

WHEN SHOULD RIGHTS “TRUMP”? AN EXAMINATION OF SPEECH AND PROPERTY

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I. INTRODUCTION

In his well-known article, *Property, Speech, and the Politics of Distrust*,¹ Professor Richard Epstein—a leading contemporary voice in the fields of property theory and constitutional law—makes a simple but compelling argument. There has been, he argues, a mistake in “the dominant mode of thinking about property rights during the past fifty years [that] has been . . . of constitutional dimensions.”² This mistake, in Professor Epstein’s view, is the refusal of the federal courts to accord to individual property rights the same kind of protection from government regulation that is accorded to other constitutional rights. Using free speech as his example, Professor Epstein argues that the “attitude of distrust”³ with which courts approach government regulation of speech should animate—in equal measure—their approach to government regulation of property.⁴ Both are constitutional rights, of equal stature; both are of critical importance to the freedom of individuals; both should, as a matter of law and policy, be afforded the same protection, the same presumptive power.

In decrying the courts’ apparent failure to protect property rights, Professor Epstein is, of course, not alone. An array of academic and political commentators has lamented the courts’ apparent failure to recognize government regulation of land use or other government regulatory or distributive efforts as “takings” by government which should—under the Fifth Amendment’s explicit terms⁵—be compensated.⁶ Professor Epstein’s juxtaposition of free speech rights and property rights serves, however, to place this question in particularly sharp relief. If—as a matter of explicit constitutional text—we protect speech, and if—also as a matter of explicit constitutional text—we protect property, how can we justify the stringent protection of the former, and the very weak protection of the latter? We might *like* land-use controls or environmental controls; we might *like* state laws that take wealth from one person and give it to another; but the fact that such sentiments are held—even by a majority of citizens—does not justify disregard of what the law, as a constitutional matter, requires. Aren’t rights, after all, *rights*?

I shall argue that Professor Epstein and other property-rights advocates are wrong: that a simple equation cannot be drawn between rights to free speech and

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1. Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992).

2. *Id.* at 41.

3. *Id.* at 48.

4. *See id.* at 48-49.

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

property rights, with the "politics of distrust" the required principle for considering government regulation of each. Rather, I shall argue that there are fundamental differences between free speech rights and property rights, and the public interests that oppose them, which require very different treatment. I shall argue that the apparent judicial disregard of property rights is not an unprincipled aberration in our law; rather, it is a reflection—a genuine, even *compelled* reflection—of the deeper tensions and structures that are an inherent part of property/public interest conflicts.

II. CONFLICTS BETWEEN INDIVIDUAL RIGHTS AND GOVERNMENT INTERESTS: THE EPSTEINIAN MODEL

In his article,⁷ Professor Epstein begins with a simple proposition. Because those in positions of political power are human beings, they face a constant temptation to act in ways that are personally self-serving or otherwise undesirable from an objective or enlightened point of view.⁸ Because of basic human frailties and other problems, we cannot assume that those in power will be "enlightened statesmen [who] will be able to adjust . . . clashing interests and render them all subservient to the public good."⁹ We must, instead, keep in mind the potentially oppressive power of government, and view its actions with distrust.¹⁰

When we consider constitutional rights in light of this principle, Professor Epstein argues, the conclusion must be in favor of well-defined rights which protect individuals against the exercise of government power.¹¹ The protection of speech and property "should," he writes, "be read in light of these political concerns."¹² Through freedom of speech, we (as a society) can combat government actions and government misconduct.¹³ The protection of property is similarly crucial. "The motivation for the Takings Clause . . . come[s] from a fear that the legislature has imperfect knowledge, imperfect motives, or both."¹⁴ It is the constitutionally provided protection for the property holder against "legislative abuse."¹⁵

The implementation of this philosophical stance does not, of course, translate into a total ban against all government regulation of speech or property. Rather, it translates into a strong presumption that speech and property are protected, and that this protection can be overridden only by a compelling government interest.¹⁶ "The modern insistence that speech is a fundamental liberty, while property is

6. See, e.g., JAMES V. DELONG, *PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE* (1997); NANCIE G. MARZULLA & ROGER J. MARZULLA, *PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION* (1997).

7. See Epstein, *supra* note 1.

8. See *id.* at 48-49.

9. *Id.* at 49 n.25 (quoting *THE FEDERALIST* No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961)).

10. See *id.* at 49.

11. See *id.* at 49-59.

12. *Id.* at 49.

13. See *id.* at 49-50.

14. *Id.* at 52.

15. *Id.*

16. See *id.* at 45.

[merely] the creature of legislation and subject to its whims,"¹⁷ is—Professor Epstein writes—completely at odds with these fundamental principles. The constitutional clauses that protect both have an "essentially libertarian cast . . . : strong, decentralized private rights and a central government with limited powers, any exercise of which must be justified."¹⁸

The model that Professor Epstein sketches is a familiar and compelling one. Speech and property are constitutionally protected because we, as a society, have decided to protect them against the pressures of majoritarian government. They are—as a matter of constitutional text and constitutional theory—of apparently equal standing and equal power. Just as the right to free speech is deemed to be presumptively more powerful than competing public interests, as expressed through ordinary legislation, so must the right to property. To argue otherwise is to contradict the principles of limited government and the understandings of rights that ground our political system.

Having made that observation, however, we are left with an odd paradox. For, as Professor Epstein readily acknowledges—indeed, it is the core fact of which he complains—the courts have repeatedly failed to implement this evident truth. Speech is rigidly protected; property, in the main, is not. As Professor Epstein writes, "under the present state of affairs, . . . there is essentially no protection of property . . . against prospective legislation, or . . . [often] against retroactive legislation as well."¹⁹ Property interests—despite their constitutionally protected status—routinely yield to the ordinary goals of government.²⁰ Whether one thinks of zoning laws, historic preservation laws, wetlands preservation laws, or laws that simply redistribute income or advance one person's commercial interests at the expense of another's, it is apparent that the courts routinely uphold government regulations "that destroy[] or adversely affect[] recognized . . . property interests."²¹

Have the courts, as Professor Epstein argues, simply "gone . . . astray"²² in their differing treatment of property and speech? Have they simply failed to appreciate the values involved, as he argues? Or are there other, more important reasons why the presumptive power of speech should not be translated, so easily, into the presumptive power of property?

III. THE PRESUMPTIVE POWER OF RIGHTS: RETHINKING PROPERTY

In order to examine the question of what presumptive power property rights should have in law, we must begin by considering what "rights"—as an abstract matter, in this context—are.

A declaration of right clothes an interest with awesome rhetorical, political, and legal power. "I have a right" is a challenge to the world: my interest, which I

17. *Id.* at 46.

18. *Id.*

19. *Id.* at 46-47.

20. The Supreme Court has indicated on numerous occasions that public interests of a very general nature may be sustained in the face of asserted property rights. *See, e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) ("substantial public purpose"); *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) ("public health, safety, morals, or general welfare"). The range of government purposes and regulations that satisfies these requirements is "broad." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987).

assert, is—presumptively, at least—superior to all non-rights interests with which it might conflict. The assertion of an individual right carries with it a powerful message of individual autonomy and the protection of the individual interests from the claims or predations of others.

The division of demands into those that are rights-based and those that are not is deeply entrenched in political rhetoric, moral philosophy, and law. The view of rights as normative demands with particular strength which "trump" (at least as a *prima facie* matter) non-rights interests that conflict with them can be found in the discussion of any contemporary social issue. Property owners claim a "right" to develop their land in violation of state or local environmental laws. Purveyors of pornography and adult entertainment claim a "right" to be free of government regulation. Citizens claim a "right" to doctor-assisted suicide.

Scholarly exploration of the precise nature of rights has generated an immense literature. Competing notions of rights include rights as the absence of prohibitions, rights as positive authorizations, rights as reflections of obligations, rights as powers, and rights as immunities.²³ Uniting these common conceptions of rights is the idea that a right protects the right-holder's interest (however defined) by imposing constraints on the actions of other people.²⁴

In conflicts between individual and collective, rights of individuals are usually contrasted with public-interest demands. "Public interests" are usually understood, in law, to be utilitarian or otherwise derived aggregative social concerns that provide reasons for coercive legal action. When we declare an individual demand to be a right, in law, it is because we take the individual and his interests seriously. To honor this grounding, individual rights must, as a *prima facie* matter at least, be deemed more powerful than competing public interests.²⁵

Thus far, our understanding of the nature and function of rights seems to be quite congruent with that of Professor Epstein and other property-rights advocates. The purpose of rights (under this understanding) is to protect individual interests against public-interest demands. In the constitutional context, this means that constitutional rights protect individual interests against the acts of government. They can be overridden—but only by a societal goal of special or compelling urgency. They cannot be defeated by the ordinary or routine goals of government.²⁶

Is this, however, all that our implementation of the notion of rights in law involves? Do we simply—and mechanically—1) determine if the individual interest asserts a right (as legally defined); 2) determine if the public interest is—in

21. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 125.

22. Epstein, *supra* note 1, at 59.

23. See, e.g., Carlos Niño, *Introduction in RIGHTS* xi, xiii-xix (Carlos Niño ed., 1992) (discussing competing theories of rights).

24. See Joseph Raz, *On the Nature of Rights*, 93 *MIND* 194, 195, 199 (1984).

25. See, e.g., Robert Alexy, *Individual Rights and Collective Goods*, in *RIGHTS*, *supra* note 19, at 163, 178-79 (the idea of taking the individual seriously requires "a general *prima facie* priority in favour of individual rights"; "there [must] be stronger grounds in favour of . . . [a] resolution required by collective goods than exist for that required by individual rights").

26. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 92 (1977). See also Alexy, *supra* note 25, at 179 (the "[p]*prima facie* priority [of rights] does not exclude the setting aside of individual rights" in favor of other interests; it simply demands that there be "stronger grounds" in favor of the resolution required by other interests than is required for rights).

fact—a collective one; and 3) afford the right “trumping” power, if the public interest is not—by its very nature—“compelling”?

In fact, there is far more to this process than our description so far allows. When we assign an individual demand the presumptive power afforded to rights, we assume that we have done so on some kind of principled basis. We assume that the process of designating particular demands as rights involves something more than completely arbitrary political action. We assume that there are reasons why some demands have been granted “rights power,” and others have not.

We assume, in short, that there is something about the nature of the demands that rights protect—*something about the nature of the interests that these demands assert*—that justifies their presumptive power. The most commonly held (and, in the end, the most persuasive) rationale for the presumptive power of rights is that the interests that underlie rights involve values that are—as a prima facie matter, at least—more important or more worthy (as a societally determined matter) than competing non-rights interests. Thus, for example, freedom of speech has been granted “rights” status and power because the values that it involves are more important than those involved in competing (public) interests.

This “normative explanation” for the power of rights is certainly in keeping with common notions of what rights are and why they are recognized in law. Freedom of speech, freedom of religion, the protection of property, equal protection, and so on, involve values that we particularly prize in our society and are, accordingly, interests to which we grant special legal protection.

This explanation for the power of rights has, however, an important and often overlooked corollary. Under this explanation, the presumptive power of rights adheres only if the values that the right involves *are not shared, in fact, by the competing public interest*. If the values that underlie the claimed right *are the same, in kind*, as the values that underlie the competing public interest, there is no basis for a conclusion that the right involves normatively superior values, and no basis for affording the right presumptive power.

The truth of this explanation of *when* and *why* rights enjoy presumptive power can be illustrated by a familiar example involving the right to free speech. Let us take, for instance, a newspaper’s claimed right to publish a story on free speech grounds, and the competing government interest in stopping publication to preserve national security. This is a case in which we would all expect the claimed right to enjoy presumptive power. Indeed, when we examine the conflicting claims in this case, we find that the values that underlie the newspaper’s claim—values that are highly prized in our society—are unanswered by the competing public interest demand. Whatever values are involved in the national security claim, they are not those associated with the right to free speech. As a result, the claimed right to free speech will have presumptive or prima facie power. The competing public interest may ultimately prevail—but it must be of a particularly compelling nature to do so.

Indeed, the general lack of identity between the values that underlie claimed rights to free speech and the values that underlie opposing public interests explains the presumptive power that free speech rights seem to so ubiquitously enjoy in law. *Almost never* are the values that undergird free speech claims shared by the public interests that oppose them. Although one can think of instances in which

free speech values are also a part of the public-interest claim—for instance, when pornographic speech or hate speech is opposed on the ground that it “silences” women or members of minority groups²⁷—those instances are very rare. As a result, we tend to believe—and rightly so—that free speech rights will (always) enjoy presumptive power in law.

Let us consider, now, the case of property. We will begin with this example: an individual’s claimed right to the exclusive use and control of her patented pharmaceutical invention, and the opposing public interest in making that invention available for the treatment of the largest number of citizens possible. Our general understanding of how this conflict is resolved in law is clear. The claimed right in this case has clear presumptive power. Once an individual has obtained patent rights, those rights cannot simply be abrogated, without legal consequence, in favor of the ordinary or routine goals of government. Although previously conferred patent rights might be overcome by a competing public interest, it would take a public interest of an extremely compelling kind—indeed, a national crisis of some sort—for this to be justified.

This result—this resolution by law—is explained by the values that the claimed right and the competing public interest involve. The values that the claimed right in this case involves are those associated with property: the protection of individual security, the encouragement of individual initiative, the rewarding of investment, and so on. The values that the competing public interest involves are of a completely different kind. The desire to prevent illness or to cure disease—however laudable—has nothing to do with the reasons why we, as a society, have chosen to privilege the patent claim. The values that underlie the claimed right are unchallenged. As a result, the right enjoys presumptive power.

The legal treatment of patent claims is not, of course, what property-rights advocates decry. Indeed, if all property claims were afforded the power of patent claims, there undoubtedly would be no “crisis”—in their view—in the protection of property. Their focus is, instead, on other kinds of property rights, such as those involving land use or the protection of wealth from redistributive taxation. Professor Epstein argues, for instance, that under current court interpretations, “any legitimate public function of conceivable merit justifies government restriction on land use. . . . Aesthetics, popular sentiments, and environmental objectives all become appropriate pegs on which to hang legal justifications for land use restrictions.”²⁸

To examine these claims, let us begin with the following case: the denial of permission to develop shorefront land on the ground that this is necessary to prevent erosion, to preserve the existing beach/dune system, and to otherwise protect existing public and private beachfront areas. Refusals by local governments to

27. See, e.g., Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 809 (1991) (discussing silencing effects of pornography); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) (discussing silencing effects of racist speech). In these cases, free speech values are involved in the claimed right *and* the competing public interests. Indeed, the difficulty that courts and commentators have had in the resolution of cases involving such conflicts attests to the inapplicability of the usual, “trumping” relation between claimed rights and competing public interests when evaluating these claims.

28. Epstein, *supra* note 1, at 76.

grant shorefront development permits have, in fact, been frequent targets for takings claims.²⁹ Are complaints by property-rights advocates in such cases justified? To answer this question, we must consider the nature of the competing claims. The asserted right—the ability to build on or to use one's land—is one that we generally associate with property rights. The values that this right involves—the protection of individual investments and expectations, the protection of individual security, and so on—are values that we, as a society, highly prize.

What about the competing public interest? When we analyze it, we find that it asserts—in fact—property-based values of a very similar kind. The protection of the existing beach/dune system, the prevention of erosion, and like concerns, involve the protection of the ability of others—public or private landowners—to use, preserve, and enjoy *their* land. This is not a case—the usual “rights” case—in which the values that are involved in the asserted right are unanswered by those involved in the competing public interest. Rather, this is a case in which the claimed right and the competing public interest involve values of *the same or a very similar kind*. The normative power of the values that the claimed right protects are equaled by the normative power of the values that the public demand asserts. As a result, there is—in fact—no reason to afford the claimed right presumptive or trumping power.

Indeed, to afford the claimed right presumptive power in this case would create a very peculiar situation in our law. To grant the claimed right in this case such power *simply because it is a “right”* would mean that the legal protection afforded to particular interests would depend solely upon the fortuity of whether they are asserted under an “individual” or a “collective” label. There is no reason why the property interests of one person should be presumptively superior to the property interests of many persons, simply because the interests of the many are asserted “publicly” or “collectively.” It is the nature of the interests and the values that they assert—not the identities or numbers of the holders—that should determine normative power. If the claimed property right and the competing public interest involve interests and values of the same kind—if, for instance, the land-use or preservation claims of one landowner are opposed by the collectively asserted land-use or preservation claims of others—there is no reason to give the individual claim presumptive power.

The reason that the property right lacks presumptive power in this case is—perhaps—fairly easily seen, since we are all familiar with the “nuisance paradigm”—the idea that the use of land by one person cannot impair the land use or enjoyment of others. Indeed, Professor Epstein acknowledges that nuisance law “constrains” the freedom with which landowners might otherwise act.³⁰ What must be realized, however, is that nuisance is *not*—as some have argued—some kind of “exception” to the otherwise broad and unassailable power of property rights. Rather, it is simply one manifestation of a very basic principle: that the normative basis for the presumed superiority of a property right—or any right—*fails* when it is opposed by a public interest which involves values of a similar kind.

This principle explains, in fact, the lack of presumptive power afforded to a wide range of property rights claims. Let us consider, for instance, a broad eco-

29. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

30. See Epstein, *supra* note 1, at 58.

logical measure, such as the preservation of wetlands and the marine life that they spawn. Let us assume, further, that this measure is opposed by landowners whose previously permitted uses are now curtailed. How should this conflict be resolved? *With what notions of presumptive power* should we approach this conflict?

Popular notions about the presumptive powers of individual and collective claims in this context are mixed. While there is generally broad support for environmental laws, some have targeted them as examples of unjustified assaults on citizens' property rights. Legal treatment of these cases has, however, been remarkably uniform. Few courts have accepted the "trumping" model of individual property rights over environmental laws that property-rights advocates have demanded. In fact, in the nearly twenty-five years since the National Environmental Policy Act,³¹ the Federal Water Pollution Control Act,³² and the Federal Clean Air Act³³ were enacted, no legal challenge to the fundamental validity of these laws has been seriously entertained. As one property-rights advocate has lamented, "[t]he federal courts have withdrawn from the protection of property [in these cases], except for occasional unpredictable interventions in some of the most egregious situations."³⁴ Why is this so? Why—despite the bitterness generated in some quarters by, for instance, wetlands preservation laws—has the essential parity of these control initiatives with private property rights been so broadly assumed?

If we examine these claims, we find that there are, in fact, deeply rooted reasons why private property claims lack presumptive power when opposed by environmental laws. Those who lament the courts' treatment of these cases make a crucial assumption: that the private property claims involve values of a uniquely powerful and compelling character, which deserve presumptive power *vis-à-vis* competing public claims. In fact, even a cursory consideration of the competing values that underlie these claims reveals this assumption to be untrue.

Let us take, for instance, the restriction of private land use to preserve coastal wetlands. This conflict pits the claimed property right of the landowner to use his land against the public interest in the wetlands' protection. The values that underlie the claimed right are ones with which we are very familiar. The ability to protect individual investments and expectations in land is something which is highly valued and which is traditionally associated with property rights.

What about the conflicting public interest? The preservation claim, asserted by the public interest, is not to preserve one's own wetlands, but the wetlands of others. As a consequence, the values that underlie this public interest—as so far understood—are quite different from the values that underlie the claimed right. Whether the public demands preservation for aesthetic, cultural, psychological, or other reasons, it is apparent that these values are—arguably, at least—quite different from those generally associated with property rights.

If this were all that this story involved, we would—it would seem—have a property right with traditional, presumptive power. However, the values that the

31. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370d (1994)).

32. The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1994)).

33. The Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401-7671q (1994)).

34. DeLONG, *supra* note 6, at 88.

public interest asserts cannot be understood so narrowly. Because of the physical and biological interdependence of wetlands, other shoreline lands, and the oceans that border them—because the filling or pollution of wetlands destroys the animal life, plant life, and physical integrity of other land and bodies of water in a way that transcends the boundaries of particular parcels—the landowner's desired actions affect not only his own property interests, but the property interests of others as well. Those who want to maintain the physical and biological integrity of coastal areas for shellfish harvesting, tourism, recreation, or other purposes clearly have property interests of their own at stake that are as real as those of the thwarted landowner. As Joseph Sax has written:

A pristine example of the inextricability of property interests is marine life that breeds along the shallow wetlands shorelines, depending upon maintenance of the shoreline habitat. The wetlands owner thus does not use only his own tract, but demands, as a condition of developing his property, that ocean users tolerate a change in their use of the ocean.³⁵

We recognize, in such environmental laws, that protectable property interests in physical resources go far beyond the narrow concern of simple freedom to use one's land. We recognize, in such laws, that the interests asserted by the claimed right, and the interests asserted by the public interest, are—*by their very nature—inextricably and unalterably interdependent.*

This interdependent nature of property interests—the fact that protection of one person's property interests so often affects the property interests of others—explains why property rights so often lack, and should lack, presumptive power in law. The assumed normative superiority of the values that the claimed right protects—the assumption that drives the presumptive power of rights—is absent in a broad range of cases involving property rights and competing public interests. Whether one considers zoning controls, environmental laws, historic preservation laws, or laws that simply protect one commercial interest at the expense of another, it is apparent that the claimed rights involved do not have a monopoly on the values that we associate with property protection. The claim by Professor Epstein and others that speech and property should be equally powerful and equally protected ignores the fact that speech and property are critically different in this regard. Although the normative superiority of the claimed right fails only rarely in free speech cases, this is a *routine occurrence* in property cases, particularly those that involve physical resources.

The interdependent nature of property interests explains many instances in which property rights fail to enjoy presumptive power. It does not, however, explain all of them. In particular, it does not explain why we tolerate, so readily, state schemes that have—as their purpose—simple redistribution of property or wealth.

Our apparent tolerance of government schemes to redistribute property is a chronic source of irritation and perplexity to those who advocate the presumptive power of property rights. There is no more definitive interference with property rights than the taking of title; yet we find casual (if any) constitutional concern about what are simply redistributive transfers. The apparent ease with which wealth can be taken from one citizen and transferred (through taxation and the mecha-

35. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 159 (1971).

nisms of welfare programs) to other citizens is inexplicable under traditional notions of property rights. In most of these transfers, the monetary benefits received by the recipients far outweigh the monetary benefits received by the parties taxed; yet these transfers do not generate the kind of outrage that one would expect from such marked and widespread disregard of property rights.

Why are these transfers not "takings"? Why do the courts—and, seemingly, most citizens—see these transfers as "exceptions" to the constitutional protection of property? Many answers to this question have been offered—for instance, that taxpayers see such transfers as "insurance" for themselves in their own times of need, or that they receive value in exchange for these transfers in the form of prevention of civil unrest or other public goods. There is undoubtedly some truth in these explanations. I believe, however, that there is another explanation for our tolerance of these transfers, one that is deeply rooted in the nature of rights, government, and property regimes themselves.

The model of individual/state relations that property-rights advocates argue to be the premise of our government is one in which human freedoms exist, and the state's actions must be prevented from destroying those freedoms. It assumes, in Professor Epstein's words, that previously existing, "fundamental" freedoms must be protected from government power.³⁶

When one considers many constitutionally protected freedoms, this model seems to be very true. We seek—through freedom of speech, freedom of religion, freedom from cruel and unusual punishment, and so on—to protect ourselves from the dangers of government. The state's role regarding those freedoms is at best protecting, and at worst oppressing, but whatever its stance, it is—essentially—an external one. The state does not create these freedoms, nor allocate them to us. It simply protects—or destroys—what we, as human beings, would otherwise freely, naturally, and equally enjoy.

What about property? Here, the state's role is completely and essentially different. Property involves conflicting claims; it involves disputes and ownership claims over identifiable wealth, finite resources. If my right to possess this land is upheld, your claim to possess that land is denied. If my right to clear cut timber, deplete species, or strip mine land is upheld, your right to control those resources is denied. The state—in creating and enforcing property rights—makes deliberate, binding, and final choices about who shall enjoy and who shall not. It *necessarily and affirmatively* grants the acquisitive claims of some people, and denies the same claims of others. Property rights, in law, are rarely the simple protection of natural and preexisting human freedoms; they are almost always *positive* rights, *allocative* rights.

It is because property rights are so often allocative in nature—it is because they so often involve honoring the interests of some, to the detriment of the identical interests of others—that we accept redistributive schemes. The claim of a property holder against a redistributive action is grounded—if at all—in the normative superiority of the values that his claim (presumably) involves. If, however, the claimed right and the competing public interest are grounded in the *same* values—if, for instance, the need for security of those with wealth is opposed by a

36. Epstein, *supra* note 1, at 46.

public interest which asserts (through welfare programs, Medicare programs, or other means) the security interests of others—then the reason for the presumed superiority of the claimed right is severely undermined. There is no obvious reason why we should privilege the need for human security or the need to appropriate the necessities of life of one individual over the identical needs of another. There is no reason to believe (on this basis, at least) that the claimed right protects more important values, or—as a consequence—deserves presumptive power.

Property rights are not, in short, private freedoms that the state neutrally abides. Property rights are collectively enforced, even violent decisions about who shall enjoy the privileges and resources of this society. The classic liberal model of individual rights, in which the state must be “hands off” and all can enjoy, might describe—and justify—the protection of speech, religion, or other such freedoms. It does not describe—or justify—the protection of property.

IV. CONCLUSION

Whether rights have the presumptive power that is claimed for them is a tremendously important issue. It is important not only as a legal matter—in determining, for instance, whether there is a violation of the Takings Clause—but also for the role that it plays in shaping the social and political debates that, in turn, shape our laws. The outrage that a publisher feels when his speech is curtailed—the outrage that a landowner feels when her ability to drain wetlands is denied—depends, deeply and psychologically, upon the idea of the presumptive power of rights.

The idea that property rights are presumptively powerful, bounded and protected, is a deeply ingrained and enduring one. It is also an important and justified one, in those cases in which the values that underlie claimed property rights are unanswered by the public interests that oppose them. The power of this idea must not, however, blind us to the actual choices and justice issues that the “right to property” so often involves. If we persist in the simplistic idea that property is—and should be—an invariably powerful right; if we refuse to acknowledge the interconnected and distributive qualities of property rights and property systems—we will simply encourage false beliefs of entitlement, and mask the critical social choices that property necessarily and inevitably involves.