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## REVIEW

### Richard Epstein's Big Picture

*John Harrison*†

*Simple Rules for a Complex World.* Richard A. Epstein. Harvard University Press, 1995. Pp xiv, 361.

Some day someone may write a piece of narrative scholarship about the bureaucratic experience, called perhaps "The Voice of Colorlessness." Such an article probably would discuss the phenomenon of going big picture, whereby someone normally or previously concerned with the intricate gearing of the great machine of state changes focus and tries to see the forest for the trees. This transition often accompanies promotion and, for those disposed to swell rather than grow, involves the sorry fate known as going terminally big picture. There are a few, however, who combine the ability actually to see the big picture, rather than a projection from their swollen egos, and to return from the heights and use what they have learned to make the gears work more smoothly, or to propose a whole new machine. In *Simple Rules for a Complex World*, Richard Epstein, a gear grinder and escarpment designer with the best of them, goes big picture with considerable success—especially given his ambition, which is to pro-

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† Associate Professor of Law, University of Virginia. The reader should know that although I did not see this book in draft, Professor Epstein is a friend of mine. My recommendation is that this knowledge induce a proper skepticism rather than a decision to give this review a pass.

vide most of the content of a system of private law and the foundations of public law.

As a first attempt to locate Epstein's program in the great scheme of things, let me propose a big picture of my own, one I do not mean to be taken completely literally. The picture involves lagged hundred-year waves of intellectual and practical influence, with Adam Smith as the most influential economist of the nineteenth century and Karl Marx the most influential of the twentieth century. Epstein is pushing one of the two principal rivals for that status as to the twenty-first century while also putting some money on a dark horse. The rivals so far are Joseph Schumpeter and Friedrich Hayek. Epstein is for Hayek, with a second vote for Ronald Coase.

Schumpeter, to use comic-strip levels of generality, maintained that capitalism would be undone, and socialism established, because capitalism brings to power intellectuals who oppose it and prefer central control with themselves in the control room.<sup>1</sup> Hayek maintained that having anyone in the control room, indeed believing that there is a control room and acting on that belief, leads to authoritarianism—authoritarianism with good luck, totalitarianism otherwise.<sup>2</sup> Coase improved the analysis for those interested in the institutional settings of economic activity by showing the pervasive importance of barriers to transactions.<sup>3</sup>

Epstein is a Hayekian-cum-Coasean. To be sure, it is a little misleading to set up the big picture as a struggle between Schumpeter and Hayek, because they asserted different kinds of propositions. Schumpeter made claims about the actual course of history, claims that have been falsified in many respects. Hayek made claims about the consequences of alternative sets of institutional arrangements, rather than predictions about what was most likely to happen simpliciter. Nevertheless the opposition of the two provides an insight worth the loss of analytical perfection: Epstein is carrying on Hayek's struggle against the tendency that Schumpeter said was a primary driver of history, that of intellectuals to fear property and markets and favor public control of them.<sup>4</sup>

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<sup>1</sup> See Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 145-55 (Harper & Row 3d ed 1950).

<sup>2</sup> See F.A. Hayek, *The Road to Serfdom* 97-111 (Chicago 50th anniv ed 1994).

<sup>3</sup> See R.H. Coase, *The Problem of Social Cost*, 3 *J L & Econ* 1, 18 (1960).

<sup>4</sup> See Schumpeter, *Capitalism, Socialism, and Democracy* at 145-55 (cited in note 1).

This Review consists of an exposition of Epstein followed by three sets of criticisms. The criticisms do not focus on the merits of his libertarian proposals. My policy views are largely in accord with his, so I lack comparative advantage on that subject. The reader who is interested in more penetrating and illuminating disagreements than I could provide can easily find scholarship that engages Epstein on such terms. Instead, my questions and disagreements have to do with the ideas of simplicity and complexity around which Epstein builds the book. Here I often take issue with Epstein. Because I focus narrowly on the words "simplicity" and "complexity," one might think of my critique as a worm's-eye view of the big picture.

One criticism, though, belongs up front: this book needs another draft. Epstein explains that it grew out of a series of lectures delivered on a tour of Australia and New Zealand, lectures "often hastily composed" (p xiii). Grant Gilmore said that *Corbin On Contracts* was the greatest law book ever written; *Simple Rules* is the greatest law book ever written on a tray table.<sup>5</sup> It is rich in argument and insight, but the rapid drafting is still noticeable, especially in the order of exposition. Although Epstein is trying to present a unifying theory of private law, he still seems to take his topics from the first-year law school curriculum. With another draft Epstein could have been more systematic and hence more readily could have given the nonlawyer reader a deep understanding of private law as something other than merely what lawyers do.

## I. THE BOOK

### A. The Debate

This big picture business is risky. About thirty years ago a brilliant legal scholar wrote a wonderful, influential, and famous

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<sup>5</sup> See Grant Gilmore, *The Death of Contract* 57 (Ohio State 1974). This problem is hardly disabling. Tradition holds that Plato's *Laws*, as we have it, is a next-to-last draft, and it is certainly worth reading. Moreover, just as a law can be either too simple or too complex, so a book can be written too hastily or too slowly. Gilmore noted that "Corbin—perhaps unwisely—had spent the better part of fifty years readying the treatise for publication." Id. In this review I draw heavily on another book that was written too slowly—indeed, was written infinitely slowly, as it is and always will remain unfinished. Despite that, *The Legal Process* is my current selection for Greatest Law Book Ever Written, Unmodified Category. Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation 1994) (William N. Eskridge, Jr. and Philip P. Frickey, eds).

article that was also a lightning rod for divine vengeance. Its conclusion begins as follows:

The highly organized, scientifically planned society of the future, governed for the good of its inhabitants, promises the best life that men have ever known. In place of the misery and injustice of the past there can be prosperity, leisure, knowledge, and rich opportunity open to all.<sup>6</sup>

That small piece of fused glass amid the wreckage of central planning was once part of a neon sign that read, "The New Property." Central ownership of the means of production is very much out of fashion and, I think, likely to remain so for a long time. The closer "scientific planning" comes to public ownership, the more it is criticized.

Part of the neon sign took the lightning, but not all. The debate between central control and the decentralized market, or if you prefer between government and private power, goes on. As Epstein discusses, the choice now is not how much of the economy the government should own in the standard socialist sense. The question is the extent to which government should direct the uses of largely private property and the content of largely private contracts, and how far it should use tax funds to supply goods, services, or income (see pp 15-16, 22-23). In short, should there be a regulatory welfare state?

No, says Epstein, for essentially Hayekian reasons. Individuals have information about opportunities and, given private ownership of the means of production, incentives to produce the goods and services other people want. Government bureaus have neither the necessary information nor the correct incentives, and no one yet knows a way to give them either (pp 42-48). According to Epstein, that is true whether the question is state ownership and distribution, or state regulation and redistribution (pp 14-16). *Simple Rules for a Complex World* presents a view of the big picture and makes broad claims about it. Whether it is safe to stand near Epstein during thunderstorms the reader can judge.

## B. The Genre

Life imitates art, or should when life involves reviewing a law book. Arthur Leff began his classic review of Posner's *Economic Analysis of Law* by asking what genre the work fell into,

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<sup>6</sup> Charles A. Reich, *The New Property*, 73 Yale L J 733, 786 (1964).

and eventually concluded that it was a picaresque novel.<sup>7</sup> Although Epstein's book jumps around enough that it sometimes seems to be the equivalent in legal scholarship of John Cage's aleatoric music, I finally concluded that *Simple Rules for a Complex World* is a myth. Let me hasten to say that this is not a bad thing. A myth, in the sense I am using the concept, is a story, a way of thinking about and organizing a subject matter. Every detail may not be there, and some that are there may not be quite right, but the real point is to provide a way of identifying and understanding the crucial premises and questions. The book is also, to use a more technical idea, much like a philosophical explanation in Nozick's sense: it tells us how it could be true that libertarianism is desirable.<sup>8</sup>

This kind of work is extremely valuable for people who are trying to make up their minds about the issues it discusses. But a myth, or philosophical explanation, or big picture, is not a treatise. *Simple Rules for a Complex World* is not a systematic analysis of law, economics, political science, or normative political theory. It seeks not to persuade the skeptic that Epstein's politics are desirable, but to enable the more open-minded reader to come to grips with the fundamental questions. One important consequence of this is that the book is not primarily aimed at specialists in any of the fields mentioned above. In particular, it is not primarily aimed at academic specialists in the fields of law that Epstein addresses. They will find in the footnotes references to the details of debates with which they are familiar, debates to which Epstein has contributed in his periods as a gear polisher. A myth should not be judged by the standards appropriate to a treatise; one should not criticize a picaresque novel because it does not rhyme.

This does not mean that we can simply let Epstein off the hook for any failings by saying that the book belongs to a genre with forgiving standards. In many important respects the standards are the same. Although a book like this will not have the same level of detail and extent of proof that a different kind of work would have, it still makes substantive claims that should be engaged at the appropriate, here relatively high, level of generality. Moreover, in some ways the standards for a good political

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<sup>7</sup> Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va L Rev 451, 451-52 (1974), reviewing Richard A. Posner, *Economic Analysis of Law* (Little, Brown 1973).

<sup>8</sup> See Rebert Nozick, *Philosophical Explanations* 8-18 (Belknap 1981).

myth are more exacting than those for a work of standard legal scholarship. The reader of a myth cannot be expected to do as much work as the specialist reading a treatise, so the demands of clarity and organization are even higher. On this score, the fact that this book is unfinished is especially problematic.

### C. The Message

Later in this Review I will attribute Gallicism to Epstein, so perhaps it is no accident that the book is divided into three parts, plus an introduction and a conclusion. The introduction argues broadly that this country is overgoverned and, in particular, overlawyered. Part I makes the general case for legal simplicity and attempts to account for the growth of legal complexity, both as defined by Epstein. Part II sets out the fundamentals of Epstein's private law and his master principle of public law; these are the simple rules. Part III argues that the Epsteinian common law is equal to the legal challenges of our complex world and contrasts the common law favorably with more intrusive regulatory systems in a variety of areas, such as employment law, products liability, and environmental protection. The conclusion responds to some of the more common challenges to Epstein's approach.

#### 1. Simplicity and its enemies.

Epstein begins this program with a discussion of overall strategy. He distinguishes simple rules from complex ones. Then a central passage sets out what he regards as one of the fundamental and recurring choices faced by the legal and institutional designer: the "great trade-off . . . between social incentives and administrative costs" (p 30). The point of law is to affect people's incentives and thereby shape their conduct. But running Leviathan is costly and government makes mistakes. The goal of the system designer thus is to maximize the net benefit of law.<sup>9</sup> One of the great mistakes, and a great enemy of simplicity, is to neglect the administrative costs of government and to focus only on the benefits it can achieve by changing people's incentives.

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<sup>9</sup> Epstein says that "the social function of law is to minimize the sum of the administrative (including error) costs and the costs associated with the creation of poor incentives for individual action" (pp 32-33), citing Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 26-28 (Yale 1970), the famous book in which Judge (then-Professor) Calabresi suggests that the purpose of tort law is to minimize the combined costs of accidents, the prevention of accidents, and the administration of the system.

Another standard mistake that leads to more complexity is to see political organizations, not pessimistically as great robber bands, but optimistically as large versions of the small and (generally) benign groups we encounter in ordinary life, such as families and circles of friends (pp 44-48). Such small groups, says Epstein, often function well by following informal and complicated norms, the very approach he says is dangerous or impossible for large groups of strangers. But small groups are crucially different from polities made up of strangers. In small groups, especially families, people generally have interdependent utility functions, which is to say that they care about one another a lot, and therefore treat one another's good and ill as their own. Moreover, in such groups people tend to know one another well and so have the detailed and idiosyncratic information that enables them to act as proxies for one another. In the wider world, however, interests diverge and information is not available, so "[l]egal sanctions cannot hope to perform at the same level of specificity and reliability achieved by informal sanctions in small groups" (p 46). Rather, Epstein says that the strategy of law and public force should be to enable people to sort themselves into small groups while dealing with strangers at arm's length.

## 2. The simple rules.

*a. The simple rules analyzed.* Epstein says that there are six or seven simple rules, depending on when he is counting. The basic six are "self-ownership, or autonomy; first possession; voluntary exchange; protection against aggression; limited privilege for cases of necessity; and takings of property for public use on payment of just compensation" (p 53). The seventh rule is that if there is to be redistribution to the poor it must be financed by fiat taxes (p 148). In this part of the Review I will attempt to restate the substance of Epstein's system in what seems to me an analytically sharper form. I do this both in the interest of clarity and because Epstein's program is to produce a system of private law, along with a basic principle of public law. A structure of such breadth and depth should be cast in some canonical form.

The form I will use for the private-law components (rules one through five) is that suggested by Hart and Sacks in their development of Hohfeld, a framework in which they identify private law as a system of rules for conduct and rules for changing rules for conduct.<sup>10</sup> This structure accommodates Epstein's simple

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<sup>10</sup> Hart and Sacks focus on one of the four components from each of Hohfeld's famous

rules because, despite his constant reliance on economics, Epstein is enough of a legal formalist to use the concept of legal prohibitions and permissions. He regularly talks about what the law forbids and what it requires. Presumably the rules have sanctions attached to them that encourage compliance, but Epstein says very little about the sanctions, which turn commands into incentives. This approach is formalistic in that it takes legal concepts and categories seriously, rather than adopting the stance of the Holmesian "bad man."<sup>11</sup> The bad man sees the law not as a set of rules but as a list of prices: he collapses substance and sanction and sees, not "murder is forbidden," but rather "if you commit the following kinds of homicide the state will attempt to do the following to you in return" (the sanction, discounted by the likelihood of application, is the price of murder). Epstein, in contrast, says much about rights and duties but little about sanctions.

Rules about duties and powers tell people what they may and may not do, and what they may do if they have the appropriate person's permission. If the system of duties is completed by the principle that everything that is not forbidden is permitted, then the rules about duties and powers should pretty much tell who prevails when desires conflict. If the rules imply that A may enter Blackacre only with B's permission, then A has to buy the right to do so from B. A set of duties and powers thus gives the initial endowments from which bargaining can take place, the initial assignment of rights that, per the Coase Theorem, would be irrelevant as to allocation if there were no transaction costs.<sup>12</sup> The rules therefore give the baseline for A and B whenever A and B are in a "Coasean nexus." Properly designed systems of duties and powers will tell modern lawyer-economists what they most need to know.

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two boxes of juridical relations: duties from the first box and powers from the second box. The focus on duties rather than rights means that law is formulated as addressed to potential actors, rather than nonactors (which are what rights-bearers tend to be). The focus on powers, especially the law concerning the power to make contracts, similarly emphasizes potential actors, those who are considering changing their legal relations and those of their contracting partners. Hart and Sacks, *The Legal Process* at 127-37 (cited in note 5). Hohfeld first presented his scheme in Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L J 710, 710 (1917). Hohfeld's first box contains rights, duties, no-rights, and privileges. His second box contains powers, liabilities, disabilities, and immunities. *Id.*

<sup>11</sup> See O.W. Holmes, *The Path of the Law*, 10 Harv L Rev 457, 459 (1897).

<sup>12</sup> See Coase, 3 J L & Econ at 15 (cited in note 3).

It should now be possible to cast Epstein's simple rules into a somewhat clearer form. The private-law rules fall into three categories: property, contract, and unintentional physical injury.<sup>13</sup> Property and contract, the master categories, each contain basic principles and modifications.

The fundamental law of property is:

- (1) most physical objects, including people's bodies, have owners;<sup>14</sup>
- (2) it is forbidden to touch or otherwise physically interfere with a piece of property without the owner's permission (pp 91-92);
- (3) people own their own bodies (pp 54-59); and
- (4) ownership of other objects, including real estate, is determined by first possession and subsequent exchange pursuant to the other simple rules (pp 59-63), or by current possession if it is hopeless to untangle a series of wrongful acquisitions (pp 63-67).

These rules generate duties and powers; what is normally called the owner's right to use (subject to the duty imposed by others' ownership of their property) results from the principle that what is not forbidden is permitted.

Keep your hands to yourself. Keep off. Good fences make good neighbors.

There are three significant modifications of the fundamental law of property. First, there should be some common property, which a large number of people are all permitted to use to an equal but limited extent (pp 67-70). Rivers, for example, should be treated this way. Second, there should be some "new property," like copyright and reputation (pp 327-31). New-property rules consist of prohibitions on actions where the actions are not physical trespasses; examples of actions forbidden by new-property rules include reproducing works of literature and telling lies about other people. The prohibitions are usually combined with a power in an "owner" to waive the prohibition, especially for a fee. New-property regimes should be set up when they will encourage

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<sup>13</sup> For reasons explained below, it is misleading to call the last category "tort."

<sup>14</sup> This is implicit in the discussion of autonomy and first possession (pp 54-63).

production or rectify market failures without making people worse off net of the new duty and the benefits it produces. Finally, when life or property is in severe danger and can be saved by violating the rules of trespass, those rules are waived and replaced with an obligation to pay a market price for any property taken (pp 113-16).

The rule on contracts is simple: people who have capacity to contract may make whatever contracts they like (pp 71-78). Almost all adults have contractual capacity. Contracts made under threat of a violation of the property rules are void (pp 80-82). The modification is that agreements to form a horizontal cartel are void (p 125).

Most of what Epstein puts in the tort box under the label "protection against aggression" I have moved to the property box. The rule against physical trespass seems to me inseparable from the law of property, because it tells us what it means to own something: it means that you are permitted to touch it, and no one else is unless you consent. That is not to say, however, that there is nothing distinctive in what is normally called the law of tort. Because the law of property and contract consists of rules for voluntary action, it cannot deal conveniently with the inadvertent consequences of action. As Epstein says in his discussion of tort, it is clear that there should be liability for intentional trespasses (p 92). He devotes considerable discussion, however, to the argument that strict liability is preferable to a negligence rule for unintentional damage to property, which seems to me to be a separate question. Epstein's other great principle of tort is a negative one: harms caused by economic competition should not be legally remediable, nor should be those harms that result when one person gives offense to another without a trespass, as for example by subscribing to a despised religion (or a despised periodical) (pp 107, 109-10). In general, with the few exceptions of new property, only physical trespass should be actionable.

Thus the private law, resulting from the first five simple rules. The sixth simple rule applies to the government. It is Epstein's takings proviso. The master principle is that the government's action, measured against the baseline created by the private law rules, must not "impose an implicit transfer of wealth from one individual or group to another" (p 135).

Epstein's takings principle applies whenever the government, without changing the rules of private law, takes something from someone, whether it be through eminent domain (p 129), taxation (pp 137-40), or otherwise. The principle also applies whenever

the government changes the rules of private law with an unfavorable effect on anyone (pp 132-37). An example of such a change would be a law providing that it would not be trespass, theft, or otherwise unlawful to carry off alcoholic beverages previously in someone else's possession.<sup>15</sup> Epstein says that whenever the government does either of these—that is, takes something from someone without changing the rules of private law or changes the private law to someone's detriment—it must provide just compensation. Compensation can be either in cash or in kind, and justice requires that the compensation be worth the same as what is lost. The creation of any regime of new property must also satisfy this constraint (p 328). The government may impose copyright restrictions, which forbid actions such as duplicating someone else's original writing, only if everyone's own ability to produce copyrighted material, combined with the benefit of increased production by others, is worth more than the loss of one's former license to jot down *Rosencrantz and Guildenstern Are Dead* and sell it. No government redistribution.

Well, maybe some government redistribution, if people really insist, but only if it is financed by flat taxes (pp 144-48). That is the seventh rule, if it is to be counted.<sup>16</sup>

*b. The simple rules justified.* Why would anyone want to live in Epstein-land? According to Epstein, the simple rules go a long way toward solving the problems inherent in human social life. When he puts on his legal-architect hat Epstein is a rough-and-ready utilitarian. He is trying to help people satisfy their desires and as far as he is concerned one desire is as good as another and one person is as good as the next. But there are a lot of people in the world, and sometimes their desires conflict. As if that were not bad enough, even when their desires are in harmony and they indeed want to work together, working together can be tricky to organize. Thus, says Epstein, “[t]he central problems of the legal system are two: how to keep people at peace with each other; and how to allow them to join together in common ventures that promise mutual gain” (p 327).

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<sup>15</sup> *Wynehamer v People*, 13 NY 378 (1856).

<sup>16</sup> Sometimes Epstein says there are six rules, other times he says there are seven (compare, for example, p 53 with p 148). Moreover, he maintains that the takings constraint limits the government to flat taxes anyway (pp 137-40), so it is not clear why there need be a seventh rule.

Epstein's tools are as familiar—and as rough and ready—as his normative goal. He adopts an account of human psychology known to any student of the line of thought that stretches from Hobbes, through Locke, Hume, and Smith, down to present-day rational-choice economics: people are largely self-interested (p 22). They are especially interested in physical security and comfort, but they also have benevolent feelings toward others, the strength of which decreases with distance (pp 42-44). Information is expensive to acquire and often difficult to communicate. No surprises here; Epstein adopts one variant of the economic approach.

His basic practical criterion will not surprise anyone familiar with that approach, although its casual formulation will disturb those who have momentarily forgotten that this book is a myth, not a treatise. The criterion is crude Paretianism, based on Epstein's horseback empirical judgments about people's interests and the consequences of institutional arrangements. He proposes rules that he says will make everyone better off (pp 30, 34). To the extent that he is silently appealing to standard concepts of welfare economics, he apparently means not merely that the rules will generate net benefits, so that the winners could compensate the losers, but that they will make everyone better off.<sup>17</sup>

Epstein's rules begin with ownership, of oneself and of external things. If I understand Epstein, he has both an argument for private property in general, which justifies the institution with respect to people's bodies as well as other things, and an argument specifically for autonomy (self-ownership).<sup>18</sup>

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<sup>17</sup> I think it is crude Paretianism, but it may be crude utilitarianism or Kaldor-Hicks efficiency. Epstein's position is hard to pin down. In particular, I am not sure about the extent to which he means to be comparing utilities when he discusses net improvements in social welfare. Epstein says that the move from anarchy to the simple rules makes everyone better off (pp 32-34), and that modifications in the simple rules, like copyright, are permissible if they make everyone better off (pp 328-31). Strict application of the Pareto principle would take the idea of making everyone better off seriously: if any individual would object to the change (for nonstrategic reasons), then it does not satisfy the Pareto criterion. Kaldor-Hicks efficiency, or simple utilitarianism, is more lenient.

The trouble is that Epstein slides from talking about making everyone better off to talking about improving social welfare, without saying much about the difference. Moreover, he invokes a veil of ignorance that is not well defined and hence might correspond either to the Pareto criterion or to something like utilitarianism (see, for example, pp 57-58, 313-15).

<sup>18</sup> By putting the arguments this way I have rearranged Epstein's order of exposition. He begins his account of self-ownership by comparing it to other systems of ownership of people, especially slavery and a Rawls-inspired system in which everyone owns a share in everyone else (pp 54-59). See John Rawls, *A Theory of Justice* 136-42 (Belknap 1971). He then turns to land and chattels, arguing in favor of first possession as a general matter

The main argument for common law ownership—the ban on physical trespass unless the single owner consents—applies to people as well as to land and chattels. Much of what people care about, and are likely to have conflicts over, involves the physical use of things. People who are guaranteed control and enjoyment of things will work hard to improve them and use them productively. So ownership is good. If a lot of people have to agree on the use of a thing and will share in the rewards of that use, the high costs of coordination (including free-rider problems) will severely retard any productive activity. Single-owner private ownership thus is especially good. Incentives, information, and costs of administration are the keys. It is Hayek plus Coase.<sup>19</sup>

The next step is to explain the particular allocation of private property. As to people themselves, the claim is that people care especially about what happens to them, so they especially value control over themselves. Because the entire system is about achieving people's goals, this allocation of rights does the best job of matching power and responsibility. As to land and chattels, the argument for first possession is that its administrative costs are low. It avoids the need for a central authority to parcel out property while still giving strong incentives to develop resources.

Later in the book Epstein makes another, more traditionally Hobbesian argument for self-ownership. It goes like this: people really dislike having other people physically molest them or threaten to do so. To be sure, it can be useful to be able to assault other people or threaten to do so, but on balance the ability to do that would be worth trading for protection against aggression directed at you. People are made better off by the Hobbesian

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(pp 59-63). Only later does he discuss the relative merits of private and common property in nonhuman assets (pp 67-70). It seems to me, though, that the proper order is as follows: whether to have ownership, whether to have private or collective ownership (or something else), and then who should start out owning what. The answer to the first question underlies his discussion of property but is most clearly presented later when he turns to torts and argues that people would not want to live in a world in which others could routinely block their uses of property (p 91). This is not really about remedies but about rights, and is in fact an argument in favor of having legal rules that say who can use what—rules of property. To say that others may not trespass on your land is to tell what it means to say that the land is yours; the right of property is defined by the correlative duty not to trespass. Epstein's argument against the Rawls-like approach is the case for private property applied specifically to people; his discussion of common property is the case applied to other assets. The argument against slavery is an argument in favor of self-ownership, assuming there is going to be private property in people. It seems logically parallel to the argument for first possession with respect to things.

<sup>19</sup> See, for example, R.H. Coase, *The Federal Communications Commission*, 2 J L & Econ 1, 14 (1959).

nonaggression pact, says Epstein (pp 91-92). To say that people are not allowed to engage in trespass to other people's bodies, however, is to say through the back door that people own themselves.

The allocation of private property, then, is oneself and whatever one can get without violating anyone else's physical autonomy. The latter rule is first possession. As for the distributional consequences of first possession (some people don't arrive first at anything), Epstein is not concerned with them because of his empirical estimate of the productivity of such a system:

Those who are unable to acquire goods by first possession are able to acquire them by purchase financed by money, goods, or land that they acquire from the use of their own labor. Since two individuals can make gainful exchanges without the participation of the rest of the world, the overall size of the gain is so large that we need not trouble ourselves over its distribution (p 62).

Take that, welfare state.

Okay now, everyone who owns something obtained by first possession, or who is in a chain of title that can be traced back to someone who owned the thing by first possession, raise your hand. As Epstein recognizes, "in a world filled with private violence and political corruption, it often happens that the great chain of title is broken beyond recognition" (p 63). His answers are title by adverse possession or prescription, and relative title.

Statutes of limitations, relative title, and other such devices have two benefits: they protect valid claims from false challenges and they create a single owner needed to bring property back into the stream of commerce (pp 64-67). If it seems that the incentives to produce that arise from single ownership are doing a lot of work in Epstein's system, they are: such incentives, and the production they encourage, are fundamental to all of Epstein's claims, the empirical heart of his approach.

If Epstein's theory has a central theme, it emerges most clearly here. Production is more important than distribution. People should stop agonizing about the justice of current holdings and get on with producing more for everyone. The central empirical claim is that the simple rules will encourage people to produce much more than would any other system, and that the benefits of that production will redound widely indeed.

Thus property, Epstein's first master principle. Next is free contract, by which people give up what they have for something

they want more. Variety of tastes and holdings makes it possible that there will be gains from trade. Here is the motor of the world, and the last thing Richard Epstein wants to be is the man who stops it. Indeed, as Epstein recognizes, exchange is part of the justification for the rules of autonomy and private property: if people have secure control over things, they will use the things in mutually advantageous transactions with others (pp 71-73). Epstein makes the case—clearly and powerfully—for a very general principle of free contract, provided that the transaction is not vitiated by physical force or fraud.

In doing so he explicitly sweeps away contracting parties' particularities and situatedness. He makes rules, not for people in all their idiosyncracies, but for "two hardy standbys in all contractual arrangements: A and B" (p 73). He ignores role and status, paying no attention to the fact that *A* is an impoverished individual while *B* is a huge industrial combine. Epstein maintains that this mighty abstraction is justified because the law of contract is all about a profound and thoroughly abstract truth: what all those wildly different *As* and *Bs* have in common is that they want more (p 75). If you want more there are two ways to get it: coercion or consent, taking what you want from someone else or trading something you have for something someone else has. Consensual transactions generate gains from trade, making both sides better off.

Epstein's rejection of some standard attacks on free contract gives an insight into the core of his justification of the rule. In opposing the concept of exploitation, he argues that what matters between employer and employee is not power in some sociological or psychological sense, but market power (pp 82-86). If one party to a transaction where there are gains from trade has a strong threat position, that party is likely to be able to extract most of the surplus.<sup>20</sup> In the vast bulk of labor contracts, he maintains, both parties have numerous alternatives; labor markets are competitive on both sides (pp 83-84). In such circumstances workers are not being exploited, they are being paid the market wage.<sup>21</sup>

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<sup>20</sup> One's threat position is defined by one's best alternative to the transaction, including standing pat and making another bargain with another party (p 77).

<sup>21</sup> Epstein, in keeping with much of the current debate on labor contracts, distinguishes the situation between employer and employee before the contract is entered into from the situations that can obtain afterwards, which may include opportunities for strategic behavior (pp 86-87). A worker who has invested heavily in firm-specific skills, to take the standard example, now faces an employer with some monopsony power because there is no perfect substitute for that employer. Even in such situations, though, Epstein

Epstein makes it quite clear that competition is the healthiest situation. Indeed, many of the problems for which he must modify the rules arise from monopoly, unilateral or bilateral.<sup>22</sup> Moreover, he claims that one of the great strengths of his system is that it maximizes the possibilities for entry into markets, in part by minimizing the power of the great monopoly maker, the government (p 78). And when situations of bilateral monopoly cause him to change the rules from absolute ownership to take-and-pay, the proper measure of compensation is the free market price (p 114).

It is not surprising, then, that the main modification of the rule of free contract has to do with monopoly. He maintains that horizontal covenants not to compete should be unenforceable (p 125). Once again, the idea is Coasean and the analysis familiar. But for transactional barriers, including the coordination difficulties created by collective action problems, the customers of a cartel would bribe the cartelists to produce at the competitive level. The ban on price fixing thus produces the allocational result that would obtain absent transaction costs, with some distributional consequences in favor of consumers. Because of his pervasive fear of the state, however, Epstein will go no further.<sup>23</sup> Price fixing is not to be a crime and merger to monopoly is not to be forbidden (pp 125-26). Administrative costs and the possibility of government misbehavior are too high.

Property and contract are the essence of the system. The first-year law student's private law trivium also includes torts. Much of what Epstein says on that subject I have moved into property, on the theory that the ban on physical invasion is part

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continues to prefer employment at will.

<sup>22</sup> Accidental joint ownership, for example, creates difficulties because it involves a bilateral monopoly (pp 116-18), as does divorce (pp 118-19).

<sup>23</sup> In a world with transaction costs, nonenforceability of cartel agreements, which infringes freedom of contract, has distributional consequences that differ from those in a regime of completely free contract. Moving from completely free contract to the common law rule against horizontal restraints therefore would not make everyone better off unless all potential cartel members would gain more from the ban than they lose.

Epstein's response to this criticism might be that at this point we are discussing the initial design of the system, not an alteration to be made once it is operational. Potential cartel members therefore are not losing their power to fix prices because they do not have it yet; at this point, we are deciding whether they should have such a power and the answer is no because of its allocative consequences. This response, however, exposes one of the fundamental difficulties with his approach. Epstein has no criterion by which to choose among different legal systems, each of which is better for everyone than anarchy but that produce different distributions. This is what happens when one tries to rewrite the social contract on an airline cocktail napkin.

of the essence of property. Two great issues remain: first, the choice between strict liability and negligence for unintentional physical invasions; and second, the general principle that, with a few exceptions, only physical harms count.<sup>24</sup>

Strict liability and Richard Epstein go way back. Although his rationale has changed, the bottom line has not. In a perfect world both strict liability and negligence would produce the same conduct, because both would lead to the optimal level of precautions. The only difference would be distributional. Invoking the rules' different administrative costs, Epstein opts for the approach that is easier to administer because it does not require inquiry into the reasonableness of precautions (pp 92-97).

More interesting (at least to a law professor who has had it up to here with the foregoing debate) is his reason for limiting the scope of compensable harms (pp 109-11). This negative principle is a central part of the system; the world is full of Coasean nexi. Every time Lewd wants to read a dirty book, the reading of which offends Prude, there is a conflict between two possible activities, both of which cannot go forward: Lewd's reading and Prude's peace of mind are incompatible. Every time a competitor causes a business to lose revenue there is another conflict: the competitor's business and the earlier revenue levels of the other business are incompatible.

To those who suffer these very real harms that are nevertheless neither physical invasions nor within the limited scope of permissible new property, Epstein's response is, suck it up. Get over it and get on with your life. There are winners and losers in these games but overall there is no reason to believe that people are worse off on net as a result of economic competition or free choice of lifestyle. If anything, the correct empirical answer is the opposite: people would give up such restrictions on others in order to be free themselves. "Unlike the harm ensuing from the use of force and fraud, the private loss in these contexts is not a reliable proxy for any form of social loss" (p 110). Let the good times roll.

Well, let them roll as long as only individuals and voluntary groups are invited to the party. Leviathan is too big and dangerous to be allowed to have any fun. The possibility of government

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<sup>24</sup> In strictness this point does not belong in the torts box either, because the duty-imposing rules of conduct that establish correlative rights go into property, at least in my schema. It seems harmless to follow Epstein here, however, because it does not really matter where a nonrule goes.

misbehavior dominates the sixth and seventh rules. The takings principle is Epstein's public law (pp 128-40). It controls public finance, requiring that each individual's tax contribution be at least balanced by benefits conferred through the provision of public goods. It controls changes in the private law, requiring that all the losers from any such change be at least compensated by benefits they receive from it. No redistribution. (And if there just has to be some redistribution through welfare programs let it be financed by flat taxes.)

Epstein's approach to public law suggests that he is one of those individuals who love people but cannot stand mankind. As individuals and in voluntary groups people are industrious, tolerably honest, and reasonably caring. But bring them together to form a government and the temptation to exploit the power that comes with it is overwhelming. Government, like theft, presents the opportunity to get something without having to pay for it. Transactions that rest on government power, says Epstein, will share the tendency of theft and slavery to be socially inefficient—people will take things that they value less than do the people from whom they are taken (p 131). Moreover, even when redistribution through government is a zero-sum or slightly positive-sum game, it consumes resources that could better be devoted to more reliably productive activities. Epstein's confidence in the productive capacity of ownership and exchange combines with his terror of rent-seeking to produce very limited government indeed.

### 3. Resisting temptation.

That's all there is to the rules. In the third section of *Simple Rules*, Epstein surveys a series of legal subjects, each time rejecting intrusive regulatory efforts in favor of the bare bones common law or some slight modification of it. He touches on labor and employment discrimination, professional liability for financial loss, products liability, corporate capacity and governance, and environmental protection. Much of this recapitulates his earlier scholarship; the case for repealing the private-sector employment discrimination laws, for example, has a whole book, *Forbidden Grounds*.<sup>25</sup> These chapters contain a wealth of argument and instruction, but the diversity of subject matter makes

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<sup>25</sup> Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard 1992).

it uneconomical for a reviewer to say much about them. I will therefore adopt the simple rule of saying nothing more.

#### 4. Epstein on the spine edge.

Ever wondered what the opposite of cutting edge is? On a one-edged knife the side that doesn't cut is called the spine, so it should be spine edge. In the conclusion Epstein takes on a number of cutting-edge arguments against his position. To my mind this is Epstein at his best, the autocrat of the Chicago lunch table, responding to big-picture objections with penetrating insights into the underlying problems.<sup>26</sup> He deals with exogenous preferences, legitimate and illegitimate preferences, the extent to which the simple rules capture justice and fairness, communitarianism, virtue, and the need for change in the simple rules.

In characterizing Epstein as the enemy of the intellectually trendy I do not mean to suggest that he is a friend of entrenched power. Certainly he denies that, explaining in his conclusion that "[t]he protection of the rich because they are rich, or of vested interests because they are powerful, is no part of the overall plan" (p 307). Moreover, Epstein is hardly altogether untrendy himself. He has climbed aboard at least one contemporary bandwagon. As he explains, the criticism of his position based on endogenous desires maintains that preferences need not be respected in the design of legal institutions because they are themselves the product of such institutions. Epstein's response is sociobiology. He claims that Hobbes and his law-and-economics successors are justified in assuming preferences to be relatively fixed and stable because people's wants are largely hard wired, the product of selection pressures back on the primitive savannah where ancestral humans developed (pp 310-11). When great questions of policy depend on difficult and controversial empirical questions Richard Epstein is not shy.

Proper evaluation of sociobiology awaits improved knowledge of the genetic and neural mechanisms that it postulates but that are so far largely unidentified. Less speculative is another response Epstein gives to those who would found extensive state power on the theory that people do not really know their own

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<sup>26</sup> At least, I think Epstein's insights are penetrating, but then I largely agree with them. As to lunch, he explains in the preface that the book rests on his "sense of the field" in the various areas he covers, a sense "acquired over twenty-five years of teaching and through innumerable meetings, conferences, workshops, classes, and, above all, lunches with colleagues and friends" (p xi). Whether any of the lunches were free is left unclear.

preferences or that some preferences are not to be respected: who decides? Do you really want to live in a state "where some individuals are authorized to say that others know so little about their own unstable preferences, and hence about their own 'permanent' or 'true' interests, that their own choices for leading their own lives should not be respected at all" (p 312)? Do not build the social control room unless you are very, very sure that you will have a seat in it.

Epstein's response to communitarianism engages a very common argument against individualism: individuals are the products of society, and people succeed because their talents are adapted to socially constructed standards (pp 320-22). Individuals therefore cannot really take credit for their talents or the value of those talents. The talents and the value instead belong to society at large.

The response, if I read Epstein right, is that he has never met this society-at-large person. He explains that no one believes that "individuals arise Athena-like as full-blown members of society, independent of all influences from other individuals who live in society" (p 321). Moreover, he agrees that luck and caprice affect people's talents and the preferences that determine the value of those talents. But, according to Epstein, "this is an insight without a payoff. . . . Things could have been different, and those who are successful today may well have been unsuccessful instead, or at least less successful in a different environment. So what of it?" (id). People's talents are not the work of "society" and do not belong to "society" because "[i]t is not 'society' as some abstract entity that values those talents," but real, concrete individuals (p 322). Those individuals get something in return; they are not left net creditors. We do not owe ourselves to one another because the books balance, and we do not owe ourselves to society because society is the sum of individuals. Epstein dissolves the claims of community into the claims of people. The simple rules are designed to deal with the claims of people who are not in close, voluntary association with one another, and to leave those close, voluntary associations alone.

## II. SIMPLE RULES, COMPLEX RULES, BAD RULES, AND FUZZY RULES

Here is the first small-picture argument over a single concept: simplicity. Epstein's account of this concept is problematic. As a result, he seriously overemphasizes the importance of simplicity, as more naturally understood, for his enterprise. More-

over, again because of troubles with the conceptualization of simplicity, he misses an important way in which his message really is about simplicity. The book might be better titled *Minimal Government for a Complex World* with a chapter called "Why Regulation Tends to Be Complex."

#### A. What's Simplicity Got to Do With It?

Meeting for lunch five minutes before noon at the north door is a simple rule. Meeting for lunch at one of four different times and three different places depending on the day of the week, the phase of the moon, the current level of sunspot activity as reported by the National Oceanic and Atmospheric Administration, and whether the coffee machine is working is a complex rule. Complex rules have higher administrative costs than simple ones: one must expend more time and trouble in determining what the complex rule requires and whether or not one is in compliance with it. Administrative costs may be even greater if both a private person and someone in the government have to determine whether the private person is in compliance. Furthermore, given the limits of human computational abilities, and the likelihood that any particular judgment will be wrong, people are more likely to make mistakes the more judgments and computations they must make. Error costs are a form of administrative costs and rise with complication. This seems like an intuitively sound understanding of complexity and simplicity in rules.

On some pages this appears to be Epstein's understanding. He says that there is a "great trade-off . . . between social incentives and administrative costs" (p 30) whenever a sound legal system aims to "minimize the sum of administrative (including error) costs and the costs associated with the creation of poor incentives for individual action" (p 32). The trade-off must be made because sometimes that last bit of improvement is just not worth the trouble. Einstein's equations of general relativity are more accurate than Newton's gravitational equations, but their complexity makes them harder to solve, so solving them takes longer and is more likely to result in an error. Most of the time the gain in accuracy from general relativity is vanishingly small, so most of the time the additional accuracy is not worth the cost. If one calculates correctly, though, the additional accuracy really is there: Einstein's equations are closer to reality than Newton's. Similarly, human traffic cops can usually control traffic better than a signal, because they have much more information and greater computational ability than a light. But administering the

complex rules used by human intelligence takes one of those carbon-based general-purpose computers, and they can cost more than traffic lights. The additional accuracy in traffic direction, the improved incentives, are usually not worth the additional administrative cost.

Epstein identifies four situations that can arise when balancing incentives and administrative costs:

- (1) superior incentives can be created at the price of increased administrative costs;
- (2) regulation will increase administrative costs and create inferior incentives;
- (3) superior incentives can be created while decreasing administrative costs; and
- (4) administrative costs can be reduced at the price of inferior incentives (pp 34-35).

As he says, (2) and (3) are easy cases, while (1) and (4) are the hard ones, where there really is a trade-off. One might think that *Simple Rules for a Complex World* would be about those cases, cataloguing the ones in which administrative savings justify imperfect incentives.

Instead, the book is mainly about “the tortured modern legal situation,” where “[t]oo often we treat the second case as though it were the first, and aim to create more complex legal structures that in fact lead to inferior social outcomes, most typically by strangling well functioning competitive markets for the provision of goods and services” (p 35). In situation (2), however, the simplicity or complexity of the legal rule is not a moving part of the argument. Government should not create inferior incentives even if it can do so for free.<sup>27</sup> Rational people would not take medicine that made them sicker even if it were being given away.

Epstein’s examples of excessive regulation, which he characterizes as excessive complexity, mainly fall into category (2): alterations of private incentives that the government never should have undertaken, no matter what their administrative

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<sup>27</sup> It will sometimes make sense for government to create inferior incentives if the administrative costs are negative—if the loss in incentives is less than the gain in reduced administration—but that is case (4), not case (2).

cost. In criticizing the antidiscrimination laws, Epstein describes some of their complexities and then asks, "what is gained, if anything, by the use of so formidable a legal structure to attack the problem of discrimination? The answer is nothing, except social unrest and economic dislocation" (p 175). You might think that increased racial harmony is worth billions in administration, but would you buy social unrest and economic dislocation for a quarter?

To be sure, administrative costs do play an important role in the arguments for the simple rules themselves. Private property is generally better than collective property because of administrative costs, and strict liability is preferred to negligence for the same reason. Even here, though, administrative cost enters as a tie-breaker, not as the winner in a tradeoff with incentives. Epstein does not assert that collective ownership gives better incentives than does individual ownership, and his argument as to liability rests on the premise that in an error-free world the two regimes generate the same incentives.

It is possible, I think, to isolate the source of Epstein's error with some precision, and useful to do so in part because the error is invited by an influential definition of complexity that Epstein takes over from another leading scholar, Peter Schuck.<sup>28</sup> Schuck identifies four axes along which legal rules move from simple to complex: density, technicality, differentiation, and indeterminacy. Dense rules "are numerous and cover in minute detail all aspects of a given transaction" (p 24). Technical rules require specialized expertise in their application, differentiated rules draw on more than one source of law, and indeterminate rules are as the name implies. Epstein has a little more in mind; he adds that "the *minimum* condition for calling any rule complex is that it creates public regulatory obstacles to the achievement of some private objective" (p 27).

This last proviso seems to be a gloss on density and a source of confusion. Suppose the law provides that people about to cross the street must meet thirty requirements. This should be a fairly dense rule by Schuck's definition, and hence more complex than the same rule minus ten of the requirements. Now suppose that almost everyone, when crossing the street, would meet all thirty requirements even if there were no law imposing them; such requirements include rules such as "do not crawl across the

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<sup>28</sup> See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 Duke L J 1, 3 (1992).

street” rather than “hop across the street on one foot.” They are no less dense and complex for being so easy to comply with. Understanding each requirement and ensuring that you are in compliance might take quite a while, even if the answer in all thirty cases turns out to be yes—how many people realize, without thinking about it, how they shift their weight when stepping off a curb? The street crosser who would have complied with all thirty requirements anyway has encountered substantial administrative costs, and nothing but administrative costs, because of this rule.

If I understand Epstein correctly, he regards the rule requiring people to hop as more complex than the one forbidding them from crawling. It is true that the cost of compliance with the former is higher, but that is not an administrative cost and it is not, by any ordinary understanding, an aspect of complexity. Two rules are of equal complexity according to ordinary language if they require that the same amount of information be gathered and the same amount of information processing take place. To be more onerous is not to be more complex. That is another axis altogether.

Schuck’s dimension of density invites this error because the natural examples of dense rules are also quite intrusive. People who complain about micromanagement are usually concerned with being told to do things they do not want to do; the problem of wasting time discovering that what they wanted to do anyway is consistent with the rule is secondary. As anyone who has ever dealt with a bureaucracy (let alone any bureaucrat) knows, being harassed and being thwarted are not the same.

This is not simply a matter of nomenclature and clarity of exposition because it can matter whether the real issue has to do with administrative costs or something more basic. If the problem with the regulatory state is that administering it is expensive, then improvements in information technology will make government more attractive. If the problem with welfare is waste, fraud, and abuse, then management improvements can make welfare desirable. This is hardly what Richard Epstein has in mind, however. Indeed, one would expect him to mourn every step forward in the technology of intrusive government, because those improvements make state interference cheaper and will cause more of it to be demanded. For Epstein, as for any Hayekian, misallocation by government is the dog and administration is its tail.

## B. Regulation and Complexity

Epstein, following Schuck, makes indeterminacy an aspect of complexity (p 25). I think this is a questionable move that obscures an important point, one Epstein would be happy to make. It is easy enough for lawyers to consider indeterminacy an aspect of complexity because we have been stuffed to the gills with multifactor tests that are highly uncertain in their application, just as we have read acres of pages of complicated argument that lead to no clear conclusion. Nevertheless, simplicity and clarity are not the same thing. A rule can be clear without being simple. The process by which OS/2 Warp Connect and WordPerfect are putting my words on the screen as I write this Review is vastly complicated, far beyond my powers of comprehension. It is also highly determinate: if one hundred Harrisons hit the same key-strokes on one hundred machines of this make and model with the same software loaded we will all get the same results except in very unusual circumstances.<sup>29</sup> My word processor is immensely complex (at least from the standpoint of my poor computational abilities) and very determinate.

A rule can be complicated yet certain. It is also possible for a provision of law to be simple, at least as that word is ordinarily used, and at the same time quite indeterminate. This latter claim will be more controversial, but consider the common distinction between rules and standards. The hallmark of a rule is clarity in application.<sup>30</sup> A standard, by contrast, is "a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience."<sup>31</sup> Hart and Sacks give a speed limit as an ex-

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<sup>29</sup> Eventually we might come up with *Hamlet*, but that is another story.

<sup>30</sup> As Hart and Sacks observe:

The most precise form of authoritative general direction may conveniently be called a *rule*, although this term is often used much more broadly to signify a legal proposition of any kind. In the narrow and technical sense in which the term is here used, a rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*.

Hart and Sacks, *The Legal Process* at 139 (cited in note 5).

<sup>31</sup> *Id* at 140.

ample of a rule, a requirement that drivers proceed at a reasonable speed as an example of a standard.<sup>32</sup>

It is tempting to think that standards must be rather complex on Epstein's reckoning, even if his criteria are stripped of the factor of determinacy. Surely standards require the acquisition and processing of large amounts of information, requiring substantial computational effort for their application and thereby generating large administrative costs. Richard Epstein of all people, however, should not say that. As a good Hayekian he knows that all the time people make decisions that seem to reflect enormous amounts of information and processing but nevertheless make them easily and quickly. Take a legal example, one of the favorite instances of a standard: the ban on cruel and unusual punishments. It does not take most people very long to decide whether a punishment is cruel. Ordinary concepts are routinely applied with low transaction costs even though it is impossible to specify what is going on when any single individual does so, and even though there is a substantial degree of disagreement among individuals as to their proper applications.

The match between indeterminacy and complexity is also imperfect if we judge complexity by Schuck's more detailed criteria (except indeterminacy, of course—no victory by definition allowed). While some people might consider a large number of factors in determining whether a punishment is cruel, very few would employ the kind of grid of mandatory factors that would make the concept dense in Schuck's sense. Nor need a concept be technical to be indeterminate; indeed, many technical concepts, including many legal concepts, are created in order to avoid the indeterminacy of ordinary language. Differentiation accompanies technicality and density but often does not plague legal standards, which tend to be cast in ordinary language. Standards can be simple and rules can be complex, except that standards are indeterminate and rules less so.

Why would anyone ever go to the trouble of formulating a dense, technical, differentiated set of rules to replace a simple standard? Sometimes certainty and clarity are worth purchasing with the coin of simplicity. This is likely to be true if the rule maker is trying to control the conduct of a rule applier who, in a particular situation, does not know quite what the rule maker would require and, in any event, may have little interest in doing it. The rule maker and rule applier may be a principal and a

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<sup>32</sup> *Id.* at 139-40.

marginally competent, doubtfully faithful, agent. Or they may be a government agency and a private person.

The need for determinacy is clear enough when the private person does not know what the agency wants. This is likely to happen fairly often, because private people mainly know what they want. Sanctioning people for breaking rules they do not understand may lead to nervous breakdowns, or cause people to abandon activities altogether, but will lead people to conduct the activity in compliance with the rules only by accident. Even when regulated parties do know in their hearts of hearts what the government would like them to do, it may be difficult to obtain compliance through a standard. In an enforcement proceeding the agency will have to expend resources persuading the adjudicator of the standard's proper application and the private person's knowledge thereof. This process can be expensive and uncertain, and sophisticated targets of regulation are likely to be aware of this and game the system as much as they can.

Is this to say that all regulation is command-and-control and that agencies never employ standards rather than rules? It is not, but there is something to learn by examining the situations in which standards are more common. Licensing is one of them. Agencies with licensing authority are notoriously disinclined to adopt rules that would constrain their discretion. The difference between licensing and other forms of regulation is that the regulated parties normally are not permitted to act without a license. If they do so they can be punished, not for violating the standard that governs the licensing decision, but simply for violating the license requirement.

Licensing puts the agency in charge of a bottleneck at which it is able to exercise discretion and avoid reducing its standard to a rule. Suppose that all the decisions of a business were subject to regulatory approval before they were put into effect, rather than being subject to after-the-fact sanctions if they violate some rule. This could still be called regulation, but it could also be called public ownership. It is like having a government agency as a board of directors. A board of directors can use rules and standards as it thinks best. It can broadly delegate to trustworthy subordinates and give precise rules to subordinates who need more guidance, while requiring that certain decisions be referred to the board for discretionary decision.

Private ownership of the means of production, however, implies that as a general matter a government agency will not be in the position of the board of directors. As Epstein explains, there

are reasons not to give government that kind of discretionary control over the economy (p xii). But if discretion is limited, if government's ability to regulate through standards is curtailed by the structure of ownership, then regulation will be pushed in the direction of rules—complex and difficult to administer, but designed to be precise in order to constrain the discretion of regulated people and facilitate enforcement. Regulation without public ownership frequently entails the kind of complexity that aims at precision and determinacy.

From Epstein's standpoint, the moral is that half measures do not work. If the economy is to be controlled through regulation rather than management there will be high administrative costs from complexity. His solution is to have the economy not controlled at all. The more powerful his arguments about the administrative costs of regulation, the more the debate over public ownership is the whole ball of wax. The intermediate position is too administratively costly to be worth the trouble.

### III. *BONHAM RICHARD* OR JEREMY EPSTEIN

Richard Epstein may or may not have a Napoleonic complex, but he is at least a Benthamite. This book strongly implies that he favors a code, a comprehensive statement of the private law sufficiently detailed that an ordinary person could use it to answer the vast bulk of legal questions. All those ordinary persons, of course, would come to the same conclusion. It is Jeremy Bentham's dream.<sup>33</sup> *Simple Rules for a Complex World* does not include the code, which is to say that its title is misleading. Epstein does not offer rules; rather, as he sometimes recognizes, he offers basic principles that are to guide the construction of the law (pp 16-17). Freedom of contract is a principle, not a law of contract; private property in land is a principle, not a system of tenures, estates, and registration.

A code there must be, however, or Epstein's preaching is vain and our faith is also vain. The point of this exercise is simplicity, as represented centrally by the reduction in the need for lawyers. Epstein does not suggest that if his proposals are adopted people will do less; if anything they will do more once their productive powers are unleashed. That means that they will be

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<sup>33</sup> See Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* 93 (Athlone 1977) (J.H. Burns and H.L.A. Hart, eds) ("Is it not to be wished that a man could know for certain, the legal consequences of his doing an act before he does it?").

able to do all those things, and be confident that what they are doing is lawful, without advice of counsel. Simplicity is nothing if it is not that. Moreover, Epstein stresses the determinacy of his approach, and agrees that indeterminacy is an aspect of complexity, the original sin in his system (p 25). This means that it must be possible to write down the answers. And that, as I suggested, is the Benthamite paradise of codification: every citizen to have a short book, suitable for memorization, that contains almost everything everyone will need to know about ordinary life, and another book or so that deals with specialized questions one might encounter as butcher, baker, or software maker.

Epstein should have no regrets about being called a philosophical radical, although it is another question whether he would admit to Frenchifying. My first point with this observation is that he has done something that legal scholars are rarely rash enough to do: he has made a testable assertion and may now legitimately be called on to stand and deliver. Epstein apparently means to say that he could write a highly comprehensible and determinate code. This can be checked. For example, we could take the code and ask a large group of people just admitted to law school, but otherwise uncorrupted, to resolve a large number of cases that could easily arise in everyday life. Or we could take a smaller number of law professors and ask them to formulate hypotheticals that have no easy answer. The less lifelike and natural the hypotheticals turn out to be, the better the code is working.

Second, Epstein is assuming that the concepts used by his private law have very little open texture—they have fairly clear application to situations that could not have arisen at the time the concepts were formulated.<sup>34</sup> Otherwise the code would not have determinacy. Epstein's discussion of social change confirms that he thinks there is very little open texture (pp 327-31). His response to the objection that the simple rules do not adapt to change, especially new technologies, is that the takings principle solves the problem. The legislature may accommodate new developments by altering the simple rules, as by creating new proper-

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<sup>34</sup> See H.L.A. Hart, *The Concept of Law* 119-20 (Clarendon 1961):

[I]n the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. . . . This imparts to all rules a fringe of vagueness or "open texture."

ty like copyright and patents, provided the alteration makes everyone better off. He gives overflights by airplanes as an example (p 329). Under previous common law rules of property, flying over land owned by another was trespass and forbidden. An exercise of the eminent domain power that allows everyone to fly freely makes everyone, or just about everyone, better off. He makes a similar argument with respect to broadcasting, where he favors changing the law to permit what would otherwise be a trespass—transmission of electromagnetic signals over people's property (p 330).<sup>35</sup>

When you think about it this is quite a claim. Epstein does not say that the simple rules provide no answer to the question of overflight or broadcasting. He says that there is an answer, albeit a suboptimal one. The suggestion that the answers really were there all along is plausible with respect to overflights, although somewhat of a stretch. As to broadcasting, it strikes me as very strange to say that Blackstone's concept of property is being applied, not changed, after the discovery of radio.

Epstein, however, does not give up; he says the answer was there all along. Which means that in an important respect he is throwing over the common law process. That is not necessarily a bad thing, but it is an unusual step for a Hayekian or Coasean to take. The more determinate and the less open-textured Epstein's code is, the less it calls for and admits of adaptation to new circumstances by judges. Consider radio again. According to Epstein the common law was clear: broadcasting, like overflight, was trespass (p 330).<sup>36</sup> According to Coase, when Congress adopted the Federal Radio Act of 1927 it interrupted the courts in the process of sorting out ownership of the spectrum through the use of common law judicial analogies.<sup>37</sup> If Epstein is right, then the courts were going about it all wrong.<sup>38</sup> They should have de-

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<sup>35</sup> For more detail on the story of broadcasting, see Richard A. Epstein, *No New Property*, 56 Brooklyn L Rev 747, 756-58 (1990).

<sup>36</sup> *Id.* at 757.

<sup>37</sup> Coase, 2 J L & Econ at 30-31 (cited in note 19).

<sup>38</sup> It is a mistake to think that a court could solve this problem by applying the principle of first possession to the radio spectrum and recognizing squatters' rights in those who had begun to broadcast—rights determined by the time, frequency, location, and power of their broadcasts. Such an approach would not be an application of the principle of first possession because the radio spectrum is not a thing that can be occupied. Even if the luminiferous ether is a thing (and thus Michelson and Morley and Kennedy and Thorndike and Lorentz and Fitzgerald and Einstein lived in vain), the spectrum is not a thing, it is a metaphor. To recognize squatters' rights would be to apply a metaphorical extension of the principle of first possession, not the principle itself. Metaphorical extension is the primary way in which open-textured concepts grow, but Epstein's concepts are

clared broadcasting a trespass and granted damages, perhaps injunctions.

Epstein might seek to salvage the common law method of adaptation by admitting that courts are changing the law when they recognize new property. He would go on to say that of course the courts are subject to the takings requirement when they do so. He might, but I hope he would not. If anyone as skeptical of government power as Richard Epstein would allow the same people to make the law and decide its constitutionality, the ceiling should fall on him. No, the judges should uphold the existing system of rights until the legislature changes it with a new rule that satisfies the takings criterion. As civilians say, the code is complete.

Epstein's code, being a code, also would be an authoritative verbal formulation of the law. My third observation is that this, like the claim of completeness, puts Epstein in tension with other Hayekian principles. Unlike a code, the common law has no canonical verbal formulation.<sup>39</sup> Judicial opinions expound and apply common law principles in specific cases but do not generate any authoritative form of words. The deposit of a case, according to the standard rules of precedent, is its holding. Holdings are no more captured in forms of words than is the doctrine of consideration; later courts respect the precedential authority of a case by following a holding that they may reformulate, even rejecting the specific phrases of the earlier opinion.

Knowledge of the common law, that is to say, is tacit rather than explicit. People know what is required of them, which is what keeps the system from being one of merely arbitrary power, but they cannot necessarily explain what they know. Judges can decide cases in a way that largely ratifies people's expectations, but the judges' attempts to express the rules are provisional. To say that the common law can be codified is to say that this knowledge is not incorrigibly tacit: what the participants and the judges know and do can be captured in words. Those words will both truly capture the practice and be so precise that someone who knows the language, but does not possess the tacit knowledge directly, can nevertheless know what is expected and predict how courts will act.

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not open textured.

<sup>39</sup> See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W Res L Rev 179, 186-87 (1986).

As Epstein recognizes, an enormous amount of what people do involves highly specific and detailed knowledge that cannot easily be expressed, and perhaps cannot be expressed at all (pp 43-44). He apparently means to claim, however, that at some point in the development of human interaction there is a major transition from rules that cannot be captured in words to rules that can be. I do not mean to deny this. I do mean, however, to point out that the issue is very important. Hayek himself was deeply skeptical of the suggestion that the rules of ordinary interaction—the stuff of private law—could be reduced to verbal formulae. He thought that knowledge of that sort remained largely tacit, and that although it could be drawn out by the common law process of commentary on practice, it could not be drawn out in canonical form.<sup>40</sup> Epstein's system, however, implies that the basic rules of interaction between strangers can be captured in words. This pulls him into the question whether programs of codification like Bentham's can truly succeed. The next iteration of Epstein's theory very much needs to address this question, and, more broadly, the question of whether and to what extent he really is a codifier. Bentham is alluring, and for the heirs of the written constitution especially so, but he may or may not have been right about private law.

#### IV. PUBLIC LAW, PRIVATE LAW, RULES, AND STANDARDS

##### A. The Supreme Court of the United States? Really?

This Section contains the easy criticism of Epstein's proposal concerning constitutional law. With respect to public law, his system is either crucially incomplete or deeply flawed. He has given us a substantive rule, the takings principle. It requires that government action that changes or goes beyond the simple rules be nonredistributive (except certain forms of straightforward

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<sup>40</sup> Hayek maintained that the earliest rules of conduct were tacit rather than explicit, rules that "existed only as a 'knowledge how' to act and not as a 'knowledge that' they could be expressed in such and such terms." F.A. Hayek, 1 *Law, Legislation, and Liberty: Rules and Order* 76 (Chicago 1973). Addressing more mature legal systems, Hayek thought the common law method superior because it preserved the ability to reason from understandings that remain tacit rather than explicit. Common law judges, he said, possess "a capacity for discovering general principles rarely acquired by a judge who operates with a supposedly complete catalogue of applicable rules before him . . . . The common law judge is bound to be very much aware that words are always but an imperfect expression of what his predecessors struggled to articulate." *Id.* at 87.

redistribution toward the poor). He says little about institutional design, and what he does say is a bad idea.

Application of the takings principle requires the resolution of large, difficult, and controversial empirical questions. In assessing the constitutionality of any form of new property, for example, the institution applying the principle must decide whether the proposed new property regime makes everyone better off, despite the new restriction on common law liberty.<sup>41</sup> The principle thus introduces a standard into the heart of the system of simple rules. Standards are delegations to future decision makers. The application of standards varies with the identity of those decision makers. Institutional arrangements that determine who decides which questions thus matter enormously.

Epstein says very little about this, so the set of rules is incomplete. What he does say is very troubling. He seems to suggest that it would be a good idea to have application of the takings principle entrusted to an institution like our current federal judiciary, headed by an institution like the Supreme Court of the United States (see p 132).

If you're going to have a standard, a delegation, you really need to have a faithful and competent agent. The Supreme Court's track record as expositor of the Constitution is not very impressive. We can consider that history from Epstein's standpoint. If you ask him, the Court gutted the Contracts Clause in *Ogden v Saunders*.<sup>42</sup> The Contracts Clause is the original Constitution's most important limitation on the private-law activities of the state legislatures. In 1857 the Court used reasoning much like Epstein's theory of the Takings Clause to come to the conclusion that the Constitution imposed on the federal territories a rule of private law that violates the principle of autonomy.<sup>43</sup> In 1873 the Court approved a slaughterhouse monopoly in New Orleans, largely erasing the centerpiece of Section 1 of the Fourteenth Amendment along the way.<sup>44</sup> Even during the balmy

<sup>41</sup> In Epstein's words, "[t]he takings principle allows for basic alterations in the system of property rights as long as these shifts promise substantial net benefits for society at large" (p 328).

<sup>42</sup> 25 US (12 Wheat) 213 (1827). Epstein's thoughts on this issue are set forth in *Toward a Revitalization of the Contract Clause*, 51 U Chi L Rev 703, 729-30 (1984).

<sup>43</sup> See *Scott v Sandford*, 60 US (19 How) 393 (1857) ("*Dred Scott*"). I am not trying to associate Epstein with *Dred Scott*. Epstein puts autonomy first. He would say that the Thirteenth Amendment is even more important than the Fifth, because the Thirteenth establishes the regime of self-ownership. The Supreme Court, not Richard Epstein, must answer for *Dred Scott*.

<sup>44</sup> See David P. Currie, *The Constitution in the Supreme Court: The First Hundred*

days of the *Lochner* era the Court frequently upheld regulation.<sup>45</sup> As for the Court's performance in the twentieth century, the less said the better.

Now that we have stopped guffawing at the suggestion that the Supreme Court has been a faithful expositor of Richard Epstein's Constitution, or mine, or any reader's, or any Constitution but its own, we can turn to more theoretical considerations. Justices are lawyers chosen by politicians, not the voters, and they serve for life. Especially in post-Realist America, nothing in that description suggests that Justices will be more likely than legislatures to apply faithfully the standards contained in the Constitution.<sup>46</sup>

To be sure, there is a plausible argument that the Court will vindicate widely shared policy views against wayward local measures and momentary gusts of public opinion. The Court's national character and its insulation from elections make that quite possible. But there is no reason in theory to believe, and no reason from history to conclude, that when the applicable constitutional provision is as standard-like as Epstein's takings principle the Justices will follow it honestly. Those widely shared policy views that Justices are likely to vindicate need have nothing to do with the Constitution.

Measured against the possible gains from judicial power are its costs. A non-Epsteinian judiciary ostensibly enforcing the takings principle could do wonderful favors for its preferred interest groups. Suppose that Congress adopts a new copyright law and thereby puts out of business people who had been copying and distributing others' works. Congress determines that these copiers read very little and never produce original material, so they are made worse off by the new law. Congress decides to give them in-kind compensation by exempting them from the new law for five years. Holders of new copyrights nevertheless sue the grandfathered copiers for infringement. They argue that the

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*Years 1789-1888* 342-51 (Chicago 1985), discussing *Slaughter-House Cases*, 83 US (16 Wall) 36 (1873).

<sup>45</sup> See, for example, *Holden v Hardy*, 169 US 366 (1898).

<sup>46</sup> This discussion is not normative constitutional law in the ordinary sense. It does not seek to tell judges what they ought to do, on the assumption that they have power. As a normative matter my arguments operate at the level of constitutional design, where the question is not what courts should do with their power but whether they ought to have it. My normative claim is that it is a bad idea to entrust the enforcement of constitutional standards to judicial review as it is known today in America. I should also note that the wisdom of enforcing constitutional rules through judicial review is another question entirely.

copiers really do receive sufficient in-kind compensation without the exemption—maybe they secretly devour new literature—and that the exemption is really a politically motivated transfer of their property to the copiers. The Justices decide who their friends are and answer the empirical questions accordingly.

The charitable reading of Epstein on this point is that he has simply neglected it. His statements about what courts should do can easily be read as ordinary normative recommendations within the current political structure rather than recommendations as to what that structure should be. If he means to be addressing the latter issue he needs to rethink the matter completely.

## B. Really Simple Rules

Here are some basic facts about social cooperation. Most of the goals toward which people cooperate are indeterminate in that agreements as to ends do not entail agreements as to means. All the hoplites in the Spartan army presumably want to achieve victory in battle but it is very unlikely that they will agree on how to do it. As a result, if each of them does what he thinks he should do to win the battle they are very likely to lose: battles are won by armies, not mobs, and the difference between an army and a mob is that the soldiers in an army are all following the same plan. Indeed, in the face of the enemy it is usually better to be in a poorly commanded army than in an armed mob. In such situations it is more important to do the *same* thing than the *best* thing.

Where people need to coordinate but have no rule clear enough to enable them to do so on their own, the best thing for each individual may be to follow the rule that provides, "Do what the commander says." The commander, if honest, will not be following any rule. He will be following a standard, one that says, "Win the battle." But commanders are as frail and human as their followers and often will use the indeterminacy built into the standards they apply to their own advantage. For all most people knew it was an accident that David placed Uriah the Hittite on the front line. Power is what one has when others follow a rule of doing what the power holder says rather than the standard of doing what the followers themselves think best. So here's the surprise: power is dangerous.

One response to this problem is to adopt a slightly more complicated rule than simply doing what the commander says. Consider this rule: "Every year the army elects the commander." This is a little trickier. The soldiers have to know one another (to

know who the army is), they have to have a method of election, and they all have to have the same calendar. If those requirements are met, however, annual election has real virtues. It has not only the obvious virtues that it makes commanders more accountable during their year in office, and makes it easier to get rid of a bad one, but the even more important virtue that it is likely to work. First, the soldiers can apply the rule themselves, without conferring power on anyone else. If the soldiers need priests to tell them when a year is up, or censors to tell them who is really in the army, or election officials to tell them who won the vote, they have the problem of power all over again. Second, the rule in a sense applies itself. If an ousted commander continues to give orders after the election, no one is likely to listen, if only because no one has much reason to expect that anyone else will listen—everyone knows who the new commander is, and there is not much point in being a general's only soldier.

Constitutional design thus involves the well known contrast between rules and standards in a different context. It is common to see a standard as a means of delegating authority to later decision makers, so that standards are chosen when such delegation is desirable. Standards may be chosen for other reasons, the most important of which is that sometimes a rule just won't do the job. So far no one knows the rules for winning the battle or making sound public policy. In these situations, delegation to future decision makers is not so much the point of the exercise as a side effect resulting from the need to use a standard. If there is agency slippage between the delegators and the delegates—if the delegates may abuse the power that comes with authoritative application of a standard—then there is a problem from the standpoint of the principals. If we think of the people being governed as the principals and the officers of state as the agents, this is the problem of government.

It is common to say that rules are chosen to avoid delegation. For at least a few rules, however, their rule-like character—the fact that a great many people will be able to apply them independently and get the same answer—is necessary to their function. In my military example, the rule that tells who the commander is can function only if it is a rule; people must know for themselves whom to follow. On such questions, where delegation is impossible, only a rule will do.

The leading example I am using of a rule that has to be a rule in order to work is the one that tells the followers who the

authoritative appliers of standards are.<sup>47</sup> Another important feature of such rules is that they are especially likely actually to be followed, and not replaced with another rule, because it is so difficult to organize departures from them: because people will follow such a rule only if they know that other people will do so, changing one is just as difficult as organizing one in the first place. Rules like this do not involve the normal dangers of delegation because they do not involve any delegation. In figuring out whom to follow the followers consult no one but themselves.

It may be that different rules concerning the identity of the leaders have different consequences for the leaders' fidelity to the interests of their followers—that some create better incentives for agents than others. Happy the country whose leaders are identified by rules that create such incentives, provided of course that the rules are capable of consistent but independent application by a great many people. But to satisfy that condition a rule must be very, very rule-like. It must be very clear and not very complicated. Richard Epstein's great master Thomas Hobbes proposed such a simple rule: absolute power vested in a single man or a single assembly of men.

Autonomy and first possession, to use two examples, hardly qualify as simple rules by this standard. They may be clear compared to current "constitutional law"—the doctrines of the Supreme Court—but they are quicksand compared to this: Two Senators from each State. There is a truly simple rule.

The contrast between Epstein's proposal and rules that are clear enough to cut out delegation to authoritative rule-appliers suggests three observations. First, this distinction gives us some purchase on one of the fundamental, if neglected, questions in American constitutional theory. It is a question Epstein's book raises implicitly: What is the relation between public and private law in the American constitutional scheme? In particular, why do constitutions in this country consist almost entirely of public law—rules about institutions of government, rather than rules, like Epstein's, that govern the relations between people? Why deal with Leviathan, king of the children of pride, rather than the children themselves?

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<sup>47</sup> The reader should not be misled by the military form of the story I tell. These issues are not limited to situations in which people must cooperate extensively in order to achieve a fairly clear, shared goal. The authoritative standard-appliers can also be judges deciding disputed questions of private law. They too might misuse the power that comes with authoritatively applying a standard, and they too must be identified by a rule that itself can be applied independently, without an authoritative interpreter.

This is an important question. On one hand it is true even today, and was overwhelmingly true when the federal Constitution was adopted and the pattern for state constitutions laid down at the end of the eighteenth century, that America is not a state-centered country. The public sector—the resources actively controlled by institutions of government—was tiny in 1790. More to the point, the central role of government in America has always been the preservation of private rights.

On the other hand, American constitutions contain almost no private law, no rules for the conduct of ordinary individuals with respect to other ordinary individuals. Moreover, even if Epstein were correct in his strongest claims for the Contracts Clause and the takings principle of the Fourteenth Amendment, the federal Constitution still would not itself supply rules to govern the relations of private people. Rather, it would severely limit the extent to which the states could change the private law. The Contracts Clause forbids the states from making laws that impair the obligation of contracts; it does not itself create or even regulate contracts or their obligation. Similarly, the takings principle deals with changes in legal relations, because it deals with government actions that take property; but one cannot take what was never possessed.<sup>48</sup>

The contrast between the rule of first possession and the rule of two senators from each state helps answer this question. It points out what might be called the extremely limited “carrying capacity” of constitutions. The less clear and more complicated the constitutional rules become, the harder it is for the principals—the people—to enforce them directly. Instead, the constitutional rules turn into standards, and therefore into delegations to authoritative interpreters. The rules’ utility from the point of view of the people declines as that happens. I do not mean to say that the rules’ effectiveness goes to zero, but it does decrease, as my one-paragraph survey of American constitutional history indicates. As that happens, it quickly becomes doubtful whether the cost of constitutionalizing the rules (actually standards or principles at this point) is worth the benefit. If the attempt to write the private law into the Constitution would deteriorate into

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<sup>48</sup> The suggestion that the Fifth Amendment’s Takings Clause is a source of private law is worth only a footnote. It is a limitation on the federal government, a government with only secondary authority over the duties and entitlements of ordinary life such as property and contract.

a regime of judge-made private law with no legislative oversight, then the project almost certainly should be abandoned.

At least, it should be abandoned unless we can devise some better way of picking judges, a way that will find those few virtuous souls who can resist the temptations of power. This leads to the second observation that comes from contrasting private law with the structural provisions of constitutions: if government action involves the exercise of discretion, including discretion that seems to be unavoidable in the application of standards, then the selection of the decision makers and their incentives in office are central to constitutional design. It is no accident that the Federal Convention was obsessed with the selection, tenure, and structural role of officers and institutions. The convention gave relatively little thought to constitutional limitations on those officials' power and almost none to the relations between private people. Hayek, Coase, and Epstein have an enormous amount to say about the latter. Without the best possible version of the Framers' new science of politics, however, it will not be possible to design institutions that will most reliably translate their prescriptions into the actual practice of government.

In saying most reliably I do not necessarily mean to be saying much, which leads to the third observation. If I may be permitted an Epstein-like generalization from history, it seems likely that institutions of government matter but that they are hardly decisive. Judicial review, one of the favorite obsessions of American legal academics, is like that: it is important only at the margins. In a country without any institutions for the use of force that are independent of the great mass of the people, what those people want is likely to be decisive.

Which means, in turn, that Epstein's program in this book is of enormous importance, probably of more importance than even the science of government. Statism begins in the minds of the people, and it is there that the defenses of private property and free contract must be constructed.<sup>49</sup> The surest protection, the only real protection, of property and contract is a widely shared conviction that they are in the permanent interests of the vast bulk of individuals. That such a conviction would be correct is the heart of Epstein's thesis. For him the spread of that conviction,

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<sup>49</sup> Compare the UNESCO Constitution, Preamble, in Edmund Jan Osmańczyk, *The Encyclopedia of The United Nations and International Agreements* 827 (Taylor & Francis 1985) ("[S]ince wars began in the minds of men, it is in the minds of men that the defences of peace must be constructed.")

especially among intellectuals, would be worth a wilderness of Takings Clauses.

### CONCLUSION

If *Capitalism, Socialism, and Democracy* was right, persuading the intellectuals is not going to be easy.<sup>50</sup> Epstein makes Hayekian arguments against the tendency that Schumpeter identified. I for one hope that the latter's predictions continue to be largely falsified. Still, whatever Schumpeter's merits as a prophet, one must give him points for style. He said that his ambition had been to be the greatest economist in the world, the greatest lover in Austria, and the greatest horseman in Vienna, but that he had never been that much of a horseman.<sup>51</sup> In *Simple Rules for a Complex World*, Richard Epstein is a great common lawyer and a great big-picture artist, whether you like his big picture or not, but he needs an editor. Two out of three was good enough for Schumpeter.

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<sup>50</sup> See Schumpeter, *Capitalism, Socialism, and Democracy* at 145-55 (cited in note 1).

<sup>51</sup> This line of Schumpeter's exists in different versions, which suggests that he delivered it in different forms over the years. Variants are found in James Tobin, Foreword, in Eduard März, *Joseph Schumpeter: Scholar, Teacher, and Politician* vii (Yale 1991), and George J. Stigler, *Memoirs of an Unregulated Economist* 100 (Basic Books 1988).