

Columbia Law School

Scholarship Archive

Faculty Scholarship

Faculty Publications

1987

Rent Seeking and the Compensation Principle

Thomas W. Merrill

Columbia Law School, tmmerri@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Legal Writing and Research Commons](#), [Property Law and Real Estate Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 Nw. U. L. REV. 1561 (1987).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/372

This Book Review is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

REVIEW ESSAYS

ESSAYS ON

TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN. By Richard A. Epstein.* Cambridge, Massachusetts: Harvard University Press, 1985. Pp. xi, 362. \$25.00

RENT SEEKING AND THE COMPENSATION PRINCIPLE

*Thomas W. Merrill***

I. INTRODUCTION

The reaction to Richard Epstein's *Takings*¹ has been almost universally negative.² Joseph Sax finds Epstein the "prisoner of an intellectual style so confining and of a philosophy so rigid that he has disabled himself from seeing problems as beyond the grasp of mere formalism."³ Thomas Grey concludes that "*Takings* belongs with the output of the constitutional lunatic fringe" and is "a travesty of constitutional scholarship."⁴ Thomas Ross, writing in this Law Review, says that, at least from an academic perspective, *Takings* is "a patent and howling failure."⁵ Epstein has provoked even the student editors of the *Harvard Law Review*, who condemn his work as "an academic exercise in its worst sense: he develops a novel interpretation of the takings clause but provides no reason to take it seriously."⁶

* James Parker Hall Professor of Law, University of Chicago Law School.

** Professor of Law, Northwestern University School of Law. B.A., Grinnell College (1971); B.A., Oxford University (1973); J.D., University of Chicago Law School (1977). I wish to thank Robert Bennett, Richard Epstein, Carol Rose, and David Van Zandt for their helpful comments on an earlier draft. Victor Goldberg deserves a special note of appreciation. Many of the ideas expressed here grew out of conversations we had in the last two years while co-teaching a seminar featuring Epstein's book. Financial support was provided by the Stanford Clinton, Sr., Research Professorship.

¹ R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

² For a less hostile treatment, but one that is also ultimately critical, see Paul, *Searching for the Status Quo*, 7 *CARDOZO L. REV.* 743 (1986).

³ Sax, *Takings*, 53 *U. CHI. L. REV.* 279, 293 (1986).

⁴ Grey, *The Malthusian Constitution*, 41 *U. MIAMI L. REV.* 21, 23, 24 (1986).

⁵ Ross, *Taking Takings Seriously*, 80 *NW. U.L. REV.* 1591, 1592 (1986).

⁶ Note, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 *HARV. L. REV.* 791, 808 (1986).

There is indeed much to quarrel with in *Takings*. But a responsible reviewer should try to answer at least two questions before judging any book. First, is it worth reading? Whatever its shortcomings, *Takings* is clearly required reading for anyone interested in theories of public law. Not only is the book consistently engaging, but the serious reader will come away with a new understanding of the takings clause and may even be forced to rethink his most fundamental beliefs about the role of government in society. Second, does the book make a significant contribution to the literature? Here too, *Takings* must be viewed a success. Epstein has developed an entirely new theory justifying compensation for government takings, based on the tendency of individuals and groups to engage in "rent-seeking" behavior that increases their wealth while decreasing that of the rest of society.⁷ Epstein's critics, however, generally downplay these accomplishments, if they recognize them at all. Instead, they stress two kinds of criticisms of *Takings*.

First, Epstein reaches certain conclusions that usually are associated with the extreme right. Under Epstein's reading of the takings clause, progressive income taxation, welfare, and the National Labor Relations Act are all unconstitutional; *Lochner v. New York*⁸ was correctly decided, though too deferential to the police power;⁹ the only flaw in *Coppage v. Kansas*,¹⁰ which barred state interference with "yellow dog" contracts, is that the opinion was "too weak."¹¹ For most reviewers, these conclusions are so antithetical to conventional wisdom that they discredit the entire book.

Second, nearly all reviewers find fault with the way Epstein frames the premises underlying his argument. Epstein sometimes argues like a natural rights philosopher; at other times he takes a utilitarian or economic position. In some parts of the book he stresses the text of the Constitution; in other parts he emphasizes the "theory" implicit in the text or in the beliefs of the framers. Most reviewers find that the inconsistency—or at least the elusiveness—of these starting points demonstrates that Epstein's edifice rests on a defective foundation.¹²

But whether they stress his unconventional conclusions or elusive

⁷ For a brief discussion of what rent seeking means, see *infra* notes 101-02 and accompanying text.

⁸ 198 U.S. 45 (1905) (striking down New York restriction on number of hours bakers legally could work).

⁹ R. EPSTEIN, *supra* note 1, at 109.

¹⁰ 236 U.S. 1 (1915) (striking down Kansas prohibition on use of "yellow dog" contracts as violative of due process).

¹¹ R. EPSTEIN, *supra* note 1, at 281 n.31. A yellow dog contract is one that conditions employment upon an agreement by the employee not to join a labor union.

¹² For example, the student editors of the *Harvard Law Review* assert that Epstein, in three short introductory chapters, misreads Locke and fails to appreciate the indeterminacy of constitutional language. Based on these theoretical failings, they conclude that there is "little reason to proceed beyond the third chapter of Epstein's book." Note, *supra* note 6, at 808.

premises, most of the reviewers of *Takings* are equally vulnerable to criticism. First, they ignore ninety-five percent of the book. Epstein spends relatively little time discussing the philosophical underpinnings of his work or explaining how his theory applies to various social welfare programs. The bulk of the book is devoted to exposition of the standard doctrinal issues that arise under the takings clause and to criticism of the Supreme Court's treatment of these issues. To be sure, Epstein boldly asserts that his account of the takings clause also represents a comprehensive theory of politics.¹³ But his method is deliberately inductive—the political theory emerges out of a detailed consideration of specific doctrinal controversies; it does not spring full blown from a set of abstract and universal truths.¹⁴ Thus, in order to understand and assess Epstein's political theory, it is necessary first to understand his account of the takings clause.

Second, in their eagerness to reject Epstein's arguments at the outset, most reviewers manage to miss the central point of the book. Epstein's basic thesis is this: The state (1) should be allowed to undertake forced exchanges of specific property rights, but (2) should not be allowed to redistribute fungible wealth. Epstein believes these basic rules will enable the state to overcome market failures and supply public goods that make everyone better off, while barring the use of the state as a vehicle for schemes that merely dissipate social resources and ultimately leave everyone worse off. Moreover, he claims that the takings clause—which provides that private property may be taken for public use, but only if just compensation is paid—can plausibly be interpreted as embodying his two criteria. These contentions are not so facially nonsensical or absurd as to be dismissed out of hand. They deserve to be addressed on the merits, regardless of how Epstein initially frames his argument, or his conclusion that most New Deal programs are unconstitutional.¹⁵

In part II of this Review, I will begin with a consideration of Epstein's general theory of the takings clause, both as a prelude to considering the genuine contribution of the book and to raise certain questions about the analysis.¹⁶ In part III, I will show that Epstein's account cannot plausibly rest on a natural rights philosophy, as most readers (admittedly misled by Epstein) have concluded, but rather is a species of

¹³ Epstein insists that "the eminent domain approach, as applied both to personal liberty and private property, offers a principled account of both the functions of the state and the limitations upon its powers." R. EPSTEIN, *supra* note 1, at 331.

¹⁴ For an explicit endorsement of this technique, see Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

¹⁵ R. EPSTEIN, *supra* note 1, at 281. It should be noted that Epstein claims only that the New Deal programs were *originally* unconstitutional. In recognition of the massive disruption that would occur if these programs were struck down, Epstein would grandfather most of them from constitutional attack. *Id.* at 324-29.

¹⁶ See *infra* notes 20-64 and accompanying text.

utilitarianism.¹⁷ In part IV, Epstein's theory of the compensation principle will be compared briefly to other contemporary theories.¹⁸ Finally, in part V, I will argue that although *Takings* opens up a valuable new perspective on the compensation question, the theory could easily be employed to reach conclusions different from those drawn by Epstein.¹⁹

II. EPSTEIN'S TAKINGS CLAUSE

Although complex in its details, the basic outline of Epstein's theory of the takings clause is straightforward. Epstein interprets the clause as posing four questions: (1) Has there been a taking of private property?; (2) is there any justification for the taking that eliminates the compensation requirement?; (3) is the taking for a public use?; and (4) has there been compensation for the property taken?²⁰

A. *Takings and the Natural Right of Property*

Epstein frames his initial inquiry in Lockean, natural rights terminology. The basic principle, he insists, is that the state has no powers greater than those of the individuals it represents.²¹ Thus, if the state does something to an individual's property that would be a common law tort if committed by another individual, the state has committed a *prima facie* taking requiring compensation.

Carried to its logical conclusion, this means that if a post office truck rams my parked car, I have a *constitutional* right to compensation from the government. Indeed, Epstein asserts that when the framers adopted the takings clause, they in effect abolished the defense of sovereign immunity, even if no one was aware of it at the time.²² Correctly understood, therefore, statutes such as the Federal Tort Claims Act do not waive sovereign immunity; they merely establish such details as the appropriate forum for recovering just compensation from the government.

This claim is, to say the least, totally at odds with the historical understanding. Indeed, given the fact that the Tucker Act was not amended to allow suits against the United States for takings until 1887, it was commonly believed during the first 100 years of the Constitution that sovereign immunity trumped the takings clause, not vice versa.²³ More fundamentally, it is not clear why Epstein's compensation theory requires the extension of the takings clause to routine torts of negligence

¹⁷ See *infra* notes 65-75 and accompanying text.

¹⁸ See *infra* notes 76-100 and accompanying text.

¹⁹ See *infra* notes 101-10 and accompanying text.

²⁰ R. EPSTEIN, *supra* note 1, at 31.

²¹ *Id.* at 12, 36.

²² *Id.* at 46.

²³ See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1326-27 (2d ed. 1973).

committed by the state. Unlike government regulations, where the "victims" (and the beneficiaries) can be identified in advance, government accidents generally inflict injury on a fairly random basis, such that the winners and losers cannot be identified before the fact. Consequently, there would seem to be little danger of systematic redistribution from one class of citizens to another through negligent, as compared to intentional, governmental acts.²⁴

If the government commits a taking whenever it performs any act that would be a tort if committed by a private party, how then do we define the "property" that is guarded against these tortious invasions? Taking a chapter from Blackstone, Epstein describes private property in terms of the rights to possess, use, and dispose of scarce resources.²⁵ Taking a chapter from Locke, he insists that property is not a positive or state-created entitlement, as most modern property scholars believe, but rather a "natural right."²⁶

It is far from clear what Epstein means when he contends that property is a natural right. Indeed, three distinct themes are interwoven into his argument. First, Epstein draws upon the social contract tradition, specifically characterizing himself as a Lockean.²⁷ This suggests that property is an institution found in the "state of nature" that has been preserved by the mutual assent in "civil society." Second, Epstein argues that property is based on first possession.²⁸ This suggests that property is the product of certain "natural" acts that do not depend on any organized state for their recognition and validity. Finally, Epstein argues that the term "private property" as used in the takings clause was intended to have the definition given by Blackstone.²⁹ This suggests that property is a natural right in the sense that it has a specific meaning that was "constitutionalized" by the framers and, accordingly, is not subject to alteration or amendment by ordinary legislation.

Unfortunately, Epstein does little, if anything, to untangle these various strands of his "natural rights" argument. Whatever its justification,

²⁴ This does not mean that government compensation for negligently inflicted injuries cannot be justified on other grounds, such as the desirability of providing correct incentives for limiting the government's accident-causing activity. But Epstein never makes this argument. Moreover, Epstein could perhaps argue that even if there were no incentive in negligence cases for rent seeking *ex ante*, there still could be a significant incentive to engage in rent seeking *ex post*. For example, if the government were not obligated to compensate for negligently inflicted injuries, accident victims could submit private bills for compensation and lobby to have them enacted. See Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955) (describing procedures for settling claims by private bills, which were primary means of redress prior to enactment of Federal Tort Claims Act in 1946). Again, however, Epstein makes no such contention.

²⁵ R. EPSTEIN, *supra* note 1, at 22, 59.

²⁶ *Id.* at 5.

²⁷ *Id.* at 3-18.

²⁸ *Id.* at 11, 61.

²⁹ *Id.* at 20-25.

the key premise is that *any* diminution in the Blackstonian trilogy of rights is a taking. Thus, if the state deprives someone of use of his land by flooding, this is a taking, even if the owner still has the rights to possess and dispose of the land.³⁰ Similarly, if the state deprives someone of the right to sell his eagle feathers, this is a taking, even if the owner still has the rights to possess and use the feathers.³¹ Finally, if the state deprives someone of the right to exclude demonstrators from his shopping center, this too is a taking, even if the owner still has the rights to use and dispose of the shopping center.³²

Epstein accentuates the apparent radicalism of his position by extending it to cases involving large numbers of similarly situated owners. General regulations and tax provisions, he concludes, are takings no less than narrowly focused interventions. This result follows from the Lockean premise that the government has no powers greater than the individuals it represents, combined with the assumption that the rights of each individual are determined in isolation from the rights of all other individuals. When it regulates or taxes, the government is depriving each individual of possession, use, or disposition of his property in a way that would be tortious if attempted by a private individual. Thus, Epstein concludes that “[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state.”³³

The first step in Epstein’s argument, therefore, is to expand radically the scope of the takings clause to cover virtually every collective interference with the rights to possess, use, and dispose of scarce resources. This step saves Epstein from the difficulty of having to distinguish, at least at the outset, between compensable “takings” and noncompensable “regulations.” But it is unclear what otherwise justifies this radical expansion of the takings clause. Epstein’s position seems to be that any interference with the Blackstonian trilogy is a taking because property is a natural right. But, as we have seen, he is ambiguous about precisely what he means by “natural right.” At least at this stage in the exposition, Epstein’s claim that property is a natural right rests on mere assertion.³⁴

³⁰ *Id.* at 38, 66 (discussing *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871)).

³¹ *Id.* at 76 (criticizing *Andrus v. Allard*, 444 U.S. 51 (1979)).

³² *Id.* at 64-66 (criticizing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)).

³³ *Id.* at 95 (emphasis in original).

³⁴ I do not mean to suggest that the Blackstone-Epstein definition of property is *wrong* either as a construction of what private property means in ordinary discourse, or as a normative prescription for optimal social institutions. The notion that private property entails the rights to exclude, consume, and transfer scarce resources has been endorsed by economists, *see, e.g.*, R. POSNER, *ECONOMIC ANALYSIS OF LAW* 30-33 (3d ed. 1986); philosophers, *see, e.g.*, Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (1972); legal commentators, *see, e.g.*, J. LEWIS, *EMINENT DOMAIN* § 63 (3d ed. 1909); and courts, *see, e.g.*, *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). My point is simply that Epstein fails to show how this conception of property has a “natural

B. *The Police Power and the Justifications for Takings*

Epstein next takes up what he calls "justifications"—circumstances in which the government may legitimately interfere with someone's rights to possess, use, or dispose of property without paying compensation. True to his earlier natural rights framework, Epstein again treats the state as having only the powers of the individuals it represents. Thus, just as an individual would have the right to take certain self-help measures to abate a nuisance, so too can the state act to abate nuisances, acting now as the collective representative or enforcement agent for individual societal members. Working by analogy from private law to public law, Epstein recognizes three justifications for takings that overcome the prima facie obligation to compensate: the police power (defense of property from tortious invasions), consent, and assumption of risk. Of these three, the police power is clearly the most important.³⁵

It is not possible to understand Epstein's account of the police power without first understanding his theory of nuisance law. Unfortunately, Epstein treats nuisance regulation in two widely separated chapters,³⁶ and for the uninitiated, it may not be clear how Epstein's account of nuisance law differs from that given by others. For Epstein, the key to nuisance liability is physical invasion: if *A* is undertaking some activity on his land that causes a physical invasion of *B*'s land, and *B* suffers harm from this invasion, then a prima facie nuisance is committed. Thus, Epstein vigorously rejects the position, adopted in the *Restatement (Second) of Torts*, that nuisances can be identified through a cost-benefit analysis asking whether *A*'s activity produces more social benefits than

law" foundation, in any of the senses discussed in the text. For further discussion of Epstein's concept of natural right, see *infra* notes 65-72 and accompanying text.

³⁵ Consent and assumption of risk (treated together in chapter 11 of *Takings*) are both defined narrowly, so that in practice they offer a defense only when the private property owner and the government have expressly agreed by contract that the government may take certain actions that otherwise would be compensable takings. Epstein's rejection of positivism is essential to reaching this conclusion because otherwise any legally mandated changes in the scope or definition of property rights would automatically put future property owners on notice that their rights were qualified. Thereafter, property owners would be barred from making a takings claim by consent or assumption of risk. Epstein further confines the defenses to contractual undertakings with the government as opposed to private contractual undertakings. In discussing *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), Epstein argues that a tenant should be compensated for the value of an expected lease renewal, even if there is no contractual right to renewal. R. EPSTEIN, *supra* note 1, at 148. It is not clear, however, why Epstein's framework requires that the defenses of consent and assumption of risk be limited to contractual undertakings with the government. This limitation is especially odd in light of Epstein's vehement defense, elsewhere in the book, of the principle of freedom of contract. For further criticism of Epstein's treatment of *Almota*, see Goldberg, Merrill & Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. — (1987) (forthcoming).

³⁶ See R. EPSTEIN, *supra* note 1, at 107-61, 239-63 (ch. 9, "The Police Power: Ends"; ch. 16, "Tort," respectively). For a unified and more fully elaborated account, see Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 7 J. LEGAL STUD. 49 (1979).

B's.³⁷

Because the police power extends only so far as the power of individuals to complain of nuisances, and because, according to Epstein, nuisances occur only when there is a physical invasion of an individual's property, the police power extends only to the regulation of physical invasions. This explains why Epstein would not permit wetlands regulation³⁸ or strip mining regulation³⁹ under the police power, and would disallow uncompensated prohibitions of alcoholic beverages.⁴⁰ It also explains why Epstein is untroubled by decisions like *Hadacheck v. Los Angeles*,⁴¹ in which the Supreme Court upheld an ordinance imposing a disproportionately heavy loss on the owner of a brickyard in order to protect the value of surrounding property developed many years after the brickyard's construction. For Epstein, the brickyard caused physical invasions that interfered with surrounding property and thus was fair game for regulation under the police power. All questions of temporal priority, reliance, contributory negligence, and the like are irrelevant.⁴²

Most readers probably will be unpersuaded by Epstein's physical invasion theory of nuisances and, derivatively, his physical invasion theory of the police power. Epstein likes the invasion principle because of its "Cartesian" quality: "Clear lines let people know where they stand, and they help persons recombine their original rights in voluntary transactions."⁴³ But it is one thing to endorse the invasion principle because of its clear demarcation of the respective spheres of private rights and its power to facilitate voluntary transactions.⁴⁴ It is quite another thing to say that the invasion principle should be transported wholesale from private to public law. To assert that a principle should be adopted as a tenet of public law because it performs a useful function in private law begs the question whether the public law, in this case the police power, performs the same functions as the private law. As with his discussion of takings,

³⁷ RESTATEMENT (SECOND) OF TORTS § 826 (1979).

³⁸ R. EPSTEIN, *supra* note 1, at 123 (criticizing *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)).

³⁹ *Id.* at 125 (criticizing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)).

⁴⁰ *Id.* at 130-31 (criticizing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

⁴¹ 239 U.S. 394 (1915) (discussed in R. EPSTEIN, *supra* note 1, at 120).

⁴² These issues would become relevant in Epstein's scheme only after the physically invading activity had been established for a sufficient period of time to give rise to a prescriptive easement. Epstein would probably find no prescriptive rights in *Hadacheck*, however, because it appears that the brickyard had not imposed substantial harm on surrounding property until the relatively recent residential construction.

⁴³ R. EPSTEIN, *supra* note 1, at 230.

⁴⁴ See Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985), for an endorsement of the invasion test in the context of the law of trespass, where transaction costs are apt to be lower than they are with respect to disputes governed by the law of nuisance.

Epstein's explication of the police power, at least in this part of the book, seems to rest on assertion rather than on any comprehensible theory.

C. *The Public-Use Limitation*

The public-use limitation, which is taken up midway through the book, marks an important transition in Epstein's argument. The Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends. According to the Court, any taking satisfies the public-use requirement so long as it bears a "rational relationship" to a conceivable governmental objective.⁴⁵ Epstein, not surprisingly, wants to put some substance back into the limitation. Here, however, he does not draw upon the natural rights tradition or private law analogies to find the appropriate limiting principle. Instead, he borrows from economics, postulating that public use is roughly coterminous with "public goods"—that is, military defense, the court system, highways, and other collective goods that are enjoyed by or are accessible to all members of society and that cannot be exploited for the exclusive advantage of a few.

Epstein asserts that eminent domain must be restricted to the provision of public goods so that the additional wealth generated by government interventions to overcome market failures is "divided among all citizens, pro rata in accordance with their private holdings."⁴⁶ The argument proceeds as follows. Public goods are nonexclusive; that is, the benefits of public goods cannot be denied to any individual. Moreover, public goods are characterized by jointness of supply. Thus, consumption by one does not limit the opportunities for consumption by others. Taken together, these features suggest that when the power of eminent domain is used to supply public goods, the surplus will tend to be divided, at least approximately, in proportion to preexisting shares of wealth. Those with large preexisting shares will obtain large benefits from public goods; those with small preexisting shares will obtain small benefits.⁴⁷

Whether the asserted relationship is true, even approximately, is subject to question. Take, for example, railroads, which Epstein apparently would count as public goods because they are subject to common carrier restrictions requiring nondiscriminatory service to all.⁴⁸ Nevertheless, even if the railroad is a kind of public good, its construction will have a tremendous impact on the distribution of wealth. If the railroad

⁴⁵ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243-44 (1984). This formulation appears to assimilate the public-use question to the "minimum rationality" test applied in equal protection and substantive due process cases. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

⁴⁶ R. EPSTEIN, *supra* note 1, at 163.

⁴⁷ *Id.* at 167.

⁴⁸ *Id.* at 168-69, 274-75.

goes to town *A* but not town *B*, fortunes will be made and lost, even if everyone in town *B* has the same "equal access" to the railroad as those in town *A*. Not surprisingly, therefore, railroad construction historically has attracted all of the activities that historically Epstein most deplors, ranging from monopoly franchises to government land grants to public subsidies to outright bribes. Thus, it is doubtful that limiting the power of eminent domain to public goods would eliminate rent seeking for the surplus created by governmental action.

On the other hand, Epstein's public-goods limitation would appear to bar the use of eminent domain in many areas where it traditionally has been employed to promote a more efficient allocation of resources by overcoming holdouts and free riders.⁴⁹ In the course of discussing the "Mill Acts" cases,⁵⁰ Epstein acknowledges that because of these problems, eminent domain will often be necessary in order to achieve an efficient use of resources. This is the case even though many of the Mill Acts did not involve the provision of traditional public goods. Significantly, Epstein would not bar the use of eminent domain for these purposes, but would insist that the condemnee be paid bonus compensation, equal to 150 percent of the fair market value of the condemned property.⁵¹ The purpose of this bonus is to preserve the preexisting shares of wealth by forcing the condemnor to share any surplus generated by the taking with the condemnee.⁵²

The introduction of bonus compensation for private takings represents an intellectual watershed in the book. It turns out that Epstein does not really believe that the state has no powers greater than the individuals it represents. The state has the power to coerce transfers of property in order to maximize wealth, something that no individual can do. Moreover, when Epstein says that property is a natural right, he does not really mean that specific items of property are shielded from collective intervention. Rather, it is a certain share of fungible wealth—a claim on the general resources of society—that is shielded from collective intervention. These clarifications in Epstein's position have, as we shall see, important implications for the general nature of his argument.

D. Just Compensation and the Efficiency of Governmental Action

By and large, Epstein's first three inquiries yield a stark and unbending conception of the takings clause. Any modification of the rights to

⁴⁹ For illustrations, see Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

⁵⁰ R. EPSTEIN, *supra* note 1, at 170-75. The Mill Acts were statutes that authorized a riparian owner to build a dam in order to create a reservoir of water sufficient to operate a mill, even if this resulted in an unconsented flooding of property owned by upstream riparians, and/or interfered with the natural flow of the water in the stream.

⁵¹ *Id.* at 174-75.

⁵² It is far from clear, however, that the 50% bonus will preserve, even approximately, the existing distribution of wealth. For further discussion, see Merrill, *supra* note 49.

possess, use, and dispose of property is a taking; the police power is limited to rectification of physical invasions; and the public-use requirement means that eminent domain generally may be used only to supply traditional public goods. It is not until the final inquiry, concerning just compensation, that Epstein builds significant flexibility into his analysis. The main vehicle in providing this flexibility is the concept, borrowed from Frank Michelman,⁵³ of "implicit in-kind" compensation. For Michelman, implicit compensation is but one factor to be considered in deciding whether any particular government regulation is a taking; for Epstein, it is the single most important conceptual tool. Moreover, for Epstein implicit compensation is relevant not to whether there has been a taking, but rather to whether just compensation has been given. Having used natural rights arguments and common law analogies to expand radically the scope of the takings clause, Epstein now calls upon economic reasoning—as he did in the public-use chapter—to return large areas of governmental activity to legislative discretion.

The starting point in Epstein's analysis of implicit compensation is the observation that compensation—at least full compensation⁵⁴—should ensure that all government regulation is Pareto efficient; that is, it should ensure that at least some individuals are made better off by the regulation without making anyone worse off. Since the losers are fully compensated, they should be indifferent, leaving only winners. The concept of implicit compensation simply reverses this logic. If a government regulation can be shown to be Pareto efficient, then explicit compensation should not be required because there will be no losers who require compensation to be made whole. As an example, Epstein cites bankruptcy legislation.⁵⁵ Abrogation of a creditor's right to full recovery is *prima facie* a taking. Since all other creditors' rights are similarly compromised, however, creditors as a group will recover more money from a debtor's estate than they would in unconstrained competition among all creditors of the estate. The legislation provides implicit compensation and, therefore, is constitutional.

There are two important qualifications here, neither of which is ade-

⁵³ See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1225 (1967).

⁵⁴ In chapter 13 of *Takings*, devoted to explicit compensation, Epstein argues that in principle compensation should make the condemnee indifferent to whether his property is taken. See R. EPSTEIN, *supra* note 1, at 182-95. In practice, however, market value must serve as a proxy for full compensation because of moral hazards and valuation difficulties associated with alternative measures, such as subjective value or replacement cost. Epstein is correct that the current opportunity cost formula for determining the measure of compensation ignores two important elements of value: the social surplus generated by the taking (which goes to the state under the opportunity cost measure of damages) and the consumer surplus that the condemnee attaches to the property (which will not be reflected in market values). For a discussion of the possible inefficiencies generated by these deviations from full (Paretian) compensation, see Merrill, *supra* note 49.

⁵⁵ R. EPSTEIN, *supra* note 1, at 224-28.

quately developed by Epstein. First, whether implicit compensation has in fact been given must be determined *ex ante*—that is, before the insolvency occurs. A creditor may or may not be better off *ex post*, depending on how quickly he can move to execute against the debtor's estate. Given that implicit compensation is determined *ex ante*, a critical question is how far back we can go in doing the *ex ante* analysis. Do we go back only to the point where we do not know if the debtor will become insolvent, or do we go back to the point where we do not know whether creditors will be creditors and debtors will be debtors? The further back we push the *ex ante* analysis, the more uncertain become the arguments about implicit compensation.

In the extreme, we can push the analysis back to Rawls' original position, where everyone is behind a veil of ignorance about his specific endowments and preferences. In this, the ultimate *ex ante* analysis, plausible arguments can be made (at least they were plausible to Rawls) that individuals are by nature highly risk averse, and that an elaborate system of progressive taxes and protective entitlements will leave everyone better off.⁵⁶ Epstein insists that the analysis cannot be pushed back this far because it is meaningless to ask what a totally abstract agent stripped of all individual tastes and preferences would agree to in the original position.⁵⁷ Nevertheless, even this answer leaves room for disagreement over what provides implicit *ex ante* compensation. Indeed, at one point Epstein argues that the legislature can prohibit slavery by contract, which suggests a fairly "deep" *ex ante* analysis.⁵⁸ If slavery contracts can be banned, why can't colorable arguments be made in support of, for example, wage and price controls, on the ground that everyone is better off *ex ante* if contracts are understood to contain an implied term that permits the state to impose modifications in the event of calamities such as unforeseen inflation?⁵⁹

The second, undeveloped qualification of the implicit compensation theory is that each statute or regulation must be evaluated in isolation. Epstein believes that arguments about logrolling or step transactions—when losses imposed on one group by one statute are offset by gains to that group from another statute—cannot be considered in deciding which measures provide implicit compensation. The concern here is legitimate. As he puts it, "[w]here each separate statute bears the sign of a negative sum game, then their totality yields only a larger negative

⁵⁶ See J. RAWLS, A THEORY OF JUSTICE (1971).

⁵⁷ R. EPSTEIN, *supra* note 1, at 343.

⁵⁸ *Id.* at 335 n.7.

⁵⁹ Epstein himself has hinted at this argument in suggesting that mortgage moratoria might be a constitutional response by state governments to de facto modifications in contractual terms caused by currency deflation at the federal level. See Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703, 737 (1984).

sum."⁶⁰ But his solution—a requirement that each statute or rule be considered in isolation—seems overly rigid. Suppose the legislature fails in its first attempt, but then passes an amendment that renders the original statute acceptable? When viewed jointly the legislation might pass muster; considered in isolation, however, both the original enactment and the amendment would fail. Epstein appears to recognize this dilemma,⁶¹ yet he can see no intermediate position between grouping all statutes together, which would dilute seriously the implicit compensation test, and forcing each statute to stand on its own, which seems to rule out trial-and-error and piecemeal legislative reform.

Epstein gives far greater attention to the problem of judicial implementation of the implied compensation test. He admits that it would not be feasible for the judiciary to determine whether every *prima facie* taking is Pareto efficient. Instead, he urges three surrogate tests. First, in areas where "economic theory" tells us that there is a common pool or collective action problem (as in the bankruptcy example), legislation to overcome the problem should presumptively be regarded as providing implicit compensation.⁶² Second, when we discern a redistributive motive at work, legislation should presumptively be regarded as not providing implicit compensation.⁶³ Finally, if the taking has a disproportionate impact on one individual or group, it should presumptively be regarded as not providing implicit compensation.⁶⁴

The last two tests, which play dominant roles in the analysis, mean that outside the conventional takings context Epstein's theory operates very much like the intermediate scrutiny equal protection test. The governmental end must be "legitimate," which in this context means that it may not have a redistributive purpose, and the means must bear a "substantial relationship" to the end, which means that the impact may not be focused disproportionately on one group or class. In the final chapters of the book, Epstein applies the redistributive-motive and disproportionate-impact tests to a variety of regulatory, tax, and transfer payment schemes, and finds much (but not all) of the modern legislative work product to be unconstitutional.

III. EPSTEIN'S ANTIREDISTRIBUTION PRINCIPLE

As this summary suggests, the crux of *Takings* appears to be a double-edged rule: the state may take property to maximize wealth, but it may not redistribute wealth. Only strict libertarians would contend that the power of eminent domain may not be used to maximize social wealth by overcoming common pool problems and other market failures

⁶⁰ R. EPSTEIN, *supra* note 1, at 210.

⁶¹ *Id.* at 209-10.

⁶² *Id.* at 202-03.

⁶³ *Id.* at 204.

⁶⁴ *Id.* at 204-09.

and providing public goods. Yet nearly all reviewers have challenged Epstein's conclusion that the takings clause bars state-sponsored wealth redistribution, including transfer payments and progressive income taxes.

This criticism is due partly to Epstein's failure to set forth more clearly his rationale for the antiredistribution principle. In fact, Epstein seems to provide two different explanations for the principle. In the three short introductory chapters and the discussion of takings and justifications, the antiredistribution idea is developed in terms of the need to preserve property as a natural right. But beginning with the public-use chapter and continuing through the implicit compensation discussion to the concluding chapter on "Philosophical Implications," the antiredistribution principle is explicated in terms of a utilitarian rationale—the need to reduce rent seeking in the political process. Most reviewers have focused their attention on the first rationale. The second, however, is the one that should be taken seriously.

A. *Property as a Natural Right*

Epstein begins the book with the depiction of two pies, a small pie representing the state of nature, and a larger pie representing society after the introduction of government. In the state of nature, according to Epstein, individuals have natural rights, including property rights. But, he tells us, the state of nature is a Hobbesian state—one characterized by an ever-present danger of force and fraud—not a peaceful, Lockean state where there is enough and as good left over for everyone. Consequently, in the state of nature many resources must be committed to fending off depredations of property rights—so many resources, in fact, that no one is very well off. The primary rationale for the creation of the state, therefore, is the desire for a more efficient collective mechanism for enforcing property rights—a "super cop." This collective enforcement mechanism allows resources to be put to more productive ends, making the pie bigger. If the government is allowed to overcome market failures and supply public goods, the pie gets even larger.

Given that the introduction of government makes society richer, how is this "surplus" to be distributed? In principle, there are a number of possibilities for distributing the surplus, each of which would be compatible with the social contract tradition. One would be by the Pareto criterion. Under this approach, any distribution of the surplus would be justified so long as everyone kept at least the original share of property that he acquired in the state of nature. Equal distribution of the surplus, again preserving the original share, would be a second possibility. Equal distribution of surplus as modified by Rawls' difference principle would be a third possibility, and so on. Epstein, however, rejects all of these approaches (at least implicitly) and insists that the surplus generated by the introduction of the state must be allocated in strict *proportion* to the distribution of holdings that prevails in the state of nature. In the first

half of the book, Epstein seems to argue that this proportionality rule is required because property is a natural right. On closer examination, however, this claim unravels.

The social contract tradition suggests one possible justification for the proportionality rule—consent. In the state of nature, persons own property in unequal shares, based on their unequal endowments of talent and industry (or their unequal ability to resort to guile or force). If the state is viewed as a compact among all persons (even if only a hypothetical compact), then, arguably, agreement on such a compact would be reached only if it were guaranteed that the surplus generated by the formation of the state would be distributed in proportion to the original holdings.

This argument, however, is unpersuasive. Why would persons insist on proportionate distribution of the surplus—the Epsteinian criterion—rather than simply being content with the guarantee that no one would be worse off while some would be better off—the Paretian criterion? Because of envy? But if envy is a problem, why not insist on equal distribution of the surplus, or on equality as modified by the difference principle? Speculations about bargaining strategies upon entering into a social compact provide no convincing rationale for the proportionality rule. In any event, Epstein explicitly disavows Locke's notion of tacit consent as a foundation for the creation of government,⁶⁵ and hence presumably would also disavow tacit consent as a justification for the proportionality rule.

Epstein's idea that property rights originate in acts of first possession might also support the proportionality rule. In principle, it might seem that so long as the original value attributable to the act of first possession is protected against collective interference, it would not matter how the surplus is distributed. But today—long after most resources have been reduced to possession by someone—the proportion of wealth attributable to first possession is relatively tiny compared to that attributable to productive activity that takes place in civil society. Moreover, the part attributable to original possession is inextricably entangled with this larger portion of wealth. In these circumstances, the administrative costs of ferreting out the wealth attributable to first possession and of preserving this increment against collective interference would be prohibitive. In practice, whatever principle we select to govern the distribution of the surplus would determine the distribution of *all* property. Arguably, therefore, the surplus must always be distributed in proportion to prior holdings to preserve the original increment in value attributable to first possession.

This line of argument, however, only pushes the inquiry back another step: why should we regard property as a natural right simply be-

⁶⁵ *Id.* at 15.

cause it originates in acts of possession?⁶⁶ In the concluding chapter of his book, Epstein appears to disavow the notion that first possession is anything other than a rule of convenience, grounded in considerations of utility.⁶⁷ In subsequent writing, he has embraced this view explicitly.⁶⁸ But if first possession is merely a utilitarian rule adopted by society as a matter of convenience, rather than the foundation for property as a natural right, then it cannot justify the proportionality rule. Viewed as a rule of utility, first possession has no implications for the correct distribution of wealth.

Finally, the idea that property is a natural right, in the sense of an entitlement subject to explicit constitutional protection, might justify the proportionality rule. If we accept Epstein's proposition that the framers specifically intended to adopt Blackstone's three-part definition of property and to bar any state redefinition of property inconsistent with that definition, then this would bar one method of altering the preexisting distribution of wealth: the state could not reduce existing holdings by redefining the incidents of property. The constitutionalization of the Blackstonian definition, however, would not prevent the state from taking property in return for just compensation and using this property to favor one faction over others. Thus, in order to preserve the preexisting distribution of wealth, it also would be necessary to hypothesize that the framers specifically intended that the public-use limitation would restrict the power of eminent domain to projects that preserve the preexisting shares of wealth. In tandem, the constitutionalization of Blackstone's definition of property and the constitutionalization of Epstein's view of public use would seem to insulate the existing distribution of wealth from any legislative alteration.

As other reviewers have noted, however, the evidence that the framers intended to constitutionalize Blackstone's definition of property is thin at best.⁶⁹ Moreover, there is no evidence that the framers contemplated Epstein's interpretation of the public-use limitation. Absent a convincing showing that the framers specifically intended to adopt *both* of these results when they drafted the takings clause, Epstein cannot rest on the authority of the Constitution *simpliciter*. Rather, he is forced to do what every other constitutional scholar must do—develop a normative argument in support of his preferred interpretation of the Constitution, and try to convince the judiciary, as guardian of the constitutional

⁶⁶ Actually, it is highly problematic to speak of first possession as a "natural" system that operates outside the state or organized social system. For a trenchant critique of first possession as a "natural" means of property acquisition, see Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

⁶⁷ R. EPSTEIN, *supra* note 1, at 336-37.

⁶⁸ See Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. — (forthcoming).

⁶⁹ See Grey, *supra* note 4; Note, *supra* note 6; see also Comment, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1982).

language, that his argument is correct.⁷⁰ Again, the observation that property is a constitutional right merely takes us back to the initial inquiry. The proportionality rule must be supported by a convincing argument on its behalf, not an assertion that property is a natural right.

At the end of the book, Epstein seems to recognize this weakness. He criticizes Robert Nozick for resting on the "bare assertion" that property is a natural right because it is "important" or "inherent in human nature."⁷¹ What we need, Epstein counsels, is a consequentialist argument that supports the primacy of private property against legislative encroachments. Thus, in the end, Epstein is a utilitarian, at least an "indirect utilitarian."⁷²

B. *Property as a Utilitarian Construct*

What then is the utilitarian argument for the proportionality rule? For the attentive reader who has made it past the discussion of public use, the answer should be clear. As Epstein puts it, "the takings clause is designed to control rent-seeking and political faction. It is those practices, and only those practices, that it reaches."⁷³ If the prior distribution of wealth can be changed by the state, Epstein believes, then the resources of society will be consumed in a factional struggle to capture the state apparatus in order to obtain benefits for one faction at the expense of everyone else—a negative sum game. On the other hand, if wealth redistribution is not permissible, then the only interventions that will receive public support will be those that enlarge the size of the pie—a positive sum game.

In economic terms, Epstein's ultimate value is wealth maximization. Further, he recognizes that because of market failures such as free-rider and holdout problems, collective action is necessary to maximize wealth. But he also has a very pessimistic view of the possibilities for achieving effective (that is, wealth-maximizing) collective action through majoritarian decisionmaking. For Epstein, it is possible that the democratic state will act to further the general interest, but it is just as likely to be captured by factions that seek to enrich themselves at the expense of the general good. Thus, in order to maximize the wealth-maximizing potential of the state, Epstein advocates a conception of the takings clause designed to operate as a powerful countermajoritarian check on the excesses of the democratic legislature, a check that will eliminate the rent-seeking proclivities inherent in majoritarian decisionmaking.

Once Epstein's consequentialist argument for the antiredistribution

⁷⁰ Grey, *supra* note 4.

⁷¹ R. EPSTEIN, *supra* note 1, at 335; see R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

⁷² R. EPSTEIN, *supra* note 1, at 337 (citing Gray, *Indirect Utility and Fundamental Rights*, 1 Soc. Phil. & Pol. 73 (1984)).

⁷³ *Id.* at 281. The rent-seeking argument comes through more clearly in Epstein's article on the contracts clause. See Epstein, *supra* note 59.

principle is understood, then *Takings* as a whole begins to make more sense. Property is a natural right, not because this is a self-evident truth, as Epstein seems to suggest in the first part of the book, but because this conception of property bars interest groups from contriving to secure self-serving legislative redefinitions of entitlements. Similarly, the physical invasion conception of the police power is not a self-evident truth, again as suggested in Epstein's initial discussion, but a formalism that serves to minimize legislative and regulatory struggles over the appropriate scope and definition of the police power. The public-use doctrine is designed to eliminate rent seeking over the distribution of the *surplus* generated by takings. If the surplus were divided in any way other than in accordance with existing shares of wealth—if we divided it by a Pareto principle or divided it equally—a differential advantage would result for one group relative to another, which would induce rent-seeking behavior. Finally, the requirement of actual compensation for all takings (either explicit or in-kind) is designed to eliminate rent seeking over the distribution of *existing shares* of wealth. If we allowed the state to proceed on some other basis—for example, by a Kaldor-Hicks⁷⁴ or pure wealth-maximization standard—similar legislative struggles would ensue between the winners and losers.

In short, what starts out as a Lockean treatise ends up as an essay on public choice theory.⁷⁵ Epstein's own explanation for this shift in the nature of the argument, advanced in conversation, is disarmingly simple: *Takings* was seven years in writing, during which time his views changed. This is fair enough, but at least judging by the reviews, many readers never realized that Epstein is not really a Lockean or a libertarian but a utilitarian with an especially grim view of majoritarian decisionmaking. Although seven years is a long time, Epstein should have done one more draft of the book, integrating the consequentialist rent-seeking theory of the second half with the natural rights theory of the first half. The book would have been stronger for the effort.

IV. EPSTEIN'S CONTRIBUTION TO TAKINGS JURISPRUDENCE

Epstein's rent-seeking theory of the takings clause can best be appreciated by contrasting it with other compensation theories. Three explanations for the compensation principle are especially prominent in the

⁷⁴ The Kaldor-Hicks standard requires that the winners gain enough that they could in theory compensate the losers and still be better off themselves, while not requiring actual compensation.

⁷⁵ One of *Takings*' oddities is that it fails to mention public choice literature, even though that literature obviously is fundamental to the development of Epstein's ideas and has been cited by Epstein elsewhere. See Epstein, *supra* note 59, at 714 nn.28-29 (citing TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. (1980) and J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962)). Other notable works that reinforce Epstein's concern with rent seeking include J. BUCHANAN, THE LIMITS OF LIBERTY (1975), and M. OLSON, THE RISE AND DECLINE OF NATIONS (1982).

existing literature on the takings clause. These explanations can be described as the "equal treatment," "insurance," and "fiscal illusion" theories.⁷⁶

A. *Equal Treatment as a Justification for Compensation*

The justification for compensation that emerges most clearly from the opinions of the Supreme Court is that of equal treatment. Simply put, it is said to be "unfair" to make a few pay for the good of the many. As the Court stated in an oft-quoted case, the government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁷⁷ The equal treatment theory also finds impressive academic support. Laurence Tribe notes that the ultimate purpose of the takings clause is to limit the arbitrary sacrifice of the few to the many.⁷⁸ Frank Michelman explains takings law in terms of Rawlsian justice.⁷⁹ John Ely concludes that the compensation principle reflects a general pattern of judicial protection of underrepresented minorities.⁸⁰ In each of these views, the compensation principle becomes yet another variant on a central theme of modern constitutional law: judicial intervention in support of "discrete and insular minorities."⁸¹

The rhetoric of equality has a powerful appeal. Suppose *A* has his land taken by the city for a park. The proponent of the equal treatment theory asks in effect: Why must *A* be required to make this sacrifice when other property owners have not been asked to do so? *A*, a minority of one, has been asked to shoulder a burden not imposed on other similarly situated persons. Thus, in order to assure equality of treatment, *A* should be compensated.

The problem with the equal treatment theory is that it fails to explain why some forms of "unequal" treatment are compensated while others are not. Suppose that, rather than having his land taken for a park, *B* has had his boat seized after being caught using it to smuggle drugs. Is *B* entitled to compensation for his misfortune? No, we are told, there is a relevant moral distinction between the claims of *A* the landowner and *B* the drug smuggler. But this "moral distinction" does not itself follow from the idea of equal treatment. *B* the drug smuggler has been subject to unequal treatment no less than *A* the landowner. The

⁷⁶ This is not to say that other theories of the takings clause or the police power have not been significant. See, e.g., Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

⁷⁷ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

⁷⁸ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9.4 (1978).

⁷⁹ Michelman, *supra* note 53, at 1218-24.

⁸⁰ J. ELY, *DEMOCRACY AND DISTRUST* 96-97 (1980).

⁸¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

same point can be made with respect to *C* the polluter subject to environmental regulations, *D* the employer subject to unanticipated changes in workers' compensation laws, and even *E* the prosperous professional subject to progressive rates of taxation. Clearly, some limiting principle other than equal treatment is needed to explain why compensation should be forthcoming in some cases but not in others.

The root of the problem, as Peter Westen and others have argued, is that the idea of equality is by itself "empty."⁸² We are told that the law must treat all similarly situated persons alike. But what does it mean to be "similarly situated"? As a logical matter, before saying that persons are similarly situated, one must first specify some set of substantive rights or entitlements that cannot be taken from anyone, or some set of legal or moral obligations that all persons must respect, or both.⁸³ In deciding when to compensate, it is this antecedent conception of substantive rights and obligations that matters, not the rhetoric of equality.⁸⁴

Epstein, as we have seen, also draws upon the idea of equal treatment. Yet because Epstein's invocation of equality is anchored in a comprehensive theory of substantive rights and obligations, it is not empty. Equal treatment, for Epstein, is used only to determine whether implicit compensation has been given in large-number takings. "Unequal" refers to the situation created by a statute or regulation that is either designed to, or has the effect of, altering the preexisting distribution of wealth. In this way, Epstein builds on the equality theme in the takings literature, while avoiding the trap into which other exponents of that theme have fallen.

B. The Insurance Theory and the Costs of Noncompensation

In addition to his articulation of the compensation principle based on the idea of equal treatment,⁸⁵ Michelman is also the father of a second

⁸² See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

⁸³ See Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049 (1979); Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

⁸⁴ This does not mean that the Court is incapable of deciding takings cases without a coherent theory of substantive rights and obligations. What happens here, as in the equal protection context, is that the Court reasons by analogy from certain dominant paradigms. In the takings context, the dominant paradigm seems to be the condemnation of a fee simple from an innocent owner. No one questions that compensation is required in the paradigmatic case. The issue with respect to any other alleged taking then becomes how similar this is to the paradigm. Distinctions emerge when the taking is accidental; when it involves less than the fee; or when it is in response to some previous conduct of the owner, such as the commission of a crime or the maintenance of a nuisance.

Although this method of reasoning by analogy allows the Court to decide particular cases, it is not satisfactory as theory. The unanswered question, obviously, is why we choose one paradigm over another as the basis for determining when inequalities of treatment affect persons who are "similarly situated." The rhetoric of equal treatment cannot justify our selection of a dominant paradigm any more than it can justify the resolution of individual cases.

⁸⁵ Michelman, *supra* note 53, at 1218-24.

justification for the compensation principle—the insurance theory. According to this theory, the government should compensate in order to overcome the disutilities associated with risk—specifically, the risk of governmental actions that reduce or destroy the value of private property. Michelman originally framed the insurance theory in terms of “demoralization costs.” He defined those costs as the sum of the disutilities that accrue to the losers and their sympathizers when they realize that no compensation is available for present losses, plus the value of the decline in future production caused by the realization that no compensation will be forthcoming for similar losses in the future.⁸⁶ Subsequent commentators have made the point more succinctly, observing that most people are risk averse, and that the risk of loss from government takings or regulation, no less than the risk of loss from earthquake or fire, imposes real costs that they will seek to avoid.⁸⁷ Compensation in this view performs the same function as insurance: pooling (or in this case socializing) risks to reduce total costs (and thereby increase the wealth) of society.

The insurance theory is not “empty” in the same sense as the equal protection theory. Following Michelman, we theoretically could measure the disutility associated with the risk of adverse governmental action (measured by the willingness to purchase insurance) and weigh this against the “settlement costs” (administrative costs) of a compensation scheme.⁸⁸ In areas where there were net benefits, we would compensate.

Nevertheless, there are two fundamental problems with the insurance theory.⁸⁹ First, if compensation performs the same function as insurance, then it is necessary to explain why private insurance (or other means of minimizing risk, such as diversification of holdings) would not handle the potential risks of loss caused by governmental action as well as, or better than, *ex post* compensation does. Blume and Rubinfeld have argued that because of problems of adverse selection and moral hazard, a private insurance market would not operate in this area.⁹⁰ Thus, they contend, it is *ex post* compensation or nothing. But it is not clear why adverse selection and moral hazard are more serious problems in this area than in any other area where risks arise primarily from acts by human agents (rather than from natural disasters). For example, why would problems of adverse selection and moral hazard be greater in insuring against government takings than, say, insuring against professional malpractice or breach of fiduciary duties by corporate directors?

⁸⁶ *Id.* at 1214.

⁸⁷ See Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984).

⁸⁸ The cost of compensation itself would be ignored under this type of analysis, as a mere wealth transfer not having “real” resource effects.

⁸⁹ The following draws upon Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986).

⁹⁰ Blume & Rubinfeld, *supra* note 87, at 592-97.

In the end, the Blume and Rubinfeld thesis proves too much; if adverse selection and moral hazard were as insuperable as they suggest, there would be no insurance against many kinds of risks for which insurance coverage is routinely available.⁹¹

Second, the insurance theory fails to account for the fact that the losses caused by governmental action are often deliberately inflicted to provide incentives for private parties to take or avoid certain kinds of actions. A typical pollution control regulation, for example, is imposed at least in part to discourage polluting activities, through cost internalization. If the government compensated for such losses, this incentive effect would be eliminated. The insurance theory, by itself, provides no way to differentiate between those areas where we award compensation to spread the risk and those areas where we deny compensation to provide correct incentives. Thus, the insurance theory not only rests on a dubious argument about market failure; it, like the equal treatment theory, is also incomplete. The insurance theory fails to explain why we willingly compensate in some cases while refusing to compensate in others.

Epstein avoids both of these problems, but at a cost. Unlike the insurance theory advocates, Epstein does not rely on a questionable theory about general market failure. Moreover, Epstein has no trouble determining when incentive effects should overcome the compensation principle. His theory of justifications, and especially the physical invasion theory of the police power, clearly demarcates the boundary between compensable and noncompensable takings.

Nevertheless, there is something curiously incomplete about a theory of the takings clause that makes little mention of reliance, risk, and demoralization costs. Indeed, the only time reliance interests are given serious consideration by Epstein is when he invokes them as the reason for *not* invalidating Social Security and other entitlement programs, which otherwise would be unconstitutional takings under his scheme.⁹² When Epstein discusses rent control, windfall profits taxes, and zoning, the reliance interests of those adversely affected by these measures get virtually no play.

Perhaps Epstein believes that, absent government compensation, the risks of government takings would be handled by private insurance or by

⁹¹ Blume and Rubinfeld mention in passing a third problem, which might be a more significant barrier to private insurance: the difficulty of setting an appropriate premium for low-probability events. *Id.* at 598. If insurance were provided only for physical appropriations, it might be possible to determine the probability of loss and the probable magnitude of loss. But if insurance coverage were extended to losses arising from governmental regulation, the number of contingencies would likely make the underwriting task exceedingly difficult.

⁹² R. EPSTEIN, *supra* note 1, at 326. Epstein clearly recognizes the distinction between compensation because of risk aversion and compensation as an antidote to rent seeking. *Id.* at 203. In this passage, he suggests that since persons *are* risk averse, the former function is important. Throughout the book, however, it is the danger of rent seeking that drives the analysis.

other mechanisms, such as diversification of holdings or leasing rather than owning. In this view, the insurance theory is trivial—something to consider in the transition from a system of compensation to a system of no compensation, but otherwise inconsequential. The only enduring reason for providing compensation would be to eliminate the incentives to engage in rent seeking. But if this is Epstein's intent, then he needs to explain why Social Security recipients and other beneficiaries of government transfer programs should not be expected to purchase private insurance (or otherwise protect themselves) against the eventuality that some future Epsteinian judge will declare all government entitlement programs unconstitutional. Is it because Epstein implicitly assumes that private insurance or other diversification strategies cannot realistically be expected to handle this kind of risk? If so, then does this example of "market failure" suggest that the insurance theory provides at least a *partial* explanation for why we should compensate for more conventional takings?

C. *Noncompensation and the Dangers of Fiscal Illusion*

A third justification for the compensation principle, "fiscal illusion," also draws upon economic reasoning.⁹³ According to this view, if the government is not required to compensate for losses inflicted by its actions, then it will tend to overregulate. This is because the costs of government regulations are externalized to those who are regulated, rather than internalized in the government's budget. Without some method of internalization, the costs of a regulation will not be factored into the decision to regulate. Thus, according to this view, compensation is necessary to ensure that the government will adopt efficient regulations.

The fiscal illusion theory suffers from a number of weaknesses. First, like the insurance theory, the fiscal illusion theory overlooks the incentive effects problem.⁹⁴ If the government imposes a tax or regulation on a certain activity in order to internalize that activity's social costs, the incentive effects that the tax or regulation was designed to achieve would be eliminated if we required compensation.

Second, since the government does not ordinarily seek restitution for the benefits conferred by its activities, both costs *and* benefits of government activity are externalized. The fiscal illusion theory, by itself, does not explain why externalization of costs is a more serious problem than externalization of benefits.⁹⁵

Finally, the fiscal illusion theory presupposes that the government will perform a correct cost-benefit calculation if all costs of government

⁹³ See, e.g., R. POSNER, *supra* note 34, at 51; Blume & Rubinfeld, *supra* note 87, at 620-22; Blume, Rubinfeld & Shapiro, *The Taking of Land: When Should Compensation Be Paid?*, 99 Q. J. ECON. 71, 88-90 (1984); Sax, *Takings and the Police Power*, *supra* note 76, at 62-67.

⁹⁴ Kaplow, *supra* note 89, at 572-74.

⁹⁵ *Id.* at 568-69.

activity are internalized. This assumes an idealized model of government decisionmaking that may not reflect reality. If the reality is otherwise—if, for example, agents of the government seek to enrich themselves at the expense of society, or the government is subject to capture by rent-seeking factions—then cost internalization will not guarantee correct cost-benefit calculations.

Epstein's theory can be viewed as an extension and elaboration of the fiscal illusion approach, but one that manages to avoid most of its weaknesses. As previously observed, the incentive effects dilemma is eliminated by Epstein's theory of the police power. Moreover, Epstein does not make the mistake of focusing on the costs of regulation at the expense of benefits; his account of the public-use limitation recognizes that government action can confer benefits as well as impose costs, and that the benefits pose as much of a danger of skewed incentives as do the costs. Finally, Epstein's theory does not presuppose an ideal model of government. He is more than realistic about the pitfalls of democratic governance and the danger that self-interested factions will defeat the general interest. Indeed, his entire analysis rests on, and is designed to allay, these problems.

D. Compensation and Epstein's Vision of Politics

If nothing else, *Takings* forcefully demonstrates the relationship between one's basic view of human nature and the political process, on the one hand, and one's view of the desirability of compensation, on the other. Pessimists about the human condition, including many conservatives, believe that mankind is inherently depraved, and that the most we can hope for from the state is that it will mitigate the potential for evil inherent in human nature. In contrast, optimists about the human condition, including many liberals, believe in the perfectability of man and trust that given the right political institutions, nothing can stop the onward march of human progress. This distinction, or something like it, seems to separate Epstein from rival takings clause theorists.

Epstein's vision is essentially Hobbesian. Although he believes that individuals are capable of civic virtue—including "humanitarian endeavors"⁹⁶—Epstein's world is filled with greedy and rapacious people waiting at every turn to exploit their fellow citizens. By a process that Epstein only dimly explains, in the realm of public affairs the greedy and rapacious tend to dominate the virtuous. As he cryptically puts it, "[t]he bad will drive out the good in a Gresham's law of political life."⁹⁷ Civic virtue can flourish only in private institutions: family life, voluntary associations, and private charities. Thus, the compensation principle for Epstein stands as a great bulwark protecting prosperity, freedom, and

⁹⁶ R. EPSTEIN, *supra* note 1, at 344.

⁹⁷ *Id.* at 345.

civic virtue from a state easily dominated by its most self-serving elements.

The partisans of the equal treatment, insurance, and fiscal illusion theories, in contrast, tend to be much more optimistic about public institutions. They either favor governmental intervention in economic affairs, or at least take a neutral stance about whether governmental regulation is on balance a good or a bad thing.⁹⁸ For these rival theorists, compensation is a way of ameliorating some of the harsh consequences of an activist state, but it does not call into question the very existence of that state.

In this regard, nothing could be more striking than the contrast between Epstein and Louis Kaplow, the author of an important recent article on the compensation principle.⁹⁹ Kaplow presupposes that government regulation is *always* efficient.¹⁰⁰ Given this happy state of affairs, he explores various arguments for awarding compensation—including the insurance theory and the fiscal illusion theory—and, finding them wanting, concludes that one should *never* award compensation. Epstein, in contrast, begins (at least implicitly) by assuming that governmental regulation is usually inefficient—an attempt by one faction to create preferences or barriers for its own benefit. Given this gloomy picture, he is driven to the conclusion that compensation *always* should be provided, except when one of several narrow justifications apply.

In the final analysis, the question whether *Takings* is the work of a crackpot, as the critics maintain, or a blueprint for societal happiness and prosperity, as Epstein would have it, may turn on nothing less than which vision of the human condition is most accurate.

V. RECONSIDERING THE CRITIQUE OF *TAKINGS*

We are now in a position to reassess the criticisms of *Takings*. The most commonly voiced objections are that Epstein fails to show how his theory is required by the Constitution, and that Epstein misreads Locke. Neither point, however, even if we concede its validity, undercuts the major thrust of Epstein's work. Epstein succeeds in developing a normative theory of the role of the compensation principle in a world in which governmental processes are viewed as dominated by rent seeking. His

⁹⁸ See, e.g., Blume & Rubinfeld, *supra* note 87, at 583; Kaplow, *supra* note 89, at 521; Michelman, *supra* note 53.

⁹⁹ Kaplow, *supra* note 89.

¹⁰⁰ *Id.* at 521 ("the discussion assumes that the reforms themselves are desirable at the time they are made"). Kaplow subsequently relaxes this assumption in order to consider the possibility that compensation might be warranted because of fiscal illusion. He concludes, however, that a policy of compensating in order to overcome "biases and other imperfections" on the part of the government will entail the sacrifice of "some economic efficiency." *Id.* at 567. He does not consider the possibility that because of the rent seeking generated by uncompensated takings, economic efficiency *requires* compensation.

views about constitutional interpretation and Locke are essentially irrelevant to this achievement.

Although these objections are essentially peripheral, this does not mean that the book is not open to serious criticism. Two questions in particular require further inquiry. First, is Epstein correct in his pessimistic account of public life, or has he painted an unduly gloomy picture? Second, if Epstein is correct in his assessment of politics, if only in part, then is his prescribed remedy appropriate, or are there other mechanisms for dealing with rent seeking that would serve us better than judicial enforcement of an enlarged and invigorated takings clause?

A. *Epstein's Vision of Democratic Government*

It is important to note that rent seeking, the *bête noire* of *Takings*, is neither technically nor factually limited to the political sphere. An economic rent is any payment to a factor of production that is greater than what that factor could obtain in any alternative use (its opportunity cost). Economic rents are thus difficult to distinguish from profits. The term "rent seeking" tends to be used when competition for economic advantage is thought to have no impact on the allocation of resources or otherwise to leave society worse off in terms of net total wealth; the term "profit seeking" is used when competition for economic advantage reallocates resources to higher valued uses and thereby leaves society better off.¹⁰¹

Analytically, it is possible to distinguish between three types of rent seeking. First, individuals or groups can seek to obtain rents by *changing* the rules of the game. This is the type of rent seeking with which Epstein is concerned. Tariffs, barriers to entry, and rent control are all examples of rent extractions through rule changes. Second, individuals or groups can seek to obtain rents *within* the rules of the game. This type of rent seeking is difficult to distinguish from profit seeking, but some lawful economic competition clearly impedes rather than advances the efficient allocation of resources. Examples of this type of rent seeking include common pool situations, in which individual property owners hold out for a disproportionate share of gains as a condition of consent to collective action; long-term contracts subject to changed circumstances, in which one party engages in strategic behavior in order to get the other to terminate or renegotiate the contract; and civil trials, in which one or both parties refuse to settle in an attempt to obtain a better outcome through litigation. Third, individuals or groups can seek to obtain rents *outside* the rules of the game. Theft, bribery, and looting are all examples of this form of rent seeking.

Implicit in *Takings* are two propositions. First, Epstein suggests

¹⁰¹ See Tullock, *Rent Seeking and Profit Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, *supra* note 75.

that the political process is dominated by rent-seeking behavior of the first type, through which parties attempt to change the rules of the game. Second, he apparently believes that outside the political process, rent seeking within the rules of the game or outside the rules of the game is either *de minimis* or can be handled by nonproblematic methods of social control. Both of these propositions are, if not wrong, at least in need of serious qualification.

As to the first, it is clear that rent seeking cannot explain everything that occurs within the public sector. Epstein himself must acknowledge that a wide variety of public regulations—ranging from criminal laws to statutes of limitation to unitization or proration schemes for oil and gas production—either satisfy his police power criterion or his implicit compensation test and hence cannot be ascribed to factional self-interest. We need a theory of the legislative process that can account for the enactment of these measures as well as for tariffs and milk marketing orders. Furthermore, other kinds of statutes, such as the Endangered Species Act, are not easily placed under either the private-interest or the public-interest model, but rather reflect widely shared moral or cultural sentiments.¹⁰² Our theory must somehow account for these measures, too.

I believe there is a great deal of truth in Epstein's depiction of the modern American political process, more so than many law professors care to admit. This may account, at least in part, for the intensely hostile reaction to Epstein's book. Most academics retain a deep, abiding faith in government as an institution for social good. Epstein's model of politics threatens this faith, triggering strong emotions that often overcome the analysis. On the other hand, it is clear that Epstein's picture of the governmental process is seriously incomplete, and probably too pessimistic. Casual observation of such recent developments as the tax reform legislation suggests that the legislative process is powered by a far more complex mix of factors than Epstein acknowledges.

The second proposition implicit in the book—that rent seeking is not a serious problem outside the public sector—is equally problematic. As to rent seeking within the rules of the game, Epstein apparently believes that holdouts and strategic bargainers can be controlled either by market forces or by the judicious use of the power of eminent domain (with bonus compensation to holdouts and strategic bargainers when the exercise of eminent domain would not result in a traditional public good). But markets are not perfectly competitive, and eminent domain is an administratively costly way to overcome holdout and strategic bargaining problems. If we apply a general utilitarian criterion to measure social institutions, it is not clear why governmental regulation beyond that justified by Epstein's police power is not equally appropriate to con-

¹⁰² See Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) (developing trichotomy along the lines suggested here, but offering no theory of when these different motivations will dominate).

trol at least some instances of rent seeking within the rules of the game. Of course, this in itself can be seen as facilitating rent seeking by changing the rules, but it is an empirical question whether institutional rules should be designed primarily to limit rent seeking by changing the rules or to limit rent seeking within the rules.

Epstein also sees little problem with rent seeking outside the rules. His basic position is that those who persist in breaking the rules should be suppressed through the police power. In effect, Epstein's vision of the takings clause requires that dissidents be dealt with by applying the stick rather than the carrot. But how do we know that the police power will always be adequate to deal with social unrest? This is the question that many reviewers have raised indirectly by asking whether redistributive programs are justified on a theory of the "big bribe"—the need to buy off the poor and downtrodden to keep them from taking to the streets.

The issue is more problematic than Epstein acknowledges.¹⁰³ Consider the dilemma of land reform faced by many Latin American countries. When populist regimes are in power, the government will often expropriate land and redistribute it among the peasants. Epstein would argue that these measures merely dissipate social resources as the wealthy maneuver to avoid having their property targeted for expropriation, and the peasants maneuver to get free land. On the other hand, when authoritarian regimes are in power, the property of the rich may be secure against governmental redistribution, but the peasants may join guerrilla movements and try to wrest it away from the wealthy by force.

Which is worse—the waste caused by rent seeking in trying to change the rules, or the waste caused by rent seeking outside the rules? This too is an empirical question that cannot be answered a priori. Epstein sees little need to permit rent seeking outside the rules, other than perhaps occasionally "providing free food in a flood-torn town to reduce the chances of looting."¹⁰⁴ But others may reasonably disagree. In impoverished third world countries with highly unequal distributions of wealth, reasonable persons may even advocate "land reform"—a polite phrase for confiscation—as a second-best alternative to revolution. The problems of the developing nations may seem remote from our own, and it is tempting to condemn legislation such as mortgage moratoria and labor laws as inevitably short-sighted. But this may not be the way things looked to the Supreme Court in the 1930s, against the backdrop of widespread industrial collapse and talk of revolution.¹⁰⁵ If one is devel-

¹⁰³ See R. EPSTEIN, *supra* note 1, at 315-17.

¹⁰⁴ *Id.* at 316.

¹⁰⁵ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) (upholding National Labor Relations Act in part because of congressional perception that it was necessary "to protect interstate commerce from the paralyzing consequences of industrial war"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (upholding mortgage moratorium law in part because of "emergency" created by Depression and massive foreclosures in agricultural areas).

oping a universal political philosophy—which is what Epstein purports to be doing—then the analysis should be applicable in bad times as well as in good times, in times of social tension and unrest as well as peace and domestic tranquility.

B. *Alternatives to the Takings Clause*

Finally, even if we accept Epstein's judgment that rent seeking through the political process is a major problem, the question remains whether the proper solution is for the federal judiciary to discipline the politicians in the name of the takings clause.

There are a number of problems with judicial activism in support of economic rights. One is the question of competence. Will the judiciary understand a theory that sustains government intervention to overcome rent seeking within the rules—such as common pool problems—and be able to differentiate this from rent seeking by changing the rules? Another is the question of public support. Is it meaningful to speak of an enlarged role for the judiciary in an area where there is no strong social consensus in support of activism?¹⁰⁶ The experience of judicial resistance to the New Deal should stand as a painful reminder that sometimes strategic retreat is the better part of wisdom, if not of valor. Finally, there is the question whether the judiciary itself would remain effectively insulated from pressure from those seeking to obtain personal advantage by changing the rules. So far, of course, the federal judiciary has managed to stay remarkably free from direct partisan influence. But judicial purity, especially in a world with dramatically heightened stakes, should not be taken for granted.

An alternative to Epstein's takings clause is suggested by the writings of James Madison, who generally shared Epstein's pessimistic view of the political process.¹⁰⁷ Madison advocated a structural solution to the problem of rent seeking, or factions as he called them, rather than a bill-of-rights approach. Under this approach, policymaking is divided among different levels of government—the federal government, the states, and localities; and a system of checks and balances constrains policymaking at the federal level. The effect of this divided, internally checked political system is to raise the costs of government action, similar to the effect of a supermajority voting rule. Thus, the structural solution works in the same direction as Epstein's takings clause: it makes it more difficult to use the government to modify the status quo.¹⁰⁸ This in

¹⁰⁶ See Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703 (1985).

¹⁰⁷ See, e.g., THE FEDERALIST Nos. 10, 14, 44 & 51 (J. Madison) (J. Cooke ed. 1961).

¹⁰⁸ Epstein recognizes the structural alternative early on in the book, but never returns to this theme. See R. EPSTEIN, *supra* note 1, at 16-18. In particular, he never asks why, given the pressure of competition between states for voters and tax dollars, it is necessary for the takings clause of the fifth amendment to apply to the states through the due process clause of the fourteenth amendment. See *id.* at 18.

many respects is a more attractive solution to the problem of rent seeking through the political process than is direct judicial enforcement of the substantive prohibitions of the Bill of Rights.

The structural solution, like the bill-of-rights solution, would have to be enforced by the federal judiciary. But it would not require any economic expertise on the part of the judiciary, only an understanding of the basic tenets of federalism and separation of powers, and their Madisonian rationales. Moreover, it would avoid the need for direct judicial confrontation with the politically accountable branches of government on matters of substantive policy. Thus, the structural solution raises fewer problems of competence and legitimacy than does the bill-of-rights solution.

The structural solution to the rent-seeking problem, like the bill-of-rights solution, would also call for a revitalization of certain parts of the Constitution that have been ignored or underenforced by the Supreme Court. One item on the agenda would be a revitalization of the limitation on federal power inherent in the commerce clause.¹⁰⁹ Limiting the power of the federal government, and concomitantly expanding the power of the states, would tend to reduce the incidence of rent seeking because competition for voters and tax dollars among the states would provide the necessary constraining force on redistributive legislation. Another item on the agenda would be a revival—or perhaps a further revitalization¹¹⁰—of separation-of-powers principles. The President, Congress, and the federal judiciary all have different perspectives and different constituencies. If all three branches must concur in order to enact effective legislation, this too will constrain rent seeking.

The structural solution is not perfect—it would allow some redistributive measures to pass into law, and it might make it harder to repeal these measures once they have been enacted. But it has an attractive flexibility and subject-matter neutrality that suggest it might be more durable than Epstein's takings clause. This does not mean that more vigorous substantive protection of property rights would not be a desirable complement to a structural approach—especially in areas where jurisdictional competition and checks and balances may not operate well, such as local land use control. But a glance at the political picture around the world suggests that Madison's solution was not all that bad. We should think long and hard before giving up that solution for an approach that boasts of greater theoretical purity, but also threatens to generate greater tensions within the institutions of government and American society generally.

¹⁰⁹ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which comes close to declaring the commerce clause nonjusticiable.

¹¹⁰ See T. Merrill, *Two Traditions in American Administrative Law* (unpublished manuscript) (describing ways in which separation-of-powers tradition has been revived by Supreme Court in recent years).