

Commentary

Learning Nothing and Forgetting Nothing: Richard Epstein and the Takings Clause

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YOU PROBABLY DIDN'T KNOW IT, but workers' compensation is unconstitutional. So are welfare laws, Social Security, the progressive income tax, minimum wage and maximum hour legislation, the National Labor Relations Act, and almost all zoning. I discovered all this from reading Richard Epstein's new book on the takings clause.¹ In fact, I learned that the New Deal was a big mistake² and now we're up to our ears in one darn unconstitutional confiscation of property after another.

Richard Epstein is a well-respected professor of tort law at the University of Chicago Law School. In addition to being the author of an excellent casebook on the law of torts,³ Epstein has, over a number of years, worked out an elaborate theory of legal and political obligation.⁴ In many ways, this book is his crowning

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

2. *See, e.g., id.* at 281. ("The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end.") (emphasis omitted).

3. R. EPSTEIN, C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* (4th ed. 1984).

4. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Epstein, *Not Deference, but Doctrine: The Eminent Domain Clause*, 1982 S. CT. REV. 351; Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOODE HALL L.J. 433 (1982); Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982); Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980); Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980); EPSTEIN, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Epstein, *Intentional Harms*, 4 J.

achievement. Although I strongly disagree with its assumptions, methodology, and conclusions (as I shall make abundantly clear), this work brings many of the themes of Epstein's earlier writings together into a satisfying whole. It combines his obvious love of the common law (and especially the common law of torts) with his more recent interests in constitutional law and property.

In essence, Epstein is arguing that the takings clause of the fifth amendment, which says that private property shall not be taken except for public use and with just compensation, is inconsistent with anything more than a very limited form of government. All of the modern regulatory devices mentioned above are takings of private property, and are either not for a public use or are not compensated. For this reason, all of them violate the U.S. Constitution.

Since his is a constitutional theory, Epstein needs to explain why his surprising conclusions are mandated by the Constitution. In skeletal terms, his argument is the following:

1. The Constitution should be interpreted in accordance with the intent of its Framers; therefore
2. the just compensation clause of the fifth amendment enforces the Framers' theory of property rights.
3. The Framers' theory of property rights was John Locke's theory of property rights.
4. Locke's theory of property rights is Epstein's theory of property rights; therefore
5. the just compensation clause enforces Epstein's theory of property rights.

One can question this argument at many points. First, it is by no means clear that Epstein has hit upon the proper interpretational theory of the Constitution. The standard ploy of looking to "original intent" is never as easy as it might appear. My problem with most versions of the original intent argument stems from the fact that (for example) I am convinced that sexual discrimination violates the equal protection clause of the fourteenth amendment regardless of what anybody living in 1866 thought. Call me antimajoritarian, but that's just how I come out on the subject. Now it is possible to get around this problem, as Ronald Dworkin does, by arguing that the intent of the Framers does not regard specific instances, but general commitments, to equality, to fair play and so

LEGAL STUD. 391 (1975); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

on.⁵ However, this sort of “intent” will not get Epstein what he wants, because he does not want to extend a theory of “takings” of “property” (and thus redefine property rights) in ways that go beyond Locke’s theory.⁶

Even granting that Epstein’s general theory of constitutional interpretation is correct, it is not at all clear that the Framers enacted John Locke’s theory of property rights into the Constitution to the exclusion of all other competing theories.⁷ To pursue an “original intent” theory, one has to consider not only the persons present at the Philadelphia convention, but the persons ratifying the document in the several states.⁸ It is not immediately clear that all of them had heard of, read, and/or understood John Locke, much less believed that they were enacting his theories of private property and his theories alone into the Bill of Rights.

A still more telling criticism of Epstein’s argument, however, is that his theory is not the same as John Locke’s. Indeed, Epstein finds it useful at certain points in the book to “improve” upon Locke’s theory, on the grounds that Locke’s assumptions are either unnecessary or incoherent. In particular, Epstein dumps

5. See Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981) (distinguishing between Framers’ intent with respect to concrete “conceptions” and abstract “concepts”).

6. On the other hand, Epstein himself does not really practice what he preaches in construing “original intent,” for he takes a very expansive and, to put it politely, “creative” view of what the Framers’ “intent” was. First, he argues for a definition of property much more expansive than the Framers would ever have conceived of. See, e.g., R. EPSTEIN, *supra* note 1, at 96 (people possess property rights in retaining particular rules of common law). Epstein’s conclusion that each person possesses a vested right in a particular arrangement of common law rules follows from the fact that the positive rules of property, contract, and tort define the system of private property. *Id.* at 96–97.

Second, Epstein also acknowledges that the Framers may have simultaneously intended contradictory things by the words used in the takings clause: “[The Framers] may have meant to endorse both the takings clause and wages and price controls without knowing the implicit tension between them. If they cannot have both, then their explicit choice takes precedence over their silent one.” *Id.* at 28. Of course, this simply begs the question whether Epstein’s theory (which does not permit wage and price controls) is the Framers’ theory.

For a fuller discussion of the problems with Epstein’s theory of constitutional interpretation, see Note, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 HARV. L. REV. 791 (1986). Although I have strong disagreement with Epstein’s remarks on constitutional interpretation, I am more interested in the present article with the actual substantive claims his theory makes.

7. See Note, *supra* note 6, at 796–97.

8. To quote Epstein himself in another context, “[i]nferences from a single writer to constitutional text are at best troublesome.” R. EPSTEIN, *supra* note 1, at 28.

Locke's assumption that in the state of nature all property was jointly owned.⁹ It becomes clear later why Epstein makes this move, for he wants to establish that society as a whole has no intrinsic rights to regulate property other than to protect the property rights of the individuals who comprise society. Epstein thus eliminates the very possibility of duties of property owners to others in civil society. However, Locke was careful to insist that such duties did exist: Locke's theory includes a guarantee of subsistence for all persons in his famous proviso that persons may acquire property freely in the state of nature only so long as they leave "enough and as good" for others, and not engage in waste.¹⁰

Epstein dislikes this restriction upon property rights for three reasons. First, it is inexact. Throughout the book Epstein has little patience for ideas with potentially fuzzy edges. Second, Locke's proviso subverts Epstein's desired conclusion that property owners have no positive duties to others and have an unlimited right of possession, use, and disposition consistent with according equal rights of property to others. If people had ill-defined affirmative duties to each other, and couldn't simply act as arbitrarily as they wanted to with their property, who knows what this might lead to? (Socialism? Communism? Rent Control?)¹¹ Third, Epstein believes that Locke's proviso is unnecessary because scooping up as much property as you can for yourself helps everyone in the long run.¹² One can just imagine persons in the state of nature explaining this "trickle down" theory to each other. One can also imagine the kind of response this argument got in the state of nature. No wonder life then was nasty, brutish, and short.

In addition to Epstein's "improvements" on Locke, Epstein's theory of property rights is not the same as Locke's because Epstein does not really limit the term "property" to what Locke might have meant by the term. This is especially ironic given Epstein's insistence that the term "private property" appearing in the Constitution has a clear and determinate meaning, presumably the same as Locke's. In fact, Epstein's notion of property is quite

9. *Id.* at 10-11. See J. LOCKE, *Of Civil Government* in TWO TREATISES OF GOVERNMENT § 26 (T. Cook ed. 1947).

10. J. LOCKE, *supra* note 9, §§ 33, 28.

11. Epstein assumes all along that natural rights are *laissez-faire* kinds of rights. When Locke does not oblige him on this point, he "corrects" Locke to achieve the desired result. One can only imagine that Locke would be turning in his (freely contracted for) grave.

12. R. EPSTEIN, *supra* note 1, at 11.

expansive; his listing of the rights of possession, use, and disposition of property ensures that freedom of contract is a property right,¹³ as are the rights protected by tort law.¹⁴ In short, Epstein's conception of property rights includes all rights guaranteed at common law, which is both the great strength and weakness of his theory.

Even if Epstein cannot demonstrate the constitutional pedigree of his theory, it still has value as a libertarian alternative to the present treatment of social and economic legislation. Therefore, even if his reading of Locke is wilful and his constitutional theory suspect, his substantive claims are important on their own merits.¹⁵ In order to understand the strength of his libertarian conception of property rights, some background description of Epstein's thought is necessary.

Epstein may be classified as an entitlement theorist. Essentially his theory is that persons have entitlements which, if violated, give rise to a *prima facie* claim to compensation.¹⁶ These entitlements are: the right to the possession, use, and disposition of property (including the right to contract); bodily security; and freedom from acts of fraud and force by others.¹⁷

Two things immediately follow from Epstein's version of entitlement theory. The first is a theory of strict liability in tort. If an entitlement is violated, the principle of corrective justice requires (at least as a *prima facie* matter) that compensation should be forthcoming, regardless of the accidental nature of the violation.¹⁸

A second consequence of Epstein's entitlement theory is that it produces a system which demonstrates an unabashed preference for economic liberty and freedom of contract. Of course, philo-

13. *Id.* at 60-62, 74-92.

14. *Id.* at 35-47, 96-98.

15. Others have not been so generous. See Note, *supra* note 6, at 808. ("[T]here may be little reason to proceed beyond the third chapter of Epstein's book.").

16. *E.g.*, Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

17. See, *e.g.*, R. EPSTEIN, *supra* note 1, at 58-59, 74, 86, 111, 331-33; Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979), R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 3, at 112-13.

18. Epstein, *supra* note 16. *But see*, Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 200 (1981) (arguing that principle of corrective justice only requires compensation for wrongful violations of entitlements, leading to fault-based or negligence standard in tort). Epstein himself is willing to admit a limited system of excuses and justifications in his theory of strict liability. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

sophical systems are like stews in that what you get out of them depends upon what you put into them. Since the entitlements that Epstein chooses as most basic and most deserving of protection are much beloved by economic libertarians generally, it is not surprising that the results he reaches are consistent with libertarian philosophy. All of which indicates that Epstein's theory is not one which is likely to sneak up on you by deriving controversial and surprising results from seemingly uncontroversial and "neutral" premises. It is pretty obvious where he is going given where he is coming from. It also follows that one might get off the boat early if one did not happen to agree with Epstein that absolute entitlements to property and free contract are as important as, say, speech, sexual autonomy, bodily security, and a subsistence level of income.

In fact, as an entitlement theory, Epstein's work is reminiscent of Robert Nozick's *Anarchy, State, and Utopia*.¹⁹ Epstein disagrees with Nozick on several points,²⁰ but the similarities are greater than the differences. Like Nozick, Epstein feels that if property is acquired by first possession, and is transferred by free contractual exchange, gift, or bequest, the resulting distribution of economic wealth and power is just. Both thinkers have little use for claims of economic duress or inequality of bargaining power, and both pretty much assume that those who have get to keep if they got either through first possession or a series of contractual exchanges. In their vision of the world, the market is not coercive, and even if it is, it is a coercion that is justified by natural right.²¹

On the other hand, Epstein's work lacks much of the sense of exploratory excitement that Nozick generates in his book. Unlike Epstein, Nozick is careful to point out not only the best versions of his arguments but also shows the reader the things about his arguments that most trouble him.²² In contrast, Epstein is much

19. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Like Epstein, Nozick is a self-styled Lockean who believes in the existence of entitlements which are "moral side constraints" on human action. *Id.* at 26-33.

20. The primary ground of difference between the two is that, unlike Nozick, Epstein acknowledges the right of the state to force exchanges of property rights more valuable than those which they have been deprived of. R. EPSTEIN, *supra* note 1, at 332. This disagreement stems in part from Epstein's willingness to embrace utilitarian considerations that Nozick wants to avoid in his theory. *Id.* at 336-37.

21. *Compare id.* at 219, 252-53, with R. NOZICK, *supra* note 19, at 150-51, 160-61, 262-64.

22. R. NOZICK, *supra* note 19, at xii-xiv. For example, Nozick notes that

more prone to speak *ex cathedra*, and he shows a marked impatience with counter-examples and difficult cases.²³

Epstein's theory of the just compensation clause is based upon his theory of entitlements, and involves the use of three allied concepts: takings, public use, and the police power. To summarize the theory: (1) A taking is a violation of an entitlement. (2) A taking is permissible only if it is (a) within the police power of the state, in which case no compensation is necessary, or (b) for a public use, in which case the taking must be compensated for either by monetary remuneration or in-kind benefits. (3) Takings which are not pursuant to the police power, or not for a public use, or are for a public use but are uncompensated, are unconstitutional.

The theory does not seem controversial until we understand the meaning these terms have for Epstein. Epstein's fundamental principle is that a governmental action is a taking if it would be treated as a taking of property if it were performed by a private party.²⁴ This definition follows from Epstein's theory of the state, in which he assumes that civil society, as a collection of persons, has no more rights than the sum of the individuals that comprise it.²⁵ This atomistic conception of the state is well suited to libertar-

Locke's theory of acquisition (which allows first possession to establish a property right on the ground that possession mixes labor with the object possessed) leads to a whole series of logical puzzles: "If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot?" *Id.* at 174. The point is that the boundaries of acquisition are not determined by the principle of acquisition itself, and this might imply that some form of trans-individual regulation might indeed be necessary. Locke's proviso (which Epstein rejects) is only a partial solution to this problem.

23. *See, e.g.*, R. EPSTEIN, *supra* note 1, at 114–18. I am convinced that there is an important ideological connection between Epstein's essentialist views about language and interpretation, *see, e.g., id.* at 20–24, and his disinclination to recognize that marginal or "hard" cases can call core ideas of a theory into doubt. That is to say, I suspect that there is a relationship between the statements that "the settled rules make perfectly clear, more than 99.9 percent of the time, who, if anyone, possesses and owns anything," *id.* at 24, and the later statement that "[i]t is never a sound tactic to refute a general proposition with a small group of well-chosen counterexamples." *Id.* at 117. It may well be that these intellectual tendencies are related to what I refer to *infra* as Epstein's conceptualism. I find the comparison of Nozick and Epstein particularly interesting in this regard because I had always assumed that Epstein's beliefs about language and thought were an occupational disease of libertarians generally. (Compare Black's and Douglas' opinions on the first amendment.) Nozick's book is the "hard case" which tests *that* assumption.

24. *Id.* at 36.

25. *Id.* at 12–13, 331–32.

ianism, and it explains Epstein's reluctance to accept the Lockean theory that all property was held in common in the state of nature and the Lockean proviso that acquisition of property was necessarily limited by the interests of nonowners.²⁶

Epstein's theory of takings, then, is based upon the issue of whether the state-as-private-party would be in violation of a right of tort, contract, or property guaranteed by the common law.²⁷ Thus, if a private party would be liable in tort for the taking of property by force or fraud, the state, which stands in no better relation to the plaintiff, should also be "liable" for compensation. A violation of an entitlement need not be total in order to constitute a taking under Epstein's criterion. In marked contrast to present Supreme Court doctrine,²⁸ any partial abridgement in the rights of possession, use, or disposition is as much a taking as the complete destruction of the property.²⁹ The only difference is the amount of compensation which has to be awarded.³⁰

26. Nozick also adopts an atomistic theory of the state, *see* R. NOZICK, *supra* note 19, at 32-33, 89, 118, although he accepts the Lockean proviso in a narrowly stated form. *Id.* at 174-82. Nozick's theory, which takes seriously the principle that the state has no rights independent of its constituent members, leads to an extremely pinched conception of proper state functions and powers. Epstein's theory of the state permits an additional right which (presumably) persons in the state of nature did not have: namely, the power to force certain types of exchanges which are to the benefit of all parties. R. EPSTEIN, *supra* note 1, at 331-34. Epstein never completely squares this additional right with his earlier stated atomistic theory of the rights of the state.

27. Note that it follows immediately from this that the doctrine of sovereign immunity is in conflict with the just compensation clause. "If the state obtains its authority only from the rights of those whom it represents, it can never claim exemption from the duty to compensate on the ground that it is the source of all rights." R. EPSTEIN, *supra* note 1, at 42. Hence "[t]he rights of action afforded under the FTCA [Federal Tort Claims Act] should be regarded not as a matter of legislative grace, but as constitutionally mandated under the takings clause." *Id.*

28. *E.g.*, *Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("the denial of one traditional property right does not always amount to a taking"); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (dismissing as "untenable" the proposition "that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

29. R. EPSTEIN, *supra* note 1, at 57-58. This point is essential to Epstein's theory: "Let the government remove any of the incidents of ownership, let it diminish the rights of the owner in any fashion, then it has *prima facie* brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application." *Id.* at 57.

30. *See, e.g., id.* at 76, 89-90.

It follows that interference with a person's right to dispose of his property also involves a partial taking. At this point we are not very far from a constitutional guarantee of contract rights.

[T]he taking of private property reaches government interference with prospective advantage by use of force and misrepresentation. It follows almost *a fortiori*, that contract rights created by a voluntary exchange are protected by the eminent domain clause. . . . It is just as tortious to use force or misrepresentation to prevent the performance of a contract once formed as it is to prevent the formation of a contract.³¹

According to Epstein, regulation is nothing more than taking from many people at once.³² The takings involved in regulation may be partial, but they are still takings nonetheless:

If a certain form of government action regulates the use of an individual tract of land, as by restrictive covenant or lien, then it is *prima facie* a partial taking of private property. Where that partial taking is directed toward the land of many persons, the generality of the rule is increased, but the nature of its impact upon each affected party remains unchanged. The state may wish to call zoning comprehensive land regulation, but it remains an elaborate network of restrictive covenants imposed upon the regulated land.³³

We are thus brought to the inexorable conclusion that “[a]ll regulations, *all* taxes, and *all* modifications of liability rules are takings of private property *prima facie* compensable by the state.”³⁴

It does not follow from this that all regulations, taxes, and modifications of liability rules are illegal. It merely means that a *prima facie* case of their illegality has been established. The state may excuse or justify the taking without paying compensation by showing that its action falls within the domain of the police power.³⁵ Even failing this, the taking may still be justified if it is for a public use and is compensated for.³⁶

Anyone who has read the Supreme Court's post-1937 cases knows that the police power of the state is very broad in social and economic legislation. In fact, the Supreme Court has recently

31. *Id.* at 88.

32. *Id.* at 94.

33. *Id.* at 95.

34. *Id.* (emphasis in original).

35. *Id.* at 109.

36. *Id.* at 109–10. Epstein analogizes the relationship between the police power and the public use requirement to the difference between the doctrines of self-defense and private necessity in tort: “Self defense allows one to inflict harm without compensating the person harmed, while private necessity creates only a conditional privilege, which allows the harm to be inflicted, but only upon payment of compensation.” *Id.* at 110.

stated that the public use requirement of the taking clause is "coterminous with the scope of a sovereign's police powers."³⁷ Epstein wants to reverse this trend, which he sees as mistaken. The scope of the public use requirement should be more limited than the Court thinks, and the domain of police power even more limited.

Epstein's limited theory of the police power follows from his atomistic theory of the state:

Where [a] harm threatens a large portion of the population, the state has the sum of their individual rights. The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on his own behalf. . . .

. . . . [T]he police power permits the state to control partial as well as complete takings by private parties. In addition, it covers all cases of force and misrepresentation, even if they result only in the destruction and not the occupation of property. In a word, the police power gives the state control over the full catalogue of common law wrongs involving force and misrepresentation, deliberate or accidental, against other persons, including private nuisance. . . . The states can [also] control [public] nuisances, thereby vindicating individual rights for which private enforcement is too costly.³⁸

It follows that the police power is simply the power to guarantee rights protected by the common law. Therefore, all regulations, taxes, and modifications of liability rules in derogation of the common law are not within the police power. In particular:

[O]ne end that falls outside the scope of the takings clause is the redress of competitive losses that are not actionable in principle at the instance of the

37. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). Similarly, in economic due process cases, the Supreme Court has, in the post-1937 era, adopted a test for social and economic regulation of a rational relation to a legitimate governmental interest, with "legitimate governmental interests" quite broadly defined. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938).

38. R. EPSTEIN, *supra* note 1, at 111-12. Epstein views public nuisances as essentially private nuisances with high enforcement costs due to the small harm to many persons; this is a misstatement of the common law doctrine. At common law many things (like houses of gambling and prostitution) constituted public nuisances even though there was no physical invasion of another's land, which was required for private nuisance. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 90, at 643-44 (5th ed. 1984) [hereinafter cited as *PROSSER & KEETON ON TORTS*]. Indeed, the common law permitted suits for public nuisance in many cases in which Epstein would consider the regulation a taking. R. EPSTEIN, *supra* note 1, at 109 n.4. Epstein must then explain why some aspects of common law doctrine are to be kept (like the principle of freedom of contract) and others are to be jettisoned as inconsistent with the theory of entitlements protected by the Constitution.

aggrieved victims. Similarly, the police power cannot be invoked to counter the perceived economic inequality between the parties, without force or misrepresentation, as there is no private wrong to control.³⁹

Seemingly with very little effort, Epstein has established that the police power does not permit any modification of common law *laissez-faire* capitalism. Virtually all of the social and economic legislation of the twentieth century—wage and hour regulation, the National Labor Relations Act, workers' compensation, most forms of zoning and land use—are beyond the police power of the states and the federal government.

However, Epstein's pinched conception of the police power has several other consequences which disturb his system's internal consistency. If "the central function of a system of private property is to establish [a] neutral baseline"⁴⁰ by which the police power is to be judged, why are the common law rules of property, contract, and tort the "right" ones? For example, Epstein argues that regulations of uses of property that do not result in physical invasions of another's property are outside the police power because the common law doctrine of nuisance only applies to physical invasions.⁴¹ But this simply begs the question why *that* common law rule and not another (which considers some nonphysical invasions as nuisances) provides the neutral baseline by which to judge whether a regulation constitutes a taking. If we had a different set of common law rules, we would have a different conception of the police power, and hence a different set of judgments as to when a taking had occurred.⁴²

39. R. EPSTEIN, *supra* note 1, at 112.

40. *Id.* at 118.

41. *E.g., id.* at 114, 118, 120, 123.

42. To give an example, Epstein argues against the result in *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), which upheld a local regulation prohibiting private owners from using landfill upon certain designated wetlands. The court justified the regulation based upon the threatened harm to the general public. *Id.* at 16–18, 201 N.W.2d at 768–70. Epstein argues that the regulation was beyond the scope of the police power because:

when the opinion speaks of harm to others, it speaks not of pollution, but solely of the economic and aesthetic losses resulting from removing private land from the general ecological balance. There is no physical invasion created by the landowner's use of the property, but only a desire by the state to use that property as part of an extended wildlife sanctuary. It is impossible to conceive of a successful action that any private owner of real estate or wildlife could maintain if the Justs decided not to use their property in its natural state.

R. EPSTEIN, *supra* note 1, at 123.

However, this begs the question of what the doctrines of public nuisance are in Wisconsin. If the rule of public nuisance happened to be that such nonphysical

There are two possible answers that Epstein could give to this objection. The first is that the common law just happens to protect the very entitlements guaranteed by natural law.⁴³ However, this is a difficult argument to swallow. There are literally thousands of different regimes of property, contract, and tort law that the common law could have developed, and there seems to be no good reason why any number of them could not have been consistent with natural law. For example, the right to prevent others from using one's name or likeness for commercial purposes might exist in regime A but not regime B.⁴⁴ However, I would be hard pressed to explain why one regime is "the" natural law set of entitlements and not the other. It will not do simply to note that A developed historically in a particular American jurisdiction and B did not, for that equates an "ought" with an "is" for no convincingly good reason. Yet it seems clear that if regime A is the baseline, enforcement of regime B by the state constitutes a taking, and vice versa.

The argument becomes even harder to swallow when we reflect on the fact that the common law is the creation of many different judges (most of whom were not philosophers of natural law) over many centuries, that the common law rules have changed over time, and that even today, different jurisdictions have different common law rules. Which time period and which state's common law is to constitute the baseline? Or are the federal courts supposed to create a federal common law from the sky as they did in the period before *Erie*?⁴⁵

The many possible candidates for the title of "the common law" simply lead us back to the question of the grounding for Epstein's

invasions could be public nuisances, then the state could enforce its rights by statute, and private owners would still not be able to sue because the doctrine of public nuisance forbids such private suits. Under this (purely contingent) set of circumstances, the state's action would be constitutional and a proper exercise of the police power.

43. By "natural law," here I mean those rights preexisting the state which the state is organized to protect, and from which the state derives all of its rights. Epstein does not state what the source of these rights is, partly because he has no well-developed theory which explains what rights we should have. However, he is extremely upset at the notion that rights of property are mere creations of the state, see R. EPSTEIN, *supra* note 1, at 305, so that his theory of property rights cannot be positivist.

44. Compare *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (refusing to recognize common law right), with *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (recognizing right).

45. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (state common law rules merely approximations of "true" rules of commercial law).

particular choice of entitlements—there is no well worked out theory of why these rights (and these particular common law versions of the rights), and not others, are to be protected.⁴⁶

A second solution might be based upon the language of the Constitution. Epstein might argue that “property,” at least as it is defined in the fifth amendment, is that set of common law rights in force in 1787, when the Constitution was adopted. Thus, although the common law rights were not necessarily tied to what natural law rights “really” are, we can assume that the Framers decided to incorporate the common law of 1787 by reference as a close approximation, and then use these rights as a neutral baseline for establishing economic liberties. Once again we have the problem that the law in each state may not have been identical, but putting this to one side, there are two further problems. The first is that the common law has developed greatly since 1787, and many of the common law doctrines that Epstein relies on in his explication were not worked out until the nineteenth and twentieth centuries. Each of these changes in the common law must be considered a taking, and each must be justified separately. Epstein himself assumes that each person has a vested right in the continuation of a particular set of common law rules.⁴⁷ This conclusion seems to undercut further Epstein’s claim to capturing the intent of the Framers of the Constitution: whatever claims may be made about the intent of the Framers, it is difficult to argue that they intended to freeze the development of common law rules by common law courts (unless the state paid out compensation), or that they be-

46. This is also a failing of Nozick’s work, which, however, Nozick himself recognizes. R. NOZICK, *supra* note 19, at xiv. Thus, Nozick’s assumption (shared by many libertarians) that absolute freedom of contract, gift, and bequest does not involve a violation of anyone else’s rights is ultimately question begging.

Epstein’s reliance on the common law as the source of entitlements becomes even more troubling when he blithely announces that some common law rules are incorrect and misstates the substance of others in order to make his theory work. An example of the latter is his treatment of the distinction between public and private nuisance. *See supra* note 38. An example of the former is Epstein’s announcement that he will disregard the modern common law developments in the doctrine of assumption of risk in favor of the more draconian nineteenth century doctrine on the ground that the modern developments are “unprincipled.” R. EPSTEIN, *supra* note 1, at 152. But Epstein cannot have it both ways. Either the common law entitlements are the correct entitlements or Epstein has to come up with an independent theory showing why his version of the common law entitlements are really the entitlements that society was organized to protect.

47. *See, e.g.*, R. EPSTEIN, *supra* note 1, at 96.

lieved that the protection of private property committed them to such a result.⁴⁸

A second troubling point about the incorporation by reference theory is that one would have to assume that the common law of 1787 had no "holes" in it, that is, that all of the questions of law which might come before it were either explicitly or implicitly decided by the positive law then existing. This assumption is necessary in order to determine whether succeeding common law decisions are consistent with the baseline or are deviations from it, and therefore constitute takings. Thus, if a case involving whether a brothel is a public nuisance had never come up before in the courts, one has to assume that it was implicitly decided by the common law in 1787, else one would not be able to say that it works a change in the common law rule.⁴⁹ But this view of how a system of common law rules operates is at best naive and at worst a return to the metaphysics of a "brooding omnipresence" of the common law.⁵⁰

Epstein's theory leaves some room for government regulation, taxation, and modification of common law rules. Regulations which do not fall within the police power of the state may, nevertheless, be permissible if they are for a public use and compensation is given. As mentioned before, Epstein's theory of public use is much narrower than the present doctrines that the Supreme Court uses. In essence, Epstein thinks that private property is put to a public use if the "surplus" from the public use is distributed pro rata among all the members of society according to their preexisting wealth.⁵¹ Put another way, a governmental act is for a public use only if the richer you are before it, the proportionately richer you are after it. It is no wonder, then, that Epstein denies that rent control, urban renewal, and similar regulations which are redistributive in character meet the constitutional requirements of public use.⁵²

48. There also is the curious consequence of Epstein's theory that the ratification of the Constitution itself might constitute an uncompensated taking to the extent that it altered any preexisting common law rights. Surely this reading of the takings clause would not have been consistent with the Framers' intent.

49. Note the problem for Epstein. Under the doctrine of physical invasion, a brothel would not be a nuisance. But the common law of many jurisdictions considered it such. *See supra* note 38.

50. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Such a theory would, however, be consistent with Epstein's rejection of positivism.

51. R. EPSTEIN, *supra* note 1, at 163-65.

52. *Id.* at 176-81. For example, in the case of rent control, there cannot, almost by definition, be a division between landlord and tenant of any surplus which

In practice, it is often difficult to determine when the surplus from a government act will be pro rata distributed among different members of society. Epstein suggests that where the governmental act provides or regulates a public good or a common pool of ownership, the public use requirement is more likely to be satisfied.⁵³ A second class of instances would involve a government service open to all on a nondiscriminatory basis.⁵⁴

Epstein's public use doctrine cannot allow the possibility that indirect benefits to the entire public coming from a taking should count in determining whether there has been a pro rata distribution of benefits. He recognizes that this concession would leave the restriction wholly empty and lead directly to the present doctrines of public use.⁵⁵ On the other hand, Epstein is hardly consistent, for he is willing to consider indirect *harms* in showing that a particular regulation has negative wealth effects and therefore violates the public use-plus-compensation test.⁵⁶ When one uses a notion as diffuse as "pro-rata distribution of surplus," it is easy to manipulate results by selectively considering certain costs and benefits of regulation, and Epstein does a masterful job throughout the latter half of the book.

Further manipulative opportunities are presented by Epstein's theory of in-kind compensation, which allows takings for a public use to escape the requirement of direct monetary reimbursement. In-kind compensation occurs when "[e]ach person whose property is taken by the regulation receives implicit benefits from the parallel takings imposed upon others."⁵⁷

The general creditor who cannot collect from his debtor receives compensation because the parallel restrictions imposed upon other creditors assure that there is a pool of assets available to satisfy claims on a pro rata basis. The landowner who cannot erect a large sign is assured that his neighbor cannot put up a sign that will block his own. . . .

. . . In principle, the demand of just compensation is satisfied when two conditions occur simultaneously: (1) the total size of the pie—the sum of the value of all ownership and personal rights—is maintained or increased; and (2) the size of each individual slice of the pie is maintained or increased as well.⁵⁸

accrues from the regulatory scheme. The whole point of rent control is to give the landlord less so that the tenant gets more. *Id.* at 177.

53. *Id.* at 166–68.

54. *Id.* at 168.

55. *Id.* at 170.

56. *E.g., id.* at 312 (noting that unemployment benefits have indirect harms which make everyone worse off).

57. *Id.* at 196.

58. *Id.* at 196–97.

Of course, measuring in-kind compensation is as difficult as measuring whether there has been a pro rata distribution of surplus under the public use test. Therefore, Epstein gives three surrogate tests: (1) whether the taking results in a net increase in the wealth of society; (2) whether the taking is made from redistributive motives; and (3) whether there is a disproportionate impact on any group in society affected by the taking.⁵⁹

The last test results in a form of equal protection analysis with economic liberty as a preferred right. In fact, Epstein argues that the courts should replace the rational basis test of modern substantive due process and equal protection doctrine with an intermediate level of scrutiny.⁶⁰ He thus invokes all of the standard devices used by courts when they are invoking a higher level of scrutiny: smoking out discriminatory motive (of have nots against haves, in this case), inquiring into less restrictive alternatives to the government regulation, requiring precision between stated ends and the means used to achieve them, and so on.⁶¹

Epstein uses his theory of in-kind compensation to show why states can, to some degree, alter liability rules and institute regulation without having to compensate. Thus, he argues that moving from a system of strict liability to negligence, or vice versa, would

59. *Id.* at 202-09.

60. *Id.* at 128. Epstein simultaneously throws in a suggestion that should endear him even more to the ACLU: he suggests that the standard for scrutiny in first amendment cases be lowered from strict to intermediate scrutiny. *Id.* at 137. The point, however, is less to belittle First Amendment freedoms than to "attack the implicit division between preferred freedoms and other residual constitutional rights." *Id.* One of the reasons Epstein gives for the equation is that protection of property rights emphasizes personal autonomy much like protection of speech, and that protection of the two go hand in hand. "Private property . . . nourishes freedom of speech, just as freedom of speech nourishes private property. Can anyone find a society in which freedom of speech flourishes where the institution of private property is not tolerated?" *Id.* at 138.

The jury is still out on Epstein's theory. Although communist countries control both speech and property rights, right-wing regimes are often perfectly happy to control the former and not the latter. In fact, the best counter-example of Epstein's theory that higher levels of protection for common law contract and property rights will benefit freedom of speech is probably post-1937 America, where freedom of speech has flourished in spite of the (in Epstein's view) confiscatory programs of the New Deal and beyond. The broadest reading that the first amendment ever received in this country may well have been during the Warren Court years, which saw marked expansion of economic regulation and welfare programs. And it is hardly surprising that conservative judges in America tend to be less sympathetic to first amendment claims even as they tend to be more sympathetic to protecting freedom of contract and property rights.

61. *E.g., id.* at 130-34, 143-45.

not require compensation, because “before an accident most persons do not know which rule will work in their favor, as they cannot predict whether a lawsuit will cast them in the role of a plaintiff or defendant.”⁶² Similarly, statutes of limitation, which extinguish common law causes of action, are permissible because “the precise categorization of actions by type is not likely to work *ex ante* any systematic shift in wealth across members of the population because the classifications do not reflect any obvious social grouping.”⁶³

Surely Epstein is wrong about both claims. I know very well *ex ante* (before I meet up with an exploding coke bottle or discover that my doctor treated me with a carcinogenic substance) that I would rather have strict products liability than a negligence standard. I know this because I know *ex ante* that I am a consumer and not a manufacturer, a potential patient and not a doctor. For the same reasons, I know that doctors and manufacturers would vehemently oppose any attempt to impose strict liability for malpractice or abolish a state-of-the-art defense in product design cases. If we can assume, as Epstein regularly seems to do in his book, that people support legal rules that they have good reason to think are in their interest,⁶⁴ a move from negligence to strict liability will benefit consumers versus manufacturers, tenants versus landlords, patients versus doctors, and so forth. Similarly, a statute of limitations rule that said that the cause of action accrues at the time of discovery of the harm (when you discover you have cancer) and not when the harm occurs (when you were exposed to that carcinogenic substance) clearly “reflect[s] obvious social groupings” of patients against doctors, consumers against manufacturers, and even Vietnam veterans against the federal government.⁶⁵

In fact, Epstein’s theory of in-kind compensation, if taken seriously, would indicate that the Civil Rights Acts of 1964 and

62. *Id.* at 240.

63. *Id.* at 243.

64. *Id.* at 203–04, 273, 290.

65. Epstein tends to argue that no *ex ante* disproportionate impact exists only when it suits his libertarian political views. In contrast to the above cases, he notes that a system of workers’ compensation has a disproportionate impact which is obvious *ex ante* because “[n]o matter how delicately the matter is put, workers’ compensation laws apply to two largely discrete classes of individuals—employers and employees—whose intense historical opposition is too plain to bear recounting.” *Id.* at 252. The same can be said for doctors and patients, landlords and tenants, manufacturers and consumers, and (as pointed out in the next section of text), whites and blacks.

1968 are uncompensated takings, and are therefore unconstitutional.⁶⁶ First of all, anti-discrimination laws with respect to housing and employment are clear abridgements of freedom of contract and the right of use and disposition of private property. If it is assumed that blacks and women have relatively few qualms about working with white males or (in the case of blacks) living in white neighborhoods, the disproportionate impact on white bigots and male sexists is clear, even if society benefits as a whole from the eradication of discrimination.⁶⁷ It is obvious as well that the purpose of such legislation is to produce precisely this disproportionate impact. Finally, anti-discrimination laws result in a net loss of wealth to society, since sexists and bigots are forced to associate with persons they dislike, while property values in previously segregated neighborhoods go down, and whites flee to new enclaves in the suburbs, leaving the cities to rot and decay.

Of course, Epstein is always able to manipulate his analysis to avoid embarrassing conclusions of this nature while still proclaiming the ideological agenda of libertarians. Thus, although he opposes a progressive income tax (which has disproportionate effects favoring the poor and an obviously redistributive motive), Epstein is able to wriggle out of the conclusion that the interest deduction for home mortgage involves an uncompensated subsidy to homeowners over renters.⁶⁸ And even though the progressive

66. Epstein thinks that state sponsored segregation might be unconstitutional, so that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was correct in result; however, because the Court rested its opinion on the problems of racial stigma and didn't see the takings clause issue, the decision is right for the wrong reasons. R. EPSTEIN, *supra* note 1, at 324 n.27. (Thanks, Professor, we never could have done it without you). The Civil Rights Act of 1964 and 1968, on the other hand, present a different issue: they are government regulations which proscribe purely private acts of racial and sexual discrimination.

67. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 27.1 (2d ed. 1977). It is no answer to say that white bigots and male sexists have no claim to compensation for being precluded from discriminating. At common law the offeror was the master of his bargain, and absent common carrier status, had the right to refuse to deal with anyone he wanted to.

68. See R. EPSTEIN, *supra* note 1, at 302 ("There may be something to say for this proposal, but it is unclear that it reaches constitutional proportions, for at every stage there is (and has been) enormous freedom of choice to develop land or to acquire housing in either market."). Of course, Epstein has all along been arguing in this book that we should not look to "what the owner has retained, when the question is always what he has lost." *Id.* at 76. (Perhaps Epstein means to assert that everyone in America can afford a house, so that everyone benefits equally from the rule. This is a dubious assumption at best). In any case, it seems obvious that Epstein here is using a much lower level of scrutiny than he invokes only a few pages earlier against the progressive tax, where he argued that the flat

income tax is no good, a switch to a consumption tax (which would favor and be favored by the rich) is not an uncompensated taking.⁶⁹ Similarly, Epstein argues that unemployment compensation and welfare programs are unconstitutional takings, but attempts to mitigate the harshness of this by assuring us that private contributions will take up the slack, and in that case it is possible that deductions for contributions to charity might (just might) be constitutional.⁷⁰

These tensions in Epstein's version of entitlement theory simply underscore a basic problem with entitlement theories in general: it is very hard for an entitlement theorist to keep the courage of his convictions. After all, the whole point of an entitlement theory is that any distribution of wealth in society is just, as long as it was arrived at through just acquisition and transfer. The test of justice is not desirable division of societal goods but the historical

tax was a less restrictive alternative decidedly less likely to have disproportionate impacts. *Id.* at 298–300. The same argument would seem to indicate that a flat tax with no deduction is less likely to have a disproportionate impact than one with such a deduction.

69. *Id.* at 300–01. This conclusion is difficult to reconcile with Epstein's earlier theory that the best evidence of whom a tax would disproportionately favor is who would push for it the most (and conversely, who would oppose it the most). *E.g.*, *id.* at 290. (If a windfall profits tax evenly distributed the burdens of the tax through pass-through effects, no single group of individuals would support or oppose the tax).

Epstein argues that a consumption tax is not a taking because no definition of income is constitutionally required as long as deviations from the Haig-Simons definition do not generate any systematic disproportionate impact. Yet it seems clear that (1) there is a systematic disproportionate impact involved in moving from an income tax to a consumption tax given Epstein's own theory of in-kind compensation; and (2) there has to be *some* baseline definition of income in Epstein's theory or he has acquiesced to the very positivist theory of property rights he eschews.

70. *Id.* at 323–24. Epstein goes through amazing contortions to achieve this result, balancing myriad hypothetical costs and benefits that cannot be quantified or compared with any degree of certainty. Thus: elimination of welfare programs will lead to more efficient private charitable organizations which will lead to fewer problems of moral hazard and less need for charity, which in turn will lead to less property taken from noncontributors (a tax deduction subsidizes contributors to charity at the expense of noncontributors). Since the noncontributors aren't subsidizing very much and they receive indirect benefits from the charitable contributions (you remember, the very same indirect benefits Epstein *wouldn't* let us consider on page 170), the result is that "[t]hese differences may just be enough to tip the balance in favor of the program, making the deductions constitutionally permissible." *Id.* at 324.

One cannot read this passage without coming away with the conclusion that Epstein's method of analysis is remarkably indeterminate, and that Epstein (who hates indeterminacy more than anything else) is totally oblivious to this fact. Alas, there's no better set of blinders than the ones you design for yourself.

pedigree of people's holdings. Therefore, no matter how awful the consequences that are produced by market forces (aided only by limited possibilities for government intervention), those consequences are just, and attempting to ameliorate them by uncompensated regulations or wealth transfers is not only unjust, but unconstitutional. For this reason, Epstein is always tempted to use the inherent indeterminacy of his test of in-kind compensation to make the results of his entitlement theory appear less harsh; more often than not he succumbs to temptation.

The flip side of the requirement that justice is determined by historical pedigree is that no distribution is just if it was arrived at through past violations of rights. Thus, any entitlement theory must have a well worked out theory of compensation, and there is a moral imperative to compensate victims of previous takings. The presence of rotten apples spoils the whole bunch. The problem for entitlement theorists in general, and Epstein in particular, is that they have no desire to take this requirement seriously. After all, if we want to talk about takings of property by force and fraud, let's not worry about minor matters like the minimum wage. Let's talk about the big ticket items like what white males have done to blacks, women, and Indians in this country. If you really took entitlement theory seriously, you'd have to engage in wholesale transfers of wealth and power to the descendants of those groups that would make the windfall profits tax look like small change in comparison.⁷¹

Typical responses to this problem are to make it go away by announcing that injustices have been spread out so thinly over the population that no present group of persons bears a disproportionate share of them, so that we can say that everything has cancelled out. But this is clearly not the case with respect to blacks, Indians, and women. Anyone who thinks that the effects of past discrimination have been wiped away is clearly either white and male or has been living on Gilligan's Island for the last few centuries.

71. It is no answer to say that no white males living today were guilty of any acts of discrimination (an unbelievable assertion in any case). Even with respect to truly innocent white males, their holdings are based upon property and opportunities they acquired from others who did discriminate, expropriate, oppress, rape, and pillage. As Epstein himself notes, you don't extinguish the original right of A to property by letting a criminal B sell the property to a bona fide purchaser C. *Id.* at 325. Epstein would surely not argue that whether unemployment compensation statutes are unconstitutional and require redress depends upon whether the present persons who benefit from the statutes worked for and supported their passage.

Similarly, one might try to argue that just as statutes of limitation are justified by the principle of in-kind compensation, so “[s]tatutes of limitation may cut off (by our principle of summation) all claims for compensation demanded by one group for the property that was taken from another group.”⁷² But this response clearly violates Epstein’s principle that takings not have an *ex ante* disproportionate impact. Everybody knows that if we cancel all claims as of 1986, blacks, Indians, and women are the big losers. This is just another backhanded attempt at making the most egregious violations of entitlements in our nation’s history disappear.

After hemming and hawing for several pages, Epstein finally comes out and says that it’s just too much of a bother to do justice to what his own theory indicates would constitute the greatest and most sustained of injustices:

The costs of undoing the past are greater than the cost of trying to reshape the future. It may be possible to take limited steps at feasible cost to rectify the greatest abuse. Doing this would be more easily justified in a country that has been plagued with recent caste discrimination or apartheid than in our own.⁷³

It is difficult to imagine which country Professor Epstein is referring to when he speaks of “our own.” The civil rights movement in America only *began* in the late fifties, and the movement for equality for women only got going in the seventies. Even assuming what is not true, that all racial discrimination ended miraculously in 1964 with the passage of the Civil Rights Act⁷⁴ and all sex discrimination ended in 1973 with the decision in *Frontiero v. Richardson*,⁷⁵ we can still hardly say that discrimination is not a part of our most recent history.⁷⁶

72. *Id.* at 348.

73. *Id.* at 349.

74. I am not even counting the fact that desegregation of the public schools and enforcement of anti-housing discrimination laws didn’t begin in earnest until 1968.

75. 411 U.S. 677 (1973) (plurality opinion) (announcing test of higher scrutiny in sex discrimination cases, ultimately leading to the development of the intermediate level of scrutiny test of *Craig v. Boren*, 429 U.S. 190 (1976)).

76. One wonders what Professor Epstein thinks that Martin Luther King was organizing all those marches for. Perhaps the Reverend was simply bored with sitting in the back of buses.

For a discussion of the systematic attempts by national and local governments to deny blacks equal rights to use, enjoyment, and disposition of real property, see J. KUSHNER, *APARTHEID IN AMERICA* (1980). If what Professor Kushner says is true, Professor Epstein should join the NAACP immediately.

Of course, Epstein is much more concerned about those poor souls who have been injured by minimum wage legislation, the Social Security Act, and Aid to Families with Dependent Children, than minor injuries to the rights of blacks, Indians, and women, which obviously must pale in comparison. All this should tell you that entitlement theory itself is neither left-wing or right-wing, but that entitlement *theorists* are left-wing and right-wing. To put the point more cynically, a right-wing entitlement theorist can use entitlement theory (as Epstein has done here) as an apology for present disparities of wealth and social power and then press for even greater dismantling of egalitarian social programs. A left-wing entitlement theorist, on the other hand, can pound his fist on the table and loudly demand reparations for oppressed groups. All that separates Epstein from a left-wing entitlement theorist is: (1) the particular groups whose injuries he chooses to recognize as most urgent and those he chooses to downplay as washing out over time; and (2) which indirect social costs and benefits he is willing to smuggle into his calculus of in-kind compensation.⁷⁷

I would like to close this article by placing Epstein's work in its historical context. The reader with an historical bent may well have remembered that the Supreme Court did in fact try, many years ago, to work out a theory of natural law property rights guaranteed by the Constitution, with doctrinal results very much like those that Epstein argues for in his book. I am, of course, referring to the *Lochner* period,⁷⁸ in which the Supreme Court believed that the

77. Once again Robert Nozick has seen much further than Epstein has. Nozick recognizes that if people's entitlements are violated, transfers of wealth may be required as a means of applying a society-wide rectification of injustice:

[L]acking much historical information, and assuming (1) that victims of injustice generally do worse than they otherwise would and (2) that those from the least well-off group in the society have the highest probabilities of being the (descendants of) victims of the most serious injustices . . . , then a *rough* rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximize the position of whatever group ends up least well-off in the society. . . . In the absence of [a full and particularized treatment of the principle of rectification in a specific society], one *cannot* use the analysis and theory presented [in this book] to condemn any particular scheme of transfer payments, unless it is clear that no considerations of rectification of injustice could apply to justify it.

R. NOZICK, *supra* note 19, at 231 (emphasis in original).

78. The *Lochner* period is named for its most famous case, *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court struck down a maximum hour law for bakers on the grounds that it interfered with the freedom of contract

due process clause protected common law rights of property and contract from state regulation.

The similarity between Epstein's work and the *Lochner* ideology is quite remarkable, even though Epstein uses the takings clause rather than substantive due process. The limited theory of police power Epstein advances—a power only available to protect common law rights—is virtually identical to that of the *Lochner* period.⁷⁹ Epstein also adopts the same higher level of scrutiny for the protection of economic liberties that the courts announced in *Lochner v. New York*.⁸⁰ And he states his opposition to most of the same types of legislation that the reactionary judges of the *Lochner* era found unconstitutional.⁸¹ Indeed, after reading his book, I was convinced that Epstein should trade in his "I love New York" T-shirt for one that says "I love *Lochner v. New York*."

Of course, Epstein would hardly be dismayed by the charge that he is "Lochnerizing," for that is quite consistent with his general libertarian outlook. In fact, Epstein says of one of the most infamous of the *Lochner* era decisions, *Adair v. United States*,⁸² that

of both the bakers and their employers. The *Lochner* period is generally thought to run from the decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), until the decisions in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The formation of its characteristic ideology actually dates back much earlier, to the 1880s. For a general discussion contrasting *Lochner* ideology with the post-1937 cases, see Balkin, *Ideology and Counter-Ideology From Lochner to Garcia*, 54 U.M.K.C. L. REV. 175 (1986).

79. See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (due process clause protects against invasions of common law rights of property and contract—police power cannot justify these because it is devoted to the protection of the very same rights). Epstein's definition of the police power would differ from that used by the *Lochner* era court in one important respect—he would not consider the protection of public morals as a proper part of the police power. R. EPSTEIN, *supra* note 1, at 109 n.4. Of course, this merely reflects the ways in which Epstein's theory of entitlements departs from the common law rights he purports to base his theory on, since by the turn of the century it had been settled that conduct injurious to public morals could constitute a public nuisance. See PROSSER AND KEETON ON TORTS, *supra* note 38, § 90, at 644 (collecting cases).

80. R. EPSTEIN, *supra* note 1, at 128 (citing *Lochner*, 198 U.S. at 57).

81. For example, Epstein probably would have sided with the dissenters in *NLRB v. Jones & Laughlin* and *West Coast Hotel v. Parrish*, the cases that brought the *Lochner* era to a close. See R. EPSTEIN, *supra* note 1, at 279–81.

To some degree, Epstein is probably more consistent than the *Lochner* era Justices were. For example, it is likely that he would not agree with the decision in *Muller v. Oregon*, 208 U.S. 412 (1908), upholding minimum wage legislation for women, but would agree with the later decision in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), striking down such laws as violative of freedom of contract. He would probably also not agree with *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum ten hour day for factory workers of both sexes).

82. 208 U.S. 161 (1908).

it is "an easy case"⁸³ and remarks that "[t]here is no answer to Justice Pitney's arguments in *Coppage v. Kansas*, which if anything is too weak because it did not stress sufficiently that the inequalities of wealth that emerge in voluntary transactions come as part of a positive-sum game."⁸⁴

Aside from its libertarian slant, however, Epstein's work also manifests a more important similarity to that of his *Lochner* era forbears. This tendency is best referred to as conceptualism. The major vice of Justice Pitney's opinion in *Coppage v. Kansas*, is, I think, not its Neanderthal politics but the unreality of its governing conception. Natural rights were made for people, and not the other way around. To the extent that the protection of particular rights serves human ends, the rights are justified. (They are the "right" rights to protect.) But the abstraction of "freedom of contract" is made more valuable than the lives of individual human beings. And the response that this is not so, the argument that nonregulated contractual exchanges really do benefit the rich and the poor alike simply begs the question in an obvious way. Perhaps rich and poor alike have the right to work for less than the minimum wage, but it is obvious who is more likely to end up doing so. The coercion of the marketplace, which is very real to the poor, is made to seem transparent, natural, or even benign through the lenses of Pitney's economic analysis.

It is the attempt to make what is fundamentally coercive seem not coercive at all and even to the benefit of the coerced party which gives us pause when we read Justice Pitney's opinion today. This is the fundamental ideological move of the *Lochner* era, and it is a move I also see in Epstein's work when he speaks of unregulated transactions between employer and employee as "positive-sum games."

83. R. EPSTEIN, *supra* note 1, at 280.

84. *Id.* at 281 n. 31 (discussing *Coppage v. Kansas*, 236 U.S. 1 (1915)). *Coppage* struck down a prohibition on "yellow dog" contracts, in which employees were required to agree that they would not join labor unions. Justice Pitney's opinion is justly celebrated for the meanness of its Social Darwinist tendencies, its happy equation of historically contingent disparities in social and economic power to "natural" features of human existence, and its smug assurances to the poor and powerless that they have equal rights to contract with the rich. For Professor Epstein's own views on the relationship between evolutionary theory and social policy, see Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980), where he argues that "[t]here is . . . good reason to believe that strong evolutionary pressures favor the emergence of the dominant legal rules of tort, property, . . . and contract." *Id.* at 675.

It may be objected that claims of coercion have no moral force if the parties are acting within their rights. That is indeed true. When I am acting within my rights, I am not really coercing you even if you dislike the use I make of my rights. But this simply brings us back to the fundamental question—the original choice of entitlements.

Each of us, I think, implicitly bases his choice of fundamental rights upon a vision of human nature and human society. Epstein would choose absolute freedom of contract as an original entitlement on the level of importance with free speech. I would not do so. I would recognize economic freedom to a somewhat more limited degree than speech, because history tells me that it is subject to greater abuses which can result in greater human suffering.

I do find one point of agreement with Epstein, however: I do not believe that the Supreme Court made the correct decision when it abdicated all responsibility in scrutinizing social and economic legislation in 1937. I tend to think that the convenient move to minimal scrutiny made in *West Coast Hotel* and *Williamson v. Lee Optical Co.* has come back to haunt us in monstrous decisions like *San Antonio Independent School District v. Rodriguez*,⁸⁵ *Dandridge v. Williams*,⁸⁶ and *United States Railroad Retirement Board v. Fritz*.⁸⁷ It is possible that Epstein also thinks these cases were wrongly decided, albeit for different reasons.⁸⁸

On the other hand, even though I do not support everything that the Court has done in the post-1937 era, I view the Supreme Court's turn-of-the-century experiment with constitutionally mandated libertarianism as a mistake and a failure based upon a fundamentally false picture of human nature and human needs. The answer to the problems of social and economic regulation in the 1980s is not to return to the reactionary views of 1905.

85. 411 U.S. 1 (1973) (upholding system of unequal funding of local school districts throughout the state of Texas).

86. 397 U.S. 471 (1970) (upholding \$250 maximum monthly grant on Aid to Families with Dependent Children regardless of family size).

87. 449 U.S. 166 (1980) (upholding revision of railroad pension plan which denied certain benefits to persons who were not connected with the railroad industry on a single day in 1974, despite evidence that Congress was misled by outside groups who were asked to draft the bill and that Congress did not realize the effect the legislation would have).

88. Unlike Epstein, my reasons for a higher scrutiny in social and economic cases would not be to protect common law rights of property and contract, but fair equality of opportunity and the integrity of the legislative process.

The conceptual revolution which occurred in 1937 has not brought us the millennium. But the history of the Court's pre-1937 period, in my view, provides its own refutation. The French diplomat Talleyrand once said of the Bourbon Kings that they had "learned nothing and forgotten nothing."⁸⁹ The same thing, I am afraid, must be said of this book.

89. BARTLETT'S FAMILIAR QUOTATIONS 400 (15th ed. 1980).