House of Representatives (June 8, 1789), reprinted in 5 Writings, supra, at 370, 382 (making a similar claim regarding the beneficial impact of a bill of rights on "public opinion"). Madison's position on this issue is consistent with the grounds on which he opposed any procedure for periodically consulting the body of the people regarding the proper form or interpretation of the Constitution. See The Federalist No. 49, at 314–15 (B. Wright ed. 1961) (opposing Jeffersons's proposal to that effect on the ground that it would "deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability"); Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), reprinted in 5 Writings, supra, at 437, 438 (making a similar argument).

42. See Treanor, supra note 38, at 714–16.

43. By contrast, Madison's conception of how legislatures *ought* to operate differs fundamentally from Epstein's ideal of a minimalist state. See H. Pitkin, The Concept of Representation 190–208 (1967); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 38–48 (1985).

44. See, e.g., Madison, The Vices of the Political System of the United States, *in* 2

to find expression in redistributions of wealth, Madison and Epstein are surely alike.[45] In the mechanisms they propose for preventing tyranny and injustice, however, they differ sharply. Unlike Madison, Epstein believes that the judiciary could and should assume the leading role in keeping legislatures within bounds. Specifically, he urges courts to enforce scrupulously the principle that a governmental action (whether avowedly confiscatory or purportedly "regulatory") that impairs any of the entitlements enjoyed by any number of property owners is unconstitutional unless either (a) it is justified by the state's authority to suppress nuisances or (b) each putative victim receives enough "implicit in-kind compensation" from the action both to offset the injury he suffers and to accord him a "pro rata" share of the surplus wealth generated by the action.[46] In other words, in contrast to most contemporary economists, who propose rebuilding the takings doctrine on the basis of the comparatively lax Kaldor-Hicks "efficiency" criterion,[47] Epstein reads the fifth amendment to incorporate a test even more stringent than Pareto superiority.[48]

Putting the desirability of Epstein's recommendations to one side,[49] they would be extremely difficult to implement. Even Epstein acknowledges that it would not be easy for courts to differentiate legitimate exercises of the police power from coerced transfers masquerading as antinuisance legislation and to determine whether the benefits of particular statutes were fairly distributed.[50] And, insofar as the large

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Writings, supra note 41, at 363–66; Proceedings of the Conference on Takings of Property and the Constitution, 41 U. Miami L. Rev. 49, 52 (1986). Though anxiety lest the majority overrun the rights of the minority is the most salient of their fears, both Madison and Epstein are also worried about exploitation of a *majority* of the populace by well-organized factions or "interest-groups." See, e.g., Epstein, Needed: Activist Judges for Economic Rights, Wall St. J., Nov. 14, 1985, at 32, col. 4.

45. For examples of Madison's thought, see Letter to Jefferson, supra note 41, at 272 ("In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constitutents, but from acts in which the Government is the mere instrument of the major number of the Constituents."); Observations on Jefferson's Draft of a Constitution for Virginia, 1788, reprinted in 6 Jefferson Papers 308, 310 (Boyd ed. 1952). Epstein has recently come to appreciate the advantages of according control over some kinds of resources to state or federal governments (as "trustees" for the public), see R. Epstein, The Public Trust Doctrine 17–18 (Aug. 18, 1987) (unpublished draft), but seems to have lost little of his suspicion of the motives of government officials, see Epstein, Rule of Law, supra note 35, at 161–62.

46. See R. Epstein, supra note 35, chs. 5, 9, 12–14.

47. See supra note 16 and accompanying text.

48. For discussion and comparison of these criteria, see B. Ackerman, Economic Foundations of Property Law xi–xiv (1975).

49. For a sharp criticism of his program, see Grey, The Malthusian Constitution, 41 U. Miami L. Rev. 21 (1986).

50. See Epstein, An Outline of Takings, 41 U. Miami L. Rev. 3, 15–17 (1986). For a harsher assessment of the "formal realizability" of the tests Epstein proposes to enforce his principles, see Grey, supra note 49, at 32–40.

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majority of regulatory laws would be subject to challenge under Epstein's doctrine, adoption of his proposal would entail imposing enormous burdens on the judiciary.

In view of these practical impediments to acceptance of his approach, Epstein would do well to reconsider the alternative route to his ends suggested by Madison's insights. Instead of trying to identify and block every instance of "rent-seeking" behavior by legislatures, the judiciary—and, in particular, the United States Supreme Court—might attempt to inculcate in the public at large the conviction that rent-seeking is wasteful and consequently immoral, thereby eventually indirectly reducing the incidence of abusive governmental action. How might the Court assume such an educative role? By publicizing and celebrating the principle on which (in Epstein's view) the takings doctrine is founded—perhaps by selecting cases in which its enforcement of the clause would be especially vivid and notorious and by employing a more hortatory, less technical style in its opinions.[51] To be sure, this method, in contrast to Epstein's proposal, would not enable the Court to dismantle the welfare state immediately. But even Epstein, in his more moderate moments, concedes that gradualism in the realization of his vision might not be all that bad.[52]

C. *Kantian Liberalism*[53]

The third perspective on the takings doctrine looks for guidance to Kant, rather than to Bentham or Locke. Although less prominent in the recent literature than the wealth maximization and classical liberal approaches,[54] the strength of the philosophic tradition from which it derives[55] makes it a serious contender in the battle of "comprehensive

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51. Michelman's response to this suggestion was that his reading of the majority opinions in the 1987 cases might suggest that their authors were moved by precisely these concerns. Conversation with F. Michelman, January 1988. William Fischel found Michelman's speculation implausible, pointing out that prior to noting probable jurisdiction in *First English*, the Supreme Court in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986), refused to review on the merits a decision by a California Planning Commission, the arbitrariness of which would have enabled the Court to issue a more memorable and comprehensible opinion. Letter from W. Fischel to author, April 22, 1988. Assessment of Michelman's and Fischel's positions would be facilitated by a more thorough knowledge of the judicial philosophies of the justices in question. Cf. supra note 12 (discussing the prevailing views of Justice Scalia's predilections).

52. See R. Epstein, supra note 35, at 327; Epstein, supra note 50, at 18 (suggesting that reliance interests might deserve protection).

53. The phrase and some of the argument in the following paragraph are derived from Liberalism and Its Critics 1–7 (M. Sandel ed. 1984).

54. The argument owes what currency it has to the attention it received in the seminal essays by Michelman and Ackerman. See B. Ackerman, supra note 9, ch. 4; Michelman, supra note 15, at 1218–24.

55. See, e.g., B. Ackerman, Social Justice in the Liberal State (1980); R. Dworkin, Taking Rights Seriously (1978); C. Fried, Right and Wrong (1978); J. Rawls, A Theory of Justice (1971); D. Richards, The Moral Criticism of Law (1977).

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views." The notion that lends shape and appeal to this approach is that justice requires that the social and political system be designed in a fashion that does not entail discrimination among alternative aspirations or ways of living, but instead accords all persons the respect they are due as autonomous moral agents.[56] The myriad ways in which that principle may be brought to bear on the takings doctrine[57] need not detain us, because all variants of the theory implicate in the same two respects the issues addressed in this essay.

First, like the classical liberal approach, the Kantian theory seems to have no place for a consideration of what Americans happen currently to think about property and its protection. Central to the Kantian vision is the notion that individual rights do not depend for their content and should not depend for their security on the will of the majority.[58] To acknowledge the relevance to judicial enforcement of those rights of the public's views regarding when compensation is and is not required would be to betray the cause.[59]

Second, Kantian theorists ought to consider more seriously than they have as yet the capacity of the judiciary deliberately to *shape* public opinion concerning the importance and sanctity of private property. To see why, one must imagine how such proselytizing might occur. Courts influence public opinion, not by resolving individual disputes, but by persuasively explaining the reasons for their decisions. Somewhat more precisely, their power derives from their ability, in the justificatory portions of their opinions, to evoke or create symbols; to inculcate (by simultaneously appealing to and modeling) conceptions of "reasonable" or "mature" decisionmaking; and to reinforce or modify their audiences' worldviews by showing how particular legal rules fit

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56. For various statements of this general objective, see, e.g., B. Ackerman, supra note 55, at 11, 57–58; C. Fried, supra note 55, at 9, 20, 24, 28–29; Richards, Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism, 5 Soc. Theory & Prac. 461, 461, 467–68 (1980).

57. Compare Michelman, supra note 15, at 1218–24 (applying Rawls' theory—prior to its definitive formulation in A Theory of Justice] to the takings problem—with B. Ackerman, supra note 9, ch. 4 (canvassing a variety of "Kantian" approaches to the problem). The breadth of the spectrum of Kantian views regarding the protections that private property should enjoy is suggested by the contrast between Ronald Dworkin's recent defense of a highly redistributive taxation system, see Dworkin, What is Equality? (pt. 2), 10 Phil. & Pub. Aff. 283 (1981), and Robert Nozick's condemnation of all but the most trivial tampering with the extant distribution of wealth, see R. Nozick, Anarchy, State, and Utopia chs. 7–8 (1974).

58. See, e.g., R. Dworkin, supra note 55, at xi–xii.

59. For a related reason why a Kantian judge or scholar should ignore popular sentiment, see B. Ackerman, supra note 9, at 83:

> From a Kantian point of view, it is precisely the law's highest duty to deny that some citizens exist for the mere convenience of others. Since such a denial will inevitably anger those who declare themselves intrinsically superior, deferring to their resentment is tantamount to abandoning the ultimate aims of the legal system.

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general moral and political visions.[60] Thus, the way in which courts are most likely to affect popular attitudes concerning the takings doctrine is not by simply announcing decisions or rules limiting the state's regulatory authority, but by explaining how those decisions or rules advance one or another theory of individual rights or conception of a just and attractive society and way of life.

The power of the judiciary to influence popular attitudes in this manner is an aspect of the general phenomenon of opinion shaping by government. In recent years, liberal legal and political theorists have devoted increasing attention to whether and in what contexts agencies of the state may legitimately engage in efforts to alter the outlooks of their constituents.[61] Although none of their analyses of the issue has been particularly compelling,[62] they have at least stimulated scholarly awareness of the problem.

Liberal theorists who look for inspiration to Kant have special reason to be interested in such questions. On the one hand, Kantians are especially suspicious of any effort by government to make up people's minds for them; their devotion to the principle that the state should be strictly neutral regarding alternative conceptions of the good[63] makes them leery of initiatives that smack of "paternalism,"[64] including efforts

60. For discussions of these aspects of courts' persuasive capacities, see C. Geertz, Local Knowledge 175, 181, 230–31 (1983); M. Yudof, When Government Speaks 190–99 (1983); Frug, Argument as Character, 40 Stan. L. Rev. 869, 896–921 (1988).

61. See, e.g., M. Yudof, supra note 60, at 174–99; Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 Calif. L. Rev. 1104 (1979); Shiffrin, Government Speech, 27 UCLA L. Rev. 565 (1980); cf. C. Lindblom, Politics and Markets chs. 5–8 (1977) (discussing the cultural power of corporate speech). None of these theorists adopts a specifically Kantian approach. See M. Yudof, supra note 60, at 108 (rejecting Kantian theory in favor of a more "eclectic" form of liberalism); Shiffrin, Liberalism, Radicalism, and Legal Scholarship, 30 UCLA L. Rev. 1103 (1983) [hereinafter Shiffrin, Liberalism, Radicalism] (same).

62. For convincing discussion of the limitations of the leading treatments, see Shiffrin, Book Review, 96 Harv. L. Rev. 1745 (1983); Tushnet, Book Review, 1984 Wis. L. Rev. 129.

63. See, e.g., B. Ackerman, supra note 55, at 11–12; R. Dworkin, A Matter of Principle 191 (1985); C. Fried, supra note 55, at 146–47; J. Rawls, supra note 55, at 325–42.

64. A useful working definition of paternalism is provided by Gerald Dworkin: "By paternalism, I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced." Dworkin, Paternalism, *in* Morality and the Law 107, 108 (R. Wasserstrom ed. 1971). For criticisms of paternalism based on Kantian political theories, see, e.g., D. VanDeVeer, Paternalistic Intervention 88, 112–15 (1986); Wikler, Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life Styles, *in* Paternalism 35, 39, 52–55 (R. Sartorius ed. 1983). Kantian theorists generally take the position that only the "incompetence" of the person at issue or his prior, hypothetical, or subsequent consent to the restraint on his liberty provide legitimate justifications for paternalism. See, e.g., Carter, Justifying Paternalism, 7 Can. J. Phil. 133 (1977). Of the group, John Rawls has the most expansive notion of the sorts of restraints that could be justified on these bases, but even he is hostile to most forms of paternalism. See J. Rawls, supra note 55, at 248–49.

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to instill in the public any particular set of tastes or convictions.[65] On the other hand, they tend to look favorably upon "conversation" and "persuasion" as ways of improving persons' outlooks;[66] as long as the judiciary were disseminating the *right* view regarding the legitimate authority of other branches of government vis-a-vis private property,[67] a Kantian theorist might conclude that such missionary work is the best possible way of inculcating the values necessary to establish and sustain a just social and political order.[68] Surprisingly and unfortunately, however, Kantian theorists to date have largely neglected these matters. Their major works contain little discussion of government speech[69] and no analysis of how the considerations just reviewed might be reconciled. If they are to develop a coherent and persuasive analysis of the takings doctrine, they must confront such issues.

D. *Theories of the Good*

The last of the four clusters of perspectives on the takings doctrine has only recently begun to take shape. Spurred by the growing reaction among political theorists and moral philosophers against the Kantian version of liberalism,[70] a few legal scholars have begun proposing approaches to the doctrine founded on the proposition that social and political institutions should be arranged to facilitate one or another kind of human flourishing. The most developed of these approaches is that advanced by Margaret Jane Radin, which argues, *inter alia*, in favor

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65. See, e.g., R. Dworkin, supra note 63, at 230 ("Paternalism is more sophisticated when those in charge try, not to oppose preferences already established, but to create preferences they think desirable and avoid those they think harmful. This is the paternalism of much moral education, for example, and the justification of much censorship."); Wikler, supra note 64, at 39, 52–53.

66. See, e.g., B. Ackerman, supra note 55, at 3–10.

67. But cf. supra note 57 (discussing disagreement among the Kantians as to what "the right view" is).

68. Cf. J. Rawls, supra note 55, at 453–504 (arguing that a system organized on the basis of his proposed principles of justice would be stable—in the sense that persons would not wish to change it—but implying that people are not inexorably drawn toward such a system).

69. An exception is Ronald Dworkin's recent defense of governmental support for the arts, in which he contends that, by preserving and making accessible to the public a rich collection of art and by fostering a tradition of artistic innovation, the state could and should expand its citizens' opportunities for creativity and subtlety in communication and thought. See R. Dworkin, supra note 63, at 229–33. It is not clear that Dworkin's argument on this score is consistent with his overall liberal theory. Cf. Shiffrin, Liberalism, Radicalism, supra note 61, at 1131 n.105 (describing and speculating on the reasons for Dworkin's gradual abandonment of his original view that such support is illegitimate). The main point, however, is that Kantian theorists have given questions of this sort comparatively little attention.

70. See M. Sandel, supra note 53, at 5–7. Examples of works taking new tacks are A. MacIntyre, After Virtue (2d ed. 1984) and R. Unger, Politics, a Work in Constructive Social Theory (1987). For a criticism of these preliminary ventures, see Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291 (1985).

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of increased protections against governmental interference with "personal" (as opposed to "fungible") property.[71] An even more ambitious but, as yet, less well integrated example of this general perspective is C. Edwin Baker's recent discussion of the appropriate constitutional protection for private property.[72] Finally, Michelman and other scholars intrigued by some variant of the political theory of classical republicanism[73] have proposed various modifications of the takings doctrine that would conduce to more widespread acceptance and realization of republican ideals.[74]

Each of these theorists should devote more attention to the ways in which the public perceives the takings doctrine. If people are to form the kinds of healthy bonds with their possessions and living spaces that Radin advocates,[75] it is at least as important that they believe that their "personal property" is protected from confiscation as that it is in fact protected.[76] Many of the same concerns that prompt Baker to devote

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71. See Radin, Property and Personhood, 34 Stan. L. Rev. 957, 986–87, 1002–08 (1982); see also The Supreme Court, 1983 Term—Leading Cases, 98 Harv. L. Rev. 87, 235–36 (1984) (advocating adoption of Radin's proposal).

72. See Baker, Property and Its Relation to Constitutionally Protected Liberty, 134 U. Pa. L. Rev. 741 (1986). Baker does not clearly place himself in this camp. Indeed, in view of (i) his professed adherence to a "formal" conception of liberty, id. at 779–82, and (ii) his willingness to defer to what "a community considers essential for meaningful life" when defining welfare rights, id. at 745, he might object to the classification. But the tenor of his catalogue of the functions of private property strongly suggests that he subscribes to a particular conception of what sorts of "liberty" are most worthy of protection and, ultimately, what sorts of lives are most worth living. That conception is most clearly visible in his favorable discussion of the "personhood function of property," id. at 746–47, ambivalent discussion of "the sovereignty function," id. at 751–53, 769–73, and criticism of the conception of human freedom inherent in the economists' notion of consumer sovereignty, id. at 796–98. Baker's approach is "less well integrated" than Radin's principally because the purpose of his article is not to develop a comprehensive new argument, but to defend (against attack by the "new conservatives") the Supreme Court's treatment of property rights as less deserving of vigorous defense than "civil rights."

73. Insofar as republicanism revolves around a particular vision of the good life (specifically, a life characterized by independence, altruism, and active engagement in politics), takings theories based upon it are properly placed in this fourth category. For examinations of the roots and character of republicanism, see, e.g., J. Pocock, The Machiavellian Moment (1975); Appleby, Republicanism and Ideology, 37 Am. Q. 461 (1985); Shalhope, Republicanism and Early American Historiography, 39 William & Mary Q. 334 (1982) (reviewing the literature).

74. See Michelman, Property as a Constitutional Right, 38 Wash. & Lee L. Rev., 1097 (1981); cf. Treanor, supra note 38, at 699–701.

75. See Radin, supra note 71, at 968–70 (distinguishing healthy bonds from commodity fetishism).

76. Arguably, it is also important that they know *why* their personal possessions and living spaces are entitled to special legal protection. Cf. Tribe, Policy Science: Analysis or Ideology, 2 Phil. & Pub. Aff. 66, 88–89 (1972) (contending that a person's "sense of self and of autonomy may be intimately bound up not just with the bare fact of having [a particular] capacity or good, such as eyes or limbs, but with *a shared social and legal under-*

considerable attention to the preference-shaping power of the market[77] should prompt him to attend to the preference-shaping power of the judiciary. And if Michelman remains true to his general view that the role of constitutional adjudication in structuring discourse about politics is as important as its role in determining the rights and powers of political actors,[78] he ought to be as concerned with the impact of Supreme Court decisions on popular views of the nature and function of property as he is with the room they afford the exercise of citizenship.[79]

This is not to suggest that it would be easy for theorists of this fourth sort to incorporate in their arguments an appreciation of the educative power of constitutional decisions. These scholars can be grateful that they are spared the conundrums of utilitarianism and Kantian liberalism. With good reason, however, none of them is entirely comfortable with authoritarianism; each of their theories contemplates some limits on the power of the state to compel people to adopt one life plan rather than another.[80] Accordingly, while they need not tarry with the arguments against paternalism that proceed from the conviction that self-determination is the supreme value,[81] they cannot reject out of hand other, more moderate objections to efforts by government to alter people's opinions for their own good. In particular, they must address: (i) the consequentialist argument that, although a person does not always know what course of action is in his best interest, he is usually a better judge of his welfare than an officious government official (at least given our present systems for selecting government officials) and that the rare cases in which that generalization does not hold cannot be effectively isolated;[82] and (ii) the argument (traceable to Mill[83]) that leaving people free to form opinions and make choices and mistakes is essential to the development of the sense of confidence and competence that must figure in any defensible theory of human flourishing.[84] Analyzing such issues on anything other than

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standing that [the capacity or good] belongs to [the person] ab initio, as a matter of *right*.") (emphasis in original).

77. See Baker, supra note 72, at 794–96.

78. See Michelman, Law's Republic, 98 Yale L.J. (forthcoming 1988); cf. L. Tribe, American Constitutional Law 14–15 (2d ed. 1987) (discussing importance of constitutional adjudication to political discourse).

79. See Michelman, supra note 74, at 1111–13.

80. See, e.g., Michelman, supra note 78; Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1906 (1987) (arguing that the freedom to disassociate oneself from "jobs, political enagements, [and] personal attributes" is "integral to personhood" and implying that governmental interference with that freedom would be objectionable).

81. See supra text accompanying note 64.

82. See, e.g., Sartorius, Paternalistic Grounds for Involuntary Civil Commitment: A Utilitarian Perspective, *in* Paternalism 95, 99–100 (1983).

83. See Mill, On Liberty, reprinted in The Philosophy of John Stuart Mill 252 (M. Cohen ed. 1961).

84. See, e.g., J. Kleinig, Paternalism 25–27 (1983); Kennedy, Distributive and Pa-

an ad hoc basis is no simple task, but the difficulty of the job does not justify avoiding it.[85]

II. The Tasks Ahead

Once one appreciates that adherents of each of the theoretical approaches that currently dominate the "takings" literature have cause to be concerned with popular perceptions of the doctrine and with the capacity of the judiciary to alter those perceptions, it becomes crucial to ascertain what those perceptions are and how susceptible they are to modification. The confused state of the current takings doctrine makes the project all the more important; if scholars wish to provide judges useful advice as to how to clean up the mess, they must assist the judges in predicting how the public would respond to alternative reconstructions of the law.

Unfortunately and surprisingly, the literature to which we might turn for guidance on such matters is sparse. The symbolic or educative function of the Constitution and the Supreme Court's interpretations thereof is a strangely neglected field.[86] The venerable essays by Max Lerner and Edward Corwin[87] and the large and provocative new study by Michael Kammen[88] make plain the continuing cultural significance of the document and the judiciary's handling of it, but leave many crucial questions unanswered. We can say with some confidence that, although most Americans are ignorant of the details of the Constitution and "misunderstand" (in some sense) its purposes and spirit,[89] the majority are cognizant of its impact upon a number of important aspects of social and political life,[90] and that the pronouncements of the Supreme

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ternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 640 (1982). For fuller discussion of some of these issues, see Fisher, supra note 30, at 1762–66.

85. But cf. Kennedy, supra note 84, at 638, 644–46 (advocating handling problems of paternalism exclusively on an ad hoc basis).

86. See Bernstein, Charting the Bicentennial, 87 Colum. L. Rev. 1565, 1618–19 (1987).

87. See Corwin, The Constitution as Instrument and Symbol, 30 Am. Pol. Sci. Rev. 1087 (1936); Corwin, The Worship of the Constitution, 4 Const. Rev. 3 (1920); Lerner, Constitution and Court as Symbols, 46 Yale L.J. 1290 (1937).

88. See M. Kammen, A Machine That Would Go of Itself (1986). The book is extremely valuable as a compendium of popular conceptions of and responses to the Constitution over the course of American history, but lacks a persuasive vision of how the Constitution and Court have figured in Americans' changing sense of themselves and their polity.

89. See id. at 1–7, 23–29; Hyde, The Concept of Legitimation in the Sociology of Law, 1983 Wis. L. Rev. 379.

90. Issues with respect to which the positions taken by the Supreme Court are reasonably widely known include: free speech (witness the duration of the discussion of the first amendment in the Judiciary Committee's examination of Judge Bork); criminal procedure (where the Court's pronouncements have been popularized by countless movies and television shows); racial discrimination; and abortion.

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Court affect in some way their views on those topics. But the gaps in our knowledge are striking. On a general level, we have only a primitive understanding of how and how much the constitutional text and its judicial construction function to anchor or shape Americans' moods, motivations, and worldviews.[91] On the level most pertinent to the problem at hand, we have virtually no idea what most Americans believe to be the limitations on governmental regulations of private property or how their attitudes are or could be affected by judicial decisions.[92]

Arguably, that constitutional scholars have devoted so little attention to a topic so central to a mature understanding of their field is itself something to worry about. In particular, it casts doubt on the sincerity of our professed scholarly ambitions. The style of doctrinal analysis in which many of us are engaged these days entails developing or positing a general normative theory of some kind and then considering how a field of law might be reorganized to advance it. That we have hitherto neglected an aspect of the takings problem critical to advancement of almost any economic, political, or moral theory[93] does not speak well of the seriousness of our projects.

For the time being, however, such bleak inferences seem avoidable. The gap in the literature is readily explainable by the infancy of the general approach described above. Until recently, it was relatively rare for legal scholars to test fields of doctrine for their consistency with comprehensive normative schemes; the typical law review article or treatise proceeded on the basis of unstated or eclectic premises and limited itself to modest proposals for doctrinal change.[94] We should be neither surprised nor distressed that, as our fields of vision have expanded, areas of obscurity have become apparent.

This is not to suggest, however, that continued neglect of the

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91. For some speculations on these matters, see Lerner, supra note 87, at 1294–1305; J. Nedelsky, Property and the Framers of the United States Constitution 5–11 (U. Chi. Ph.D. dissertation, microfilm no. T 26294).

92. About all we can say with confidence is that governments' practices in condemnation proceedings figure in some segments of popular culture, see, e.g., J. MacDonald, Barrier Island (1986); Joni Mitchell, "Raised on Robbery," track 9 on Court and Spark (Asylum Records 1974), and that popular literature is replete with reference to the scope and arbitrariness of the zoning power, see, e.g., J. MacDonald, supra, at 35–37, 39–41. How much, if at all, the newspaper articles cited supra notes 3–4 affected public attitudes is beyond our ken. Regrettably, M. Kammen, supra note 88, contains virtually no discussion of popular views of the fifth amendment.

93. This may be an overstatement. Perhaps one could imagine a comprehensive normative theory capable of guiding the reconstruction of the takings doctrine to which public attitudes were in no way relevant. But it is telling that no such theory is currently in general circulation.

94. For similar criticisms of contemporary legal scholarship, see, e.g., B. Ackerman, Reconstructing American Law 6–22 (1983); Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017, 1018–19 (1981); Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L.J. 1205, 1208–10 (1981).

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issues discussed in this paper would be justified. If we are sincere in our scholarly ambitions, we must learn something about how the courts' interpretations of the Constitution affect Americans' ideologies. Inquiry of three related sorts seems imperative. First, legal scholars should become more familiar with (and perhaps contribute to) the efforts of social and political theorists to understand the general ways in which belief-systems arise, change, and deteriorate.[95] Second, in conjunction with sociologists, we need to do more empirical work on the cultural significance of the Constitution and Supreme Court.[96] Finally, we historians have to pay more attention to the ways in which the state and federal constitutions and their explications by the judiciary have shaped Americans' worldviews over time.

CONCLUSION

Public perceptions are germane to all four of the theories that dominate contemporary takings scholarship. For the economists, the citizenry's convictions matter for two reasons: the possibility that particular rulings in takings cases will chafe the public's sensibilities should be taken into account in the utilitarian calculus (under the rubric of "demoralization costs"); and the capacity of the judiciary to shape beliefs renders the efficiency criterion potentially indeterminate. For both the classical liberals and the Kantian theorists, the educative power of the judiciary provides oppportunities for instituting the political and social regimes they consider just, but before availing themselves of those options, they must confront some fundamental questions regarding the legitimacy of opinion shaping by government. Because public attitudes—such as senses of security or community—figure more directly in the utopian visions of scholars critical of the liberal traditions, they have even greater reason for taking into account judges' capacity to inculcate values, but they too need to consider whether some exercises of that power would run afoul of the values that underlie our suspicion of "paternalism." In sum, the character of the connections vary, but popular attitudes are relevant to each of the perspectives.

Unfortunately, none of the adherents of the dominant approaches has thus far devoted significant attention to public perceptions. In combination, the comparative novelty of the "scientific" style of doctri-

95. Recent studies to which they might profitably attend include: M. Bal, Murder and Difference (1988); J. Femia, Gramsci's Political Thought: Hegemony, Consciousness and the Revolutionary Process (1981); C. Geertz, supra note 60; New Directions in American Intellectual History (J. Higham ed. 1979); Modern European Intellectual History (D. Lacapra & S. Kaplan eds. 1982); P. Ricoeur, Lectures on Ideology and Utopia (1986); Lears, The Concept of Cultural Hegemony: Problems and Possibilities, 90 Am. Hist. Rev. 567 (1985).

96. The sort of "empirical work" that seems most promising is the kind of theoretically inspired, "pragmatic" inquiry described in Trubeck, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 580 et passim (1984).

nal analysis exemplified by all four schools and the shallowness of the empirical and historical literature on which they would have to rely perhaps excuse the theorists' neglect of these issues. But if their analyses are to be helpful in rebuilding the takings doctrine—a field that all participants in this conference seem to agree currently is in disarray—the omission must be remedied.

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