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Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property

Richard A. Epstein¹[LINK TO ABSTRACT](#)

The Uneasy Status of Bundle-of-Rights Theory in Modern Property Law

In their Prologue to this symposium, Daniel Klein and John Robinson (2011) dwell on the dangers of using “the bundle of rights” image in property law. They offer a range of quotations that are intended to show that the bundle-of-rights approach appeals especially to statist. Some of the excerpts that they quote offer a clear indication of how that position is taken today by many of the most eminent theorists in property law. Thomas Merrill and Henry Smith worry that the ability to adjust property rights “along countless margins” carries with it the implication that these rights no longer run between the individual owner and the rest of the world, but instead run only between the individual and the all-powerful state (Klein and Robinson 2011, 198). James Penner fears that the bundle-of-rights metaphor leaves property without some “definable essence” such that no “particular right or set of rights in the bundle is determinative” (ibid.). Eric Claeys worries that the use of the bundle-of-rights language will give aid and comfort to the defenders of rent control, who can now portray property owners as “selfish to whine about” the loss of some sticks in the bundle of rights when they are entitled to retain others (ibid.).

1. New York University School of Law, New York, NY 10012.

In making these broad claims, these writers insist that classical liberals must oppose the bundle-of-rights conception if they are to be true to their classical liberal origins. For the record, I am not on the list of quoted authorities. But I am a classical liberal, and I think that the bundle-of-rights image, rightly understood, offers the best path to preserving the institution of limited government. I used it extensively in my *Takings* book (Epstein 1985, 57–62), where I relied heavily on Roman and common law sources, and I continue to use that expression today. To be sure, the Romans had no explicit equivalent for the bundle of rights, but they did speak of the “incidents” of ownership, which they often described as *ius utendi fruendi abutendi* (or of use, fruits, and abuse). In practice these were immediately coupled with the right to convey property, but they were also part of some overarching conception of *dominium*, or a strong form of ownership, and so were all entitled to protection under the system (Buckland 1921, 187).² Indeed, as a matter of juridical construction, the notion of the right to abuse property was extended to cover its disposition (Nicholas 1962, 154).

The most common modern formulation is offered by Tony Honoré, himself a Roman Dutch lawyer. Honoré uses just this approach when he lists nine incidents of ownership, of which the key ones are possession, use, and disposition (Honoré 1961, 107, 112–124).³ Indeed, American takings decisions that have been resolved favorably for private claimants have taken this position. Thus in *United States v. General Motors* (1945, 377–378), in which the Supreme Court allowed consequential damages for the taking of a short-term sublease for the duration of the Second World War, Justice Owen J. Roberts used the bundle-of-rights terminology to solidify the takings claim.

The critical terms are “property,” “taken” and “just compensation.” It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

2. Buckland’s hesitation about endowing these three incidents with an absolute quality stems from his insistence, historically accurate, that height and setback limitations were inconsistent with absolute use. “The law might forbid him to build above a certain height, or within a certain distance of his boundary” (Buckland 1963, 187).

3. He lists in his original article nine such incidents: the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the incident of transmissibility, the incident of the absence of harm, the prohibition against harmful use, and liability in execution.

The difference between this notion and the bundle-of-rights image is at most terminological. Understanding how the notion of ownership is put together is critical no matter which conception is used. In some form or another, the notion of a bundle of rights has a pedigree that long antedates the rise of Progressive thought toward the end of the nineteenth century.

Why the suspicion of a phrase with such deep historical roots? Much of it has to do with the definition of a “bundle,” which, whether one speaks of cloths, rags, or property rights, looks like some arbitrary assemblage with no inner coherence, kept together only because someone ties them together like stalks of wheat. When we deal with property rights, the fear is that the people who put the bundle together are public authorities who, for reasons that only they know, parcel it out as they see best.

I think that these claims are largely misplaced. To show why, I shall engage not in a direct criticism but in a flanking attack. I begin with a close analysis of a passage from John R. Commons, one of the most influential thinkers of the late nineteenth and early twentieth century. His views are of special interest because they provided, as no modern author could do, the intellectual fuel for many of the innovations of the Progressive Era, which did, without question, do so much to undermine the system of property rights. Afterwards, I relate these arguments to the passages that I quoted at the outset of the paper.

John R. Commons on Property

Ponder this passage from Commons:

Property is, therefore, not a single absolute right, but a bundle of rights. The different rights which compose it may be distributed among individuals and society—some are public and some private, some definite, and there is one that is indefinite. Partial rights are definite. Full rights are the indefinite residuum. . . . The first definite right to be deducted from the total right of property is the public right of eminent domain. This is the definite right which belongs to the state in its organised capacity of purchasing any property whatsoever at its market value, whenever public safety, interest, or expediency requires. It is merely a definite restriction upon the unlimited control which belongs to the individual. (1893, 92)

This passage, which contains much insight but manifold blunders, is an appropriate launching pad for thinking about the central question of whether calling property a bundle of rights greases the way toward a large and powerful state. I

think that a fuller appreciation of how the bundle-of-rights language should work when it is properly understood produces exactly the opposite result. It gives a strong and internally coherent notion of what property is, which in turn shapes the state's power of eminent domain. This power can then be usefully integrated with the state's police power—a notion that is pervasive in the history of American constitutional law, but which nowhere makes it into the Prologue.

The difficulty in the Commons passage stems from his inveterate habit to write in the passive voice, as when he says that the different rights in the bundle “may be distributed among individuals and society.” The passive voice leaves open the question of *who* is going to undertake the distribution of these property rights. In the quoted passage, no determinate person takes on that role, so the clear implication of this proposition is that this honor belongs to the state. That impression is reinforced by the observation that the distribution of rights may be shared “among individuals and society,” where the latter is a shadowy collective presence hovering over the individuals in question.

From this position, it is easy to see how the inference of a statist system of property regulation can develop. The state can decide which of the rights it wants to retain for society and which it wants to give away. In so doing, it could, for example, decide that a height restriction is a perfectly appropriate way to deal with the use rights of individuals. Indeed, just that decision was reached by the Supreme Court in *Welch v. Swasey*, in which Justice Rufus Peckham explicitly invoked the police power to hold that laws enacted “for the safety, comfort or convenience of the people and for the benefit of property owners generally, are valid” (1909, 106).⁴ Peckham, of course, made no effort to determine whether the value of the real estate was reduced by the restrictions, or indeed whether the value of all real estate in a particular neighborhood was so reduced. The notion was that since the “benefit” of those restrictions was shared and widespread, there was sufficient reason for judges, on categorical grounds, to find the requisite return benefit for the property taken.

Dangerous principles have real consequences. *Welch* in turn provided one of the major props for Justice William Brennan's disastrous flirtation with property theory in *Penn Central Transportation Company v. City of New York* (1978), which held that the confiscation of air rights over a building did not require compensation so long as the owner could cover his operating and capital costs from existing revenues. Put otherwise, the Brennan position was that the option to develop property, however valuable in the private market, counted for zero in eminent

4. Peckham also wrote *Lochner v. New York* (1905), which he cited in *Swasey*. Clearly he believed in an extensive police power. In this regard, rightly or wrongly, he was following the early Roman tradition on state limitations of an owner's use of his property, which took hold long before the modern era.

domain calculations so long as the underlying operations were not kept under water. At no point did he address the question of whether it was permissible to so limit these development rights if the property generated no current revenue or operated at a loss—issues that have come to bedevil the entire area.

Justice William Rehnquist dissented in *Penn Central*, but only to protest the ad hoc nature of restrictions that “singled out” individual structures for government oversight and review. He argued that by regulating only individual structures, New York City’s plan failed to provide reciprocal benefits of the sort found in the height restrictions that were upheld in *Welch*—benefits which were necessary to sustain that regulation against the charge of confiscation (*Penn Central Transportation Company v. City of New York* 1978, 140). But larger zoning systems, such as those which were implemented without compensation in *Euclid v. Ambler Realty Co.* (1926), received Rehnquist’s implicit blessing, thus solidifying the core proposition that the property rights that remained in private hands were largely held at the sufferance of the state.

It is not clear that we can blame Commons for this form of statist domination, because he does not write as if the state owns everything at the outset. Rather, to him the key to understanding property rights lies in a distinction between definite and indefinite rights. Under this distinction, the indefinite rights went to the property owner, a view that tracks both the Roman and common law treatment of the subject. Indeed, Commons’ view of eminent domain as a system of organized state purchases is more protective of property than are the modern zoning decisions, which allow extensive government regulation with large diminutions in value to take place *without* compensation, so long as they are done in the name of the public good—which proponents of regulation always seem to articulate, at least to their own satisfaction. It was this move, from compensated taking to uncompensated regulatory taking, which allowed for the greatest expansion of government power. Whatever the mistakes of Commons, the quoted passage does not commit him to that expansion.

Bottom Up Versus Top Down

Neither the words from Commons nor the writings of the more modern scholars come close to clinching the case that the bundle-of-rights language led to the expansion of state authority. So the question is, what intellectual transformations drove that change? On this issue it is critical to distinguish between two related matters. The first is the bundle-of-rights terminology. The second is the question of whether we think of property rights from a top-down or bottom-up perspective. In my view, the nub of the difficulty with modern property law does

not stem from the bundle-of-rights conception, but from the top-down view of property that treats all property as being granted by the state and therefore subject to whatever terms and conditions the state wishes to impose on its grantees. The correct approach, in my view, keeps the bundle-of-rights terminology, but in the context of a bottom-up system of property rights.

Here is how it works. The critical distinction that begins the discussion of property in Justinian’s Institutes (Book II, Title I) is the line between common and private property. The former includes rights to air, lakes, rivers, and oceans, and to the beach or shoreline, which are open to all and which cannot be unilaterally reduced to private property. It is, however, a mistake to think of these common rights as though they belong to “society” in the fashion that Commons used. That societal notion suggests a system of centralized state control, when in fact Justinian’s distinction envisioned common property arising under natural law—i.e., before the creation of the state—which gives access to these public waters to all individuals in their private capacities. There is no element of centralized control in this conception of access rights, which lies, moreover, at the opposite end of the spectrum of rights to exclude. What follows is the recognition that the value of waterways and beaches for transportation is so great that they must be kept out of private ownership, which would allow multiple riparian owners to block movement along these natural arteries in ways that would stifle transportation and communication, thereby leading to endless tollbooths on the Rhine river (Heller 2008).⁵ This conception of common property is driven strongly by consequentialist logic, but it is still a bottom-up conception.⁶ Once it is faithfully applied, it leads, for example, to the strong constitutional protection of individual rights of access to public waters, which are in play when the government wishes to alter the flow of a river or block access to it by certain riparians (*United States v. Cress* 1917). This conception is in sharp contrast to the top-down system explicitly advanced by Justice Jackson, that “only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion” (*United States v. Willow River Power Co.* 1945, 502). At this point, of course, it is judges or legislatures who in ad hoc ways decide whether to back these rights. It is therefore no accident that just this formulation of water rights worked its way back into the land use area in *Penn Central*, where Justice Brennan referenced this passage to explain his neutralization of the air rights over the Grand Central station that were

5. By far the worst thing about Heller’s 2008 book is the title. The internal evidence, including his discussion of the Treaty of Westphalia, all points to excessive government controls as the source of the difficulty (Epstein 2011a).

6. For two extended accounts of how this works, see Epstein (2011b and forthcoming).

vested under New York law (*Penn Central Transportation Company v. City of New York* 1978, 124–25).

Historically, it was the top-down account that reduced the scope of private rights and increased, correlatively, the domain of uncompensated state regulation. There is nothing in the bundle-of-rights conception of property that drove this conclusion. The ultimate judgment was political, insisting that vigilant state control was necessary to control common resources. The attitude entailed a faith in expert planning, often used to justify government control over rivers, which commanded that expertise was not to be impeded by requiring compensation to be paid to individuals. The tools that were used to achieve this end were twofold. The first was an expanded definition of what counted as a negative externality, so that matters such as aesthetics were covered by the state police power. The second was the uncritical extension of the notion of a regulated party's return benefit, which was conclusively postulated generally without giving the owner any opportunity to prove a shortfall between the return benefits generated by the regulation and the value of the property rights lost to that regulation. The two were presumed equivalent, so that the just compensation requirement was satisfied by fiat alone.

The second piece of the puzzle has to do with private property—that is, the rights that one individual has against the entire world to require forbearance with respect to the use of force and fraud on one's own possessions. The Roman and common law systems both initiated a system of private property from the bottom up: first possession of land (i.e., occupation) was the only mode by which to acquire property. Under the state-of-nature theory, it would be impossible to acquire property by a grant from the state, which, at the time of the original acquisition of property, did not exist. The question therefore concerned the attributes of the rights that were obtained bottom-up. These rights must be measured over a number of relevant dimensions. One is the element of time. The solution was that property was infinite in duration, lest there be a huge problem in deciding what happens to property that is improved and resold once the original ownership period is over. Infinite property rights solve that problem for land, even if they do not work as well for intellectual property, where at the expiration of a patent or copyright the once-protected information returns to the unorganized common, now christened the public domain.

A second element is that of space. The Roman and common law took seriously the *ad coelum* rule—*cuius est solum eius est usque ad coelum usque ad inferos*, or, “for whoever owns the soil, it is theirs up to Heaven and down to the Depths of the Earth”—because it again led to a unique allocation of a particular resource to a single owner who was in the best position to coordinate the use and disposition of the asset in question. This rule runs into difficulties with certain complex mineral interests that run in long and sinuous veins, and with overflight easements, which

require sensible modification of the rule. But once again the core conception makes good sense. There is no reason to allow large parts of the physical universe to remain without an owner. If the surface owner could only get the surface, property would literally be in two dimensions. The *ad coelum* rule solved that problem. Like the temporal dimension, it paved the way for useful development of property rights.

The third element deals with the incidents of property, which are squarely implicated by the bundle-of-rights image. Clearly these include the right to exclude. But by the same token, a parade of mistakes in modern American takings law has stemmed from the willingness to say that the right to exclude is somehow special in the law of property. Of course, it has to be protected, but, literally speaking, the right to exclude the world does not even give the owner the right to enter his property, let alone use or dispose of it. The very notion of property is at war with so restricted a view, which suggests that however indispensable the right to exclude may be, it hardly tells the whole story. Rather, a more robust sense of property that embraces both use and disposition is needed to solve the hopeless division of power that would come about if those incidents were given to another private person, or worse, held to be part of the residual bundle of indefinite rights in the hands of the state. If such were the case, the system would fall apart, because the division of rights would create a set of vetogates that no one could circumvent. The point here is that we need to keep the incidents of possession, use, disposition, and (often neglected) access to common roads intact so as to facilitate further transactions that explicitly allow for the voluntary creation of divided interests in property. Such divided interests can increase value in the way that state holdups, e.g., any permit system, completely block.

In this regard, an extra word must be said about the rights of disposition, which can function in two ways. One is to allow the outright sale of property from one person to another, so that the unitary bundle of rights now vests in different hands. For legal theory, however, the more important move involves the voluntary division of property rights into multiple parts. That division opens up new vistas for gains from trade, by allowing, for example, the use of land as security for a loan. That division in turn means that neither the borrower nor the lender is the unitary common law owner. But far from being a dangerous situation, it has two virtues. First, it increases total value between the parties. Second, it allows for the protection of third persons by allowing the two parties to designate which of these two persons is entitled to do business with the rest of the world. That person is usually the borrower, although that control can, by contract, shift to the secured lender if the loan, for example, falls into arrears. So long as the instructions in the various contracts are clear, it is all to the good that neither party meets the definition of an outright common law owner.

At this point, therefore, it is no longer correct to condemn the bundle-of-rights position as either internally incoherent or wholly arbitrary. Decidedly, it is neither. There is, in fact, no way that addition or subtraction from the common-law bundle of rights can improve the overall efficiency of a property rights system. We need all those rights. To protect only the right to exclude allows the state to wreck rights of use, development, and disposition, for under modern law these are mere “regulatory takings” that don’t receive the same level of scrutiny as do dispossessions. Thus, under current law, the state can frequently veto or limit my building on my land, without compensation, even if it cannot, without compensation, build on that land itself.

The next question is what legal regime has to be put in place to enforce this delineation of rights. Let us begin with the private law. In this instance, the legal system wisely provides two tiers of protection, one that works for the whole of the property and the other that works for various incidents. Thus, the obvious takings case is the occupation of land by a stranger, which historically brought forth the early remedy of novel disseisin (recent dispossession from land). Unless that remedy is given, the entire system of property is at an end. But by the same token, the legal system has to deal with incursions that are short of entire dispossession. Here are some such incursions.

Encroachment: You take and occupy only part of my land, and you build on it. The usual remedy is to throw you off and to force the building to come down (with a narrow exception allowing one to buy his way out if he has inadvertently sunk huge resources into the project that are otherwise subject to expropriation by the landowner if he holds out for far more than the loss that he suffers from the encroachment). Encroachments count as physical takings under modern law, so that there is a per se rule that allows the private owner to obtain not only removal of the invader, but also compensation for the loss of use or other inconvenience. There are also analogous actions for ejecting people who take your minerals or who build over your land, so that the three dimensionality of the property relationship is fully protected. Here there is no gap in the property armor.

Nuisance: Here the list of non-trespassory invasions covers noise, filth, odors, and other noxious substances. These cases are all subject to both damages and injunctions. Think of them as protecting the possessor’s quiet enjoyment of property.

Interference with advantageous relations: Here the wrong is that the stranger interferes with the right to dispose of land, in whole or in part, or, conversely, to acquire that land in whole or in part. The classic case of the tort was shooting guns at the potential publics of a school, which gave the schoolmaster a cause of action for the loss of his right to deal with others. The same would apply to someone who forcibly prevented the sale of property to a stranger. Indeed, in these cases force is not required. It is possible to interfere with the right of disposition by, for

example, the slander of title, whereby the defendant claims to a potential buyer of land that the plaintiff does not have good title. This species of defamation is very old in the law, for it is an application of the libertarian prohibition against fraud (or in some cases even innocent misrepresentation) with respect to one critical incident of property—the right of disposition. The system on the private side thus coheres.

What remains is to show how this framework links up to the system of eminent domain in ways that acknowledge the power of the state to overcome coordination and holdout problems without conferring on government the unlimited power to regulate without compensating aggrieved owners. In doing this, we need the same two-tier system that is found in private law. The first tier protects an owner against absolute dispossession. In some cases it blocks a taking on the ground that it is not for a public use. In other cases it allows government occupation on payment of compensation. In still other cases the current regime allows regulation of rights of use, development, and disposition, all without compensation.

Let's concentrate on the last distinction. Here, the rule of translation from private to public law is this: whenever one party can enjoin the conduct of another without compensation, the state may do so as his agent, again without compensation. Therein lies the core of a sensible police power limitation, allowing for the state to embark on the more efficient enforcement of traditional property rights without claiming new rights in its collective capacity. It was just this proposition that was explicitly denied by Justice Jackson in *Willow River*, when he said: "Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation" (*United States v. Willow River Power Co.* 1945, 510). It is this idea that special rights are inherent in the state that undermines the notion of private property. Once that dangerous proposition is rejected, the state can still enjoin nuisances and stop the use of force and defamation to disrupt advantageous relationships, all without compensation. But when it seeks to go beyond the enforcement of rights already held by the citizens whom it represents, it must compensate. No private landowner could stop his neighbor from building on his own land or paving over his driveway. The state, therefore, can only impose, say, height restrictions or wetland restrictions if it pays for the privilege. In some cases—as in some height restriction cases, perhaps—the interlocking restrictions that are uniform in the area could satisfy that rule, at which point in-kind compensation removes the need to pay hard cash. But most of the really aggressive political systems do not have that nice "reciprocal" feature, instead operating like the New York City landmark designation program, which preserves for the state the power to impose a net loss on the owner. Thus, we can see that the protection

of each incident of the standard bundle of rights from state regulation reduces state power.

At this point, we are in a position to see the mistakes that are implicit in the passages of the bundle-of-rights theory's critics quoted at the outset of this paper. First, Merrill and Smith make the same mistake as Commons when they assert that it is dangerous to let property move on multiple margins. This view is misguided for two reasons. First, it hardly follows that the movement on these margins can only be done by the state. All voluntary transactions that create divided interests move along multiple margins. But there is no risk here so long as those divisions produce gains from trade to the parties and neither increase nor decrease rights against third persons. Put otherwise, the divided ownership between A and B does not stop them, acting separately or jointly, from asserting *in rem* claims against the rest of the world. In this connection, we have no reason to think that the disaggregation of property rights counts as a disintegration of property rights that somehow will eliminate some irreducible core to the notion. So long as we know how the rights were separated and how they could be reassembled, we can let the parties decide how they choose to interact among themselves and with the outside world.⁷

Next, I think that Penner misunderstands how the classical system works when he worries about a malleable system of property rights without some definable essence. The key point is that the initial bundle of rights acquired by first possession is neither malleable nor without some definable essence. Rather, it has the strong and invariant characteristics noted above. The only time that it is difficult to figure out who counts as the owner is when private parties divide the incidents of ownership. But here, malleability and the loss of some essence—when done privately—only increases gains from trade, so long as the rest of the world knows whom it has to deal with.

And last, Claeys is wrong to worry that divided interests, in his case between a landlord and tenant, leads to a partial erosion of property rights by creeping regulation. That would be true if the state could take some of the parties' rights so long as it leaves the remainder. But, in fact, the correct view under the bundle-of-rights theory is that the state pays for what it takes, no matter how many sticks of the original bundle the owner retains. In dealing with land, the state cannot take the north ten acres for free so long as it leaves you with the south ten acres. The same is true with rights of disposition and use. Keep the maxim "the more the state takes, the more it pays," and all is well.

Indeed, I will venture, further, to assert that it is the unitary conception of property rights that is in fact vulnerable to creeping statism. Extol the vision of private property as one unitary thing, and the law will give strong protection against

7. For further discussion see Epstein (2010).

outright dispossession but little against regulation. That is the nub of the legal difficulties in takings law today, and it is driven not by a bundle-of-rights theory as such but by an eerie willingness to infer return benefits to an owner whose property has been taken, whether by occupation or restriction, when none exist, or to postulate huge externalities from ordinary harm. The vast over-estimation of return benefits guts the just compensation requirement. The vast over-estimation of negative externalities expands the police power beyond recognition. Use the bundle-of-rights theory to constrain both of these abuses, and the system of property rights will flourish with what is, after all, a conception of property that long antedates the Progressive Era and the modern New Deal state that it spawned.

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About the Author



Richard A. Epstein is the Laurence A. Tisch Professor of Law, New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law, Emeritus, and Senior Lecturer, The University of Chicago. He has written and taught extensively on property law issues as a matter of political theory, Roman and common law, and constitutional theory. He also has extensive practical experience in dealing with complex property transactions. His email address is richard.epstein@nyu.edu.

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