Winter 1987

An Assault Upon "Takings" Doctrine: Finding New Answers in Old Theory

Calvin R. Massey
University of California, Hastings College of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol63/iss1/3

This Book Review is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
BOOK REVIEW

AN ASSAULT UPON "TAKINGS" DOCTRINE:
FINDING NEW ANSWERS
IN OLD THEORY†

TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN
BY RICHARD A. EPSTEIN. CAMBRIDGE: HARVARD UNIVERSITY PRESS,
1985. PP. XI, 362. $25.00

CALVIN R. MASSEY*

INTRODUCTION

Forty years after the death of Franklin Delano Roosevelt, the New Deal has become a part of American folklore. It wrought a vastly enlarged role of government that is firmly fixed in the constellation of American political discourse. Measures such as Social Security and government regulation of industry are so firmly established that arguments concerning them generally occur at the margins. Indeed, despite the popularity of Ronald Reagan, Americans appear overwhelmingly to accept and approve of the keystone principles of the New Deal social welfare state. Debate concerning the constitutionality of New Deal reforms has largely disappeared since Justice Roberts' "switch in time that saved nine."1 Takings, Private Property and the Power of Eminent Domain2 may revive that debate.

Takings is a disturbing book; it challenges the central assumptions of modern constitutional law governing property rights, government regulation and economic liberties, and it examines the conflict between the original

† © Copyright 1987 by Calvin R. Massey.
* Associate Professor of Law, University of California, Hastings College of Law. J.D., 1974, Columbia University; M.B.A., 1971, Harvard University; B.A., 1969, Whitman College.
1. West Coast Hotel v. Parrish, 300 U.S. 379 (1937). See also L. Tribe, God Save This Honorable Court 64-66 (1985).
constitutional design and the modern expansion of state power. Professor Richard Epstein, James Parker Hall Professor of Law at the University of Chicago, argues that the eminent domain clause and its parallel kin in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, progressive taxation. Where these governmental innovations do survive in principle, it is often in a truncated and limited form.\(^3\)

**I. THE NORMATIVE THEORY OF TAKINGS**

Professor Epstein starts with fundamental political theory. He argues convincingly that the Constitution was an embodiment of Lockean political thought. From this premise flows the remainder of his normative theory concerning the substantive dimensions of the eminent domain clause: "nor shall private property be taken for public use, without just compensation."\(^5\)

John Locke and Thomas Hobbes found different answers to a common problem. Hobbes, the defender of absolute sovereign power, regarded humans as uniformly selfish in a world without external authority to restrain their passions.\(^6\) Accordingly, life in this condition was "solitary, poore, nasty, brutish and short."\(^7\) To escape this gloomy fate and to acquire security and order, Hobbes would exact a price consisting of the surrender of liberty and property to an absolute sovereign. While the individual parties to this Hobbesian social contract would be somewhat better off, there is no doubt that the sovereign would be the big winner. As a legal monopolist, the sovereign would exact monopoly rents: most of the benefits of political union would be expropriated by and for the sovereign.

Locke, by contrast, sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights.\(^8\) His goal was to vest in the individuals composing the society all of the benefits created by the political union. Unlike the Hobbesian view, Locke's sovereign was to

---


4. R. Epstein, *supra* note 2, at x.

5. U.S. Const. amend. V.


7. *Id*.

be prevented from expropriating the benefits of the social contract. To accomplish this goal, Locke posited that the sovereign merely succeeded to the private rights given up to it by the contracting individual members of society. Thus, the state itself has no claim to new and independent rights as against the persons under its control. "The state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects." Moreover, unlike Hobbes, Locke contended that the state should have no power to take an individual’s property without his consent, since the point of representative government was to better secure individual entitlements at risk in the state of nature. Under Epstein’s view of Lockean theory, consent, in this context, is really defined as:

an explicit and rigorous theory of forced exchanges between the sovereign and the individual that can account both for the monopoly of force [vested in the state] and for the preservation of liberty and property. . . . What individuals must give up is their right to use force; what they are given in exchange is a superior form of public protection. There is no contract as such, only a network of forced exchanges designed to leave everyone better off than before. Epstein visualizes this process as a pie. Before the Lockean bargain is struck, each individual has a different percentage, or slice, of the whole pie. After political union, the pie is enlarged but each individual’s share, as a percentage of the whole, remains constant. Thus, in absolute terms, all individuals are better off though, in relative terms, there has been no change or movement. To preserve this keystone principle, the eminent domain clause demands that private property be taken only for public use and after payment of just compensation. In testing specific applications of his theory of eminent domain, Professor Epstein constantly keeps his pie in mind.

In *Takings*, Epstein approaches the eminent domain clause by asking four questions: “1. Is there a taking of private property?; 2. Is there any justification for taking that private property?; 3. Is the taking for a public use?; [and] 4. Is there any [or just] compensation for the property taken?” He analyzes each question by constant reference to the underlying principles of Lockean representative government.

To determine whether a taking has occurred, Epstein asserts that the critical inquiry is whether the government action would be treated as a taking if it had been performed by a private party. This inquiry is valid because under Lockean principles, the state derives its power solely from the private rights

12. *Id.* at 31.
13. *Id.* at 36.
conveyed to it by its citizens. With this frame of reference, Epstein then identifies the private law elements of property: use, possession, and disposition. As a result, whenever any one or more of these elemental rights are infringed in a manner that would be privately actionable, a taking has occurred. By this reckoning, zoning ordinances (which restrict use), limitations upon the right of a shopping center to oust unwanted political solicitors (which restrict the right of exclusive possession), and bankruptcy legislation (which forces a disposition, at a loss, of contract rights) are all takings.

That, of course, is not the end but just the beginning of the analysis. Nevertheless, by proceeding from the fundamental premise that the Lockean state cannot legitimately exercise power that cannot be wielded in private hands, Epstein has cast a wide net which includes much that, instinctively, is not thought to be a taking.

In formulating the criteria of a taking, Epstein deals with individual cases. However, he does not confine his theory to questions of government action directed toward isolated individuals. He asserts that his theory of takings, including partial takings, applies with equal force to "claims by a large number of individuals that their property has been taken by acts which, if done against one of them alone, would be covered by the eminent domain clause." Thus, when focusing solely on the initial inquiry of a taking:

it is not possible to ask how widespread government action must be in order to escape scrutiny under the eminent domain clause, because questions of line and degree are wholly irrelevant to this stage of the inquiry. It is only the character of the government action . . . that determines whether there is a taking of private property—of one or of few or of many.

As a result, Epstein is able to conclude that "all regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state." These are strong propositions, but surely there must be some exceptions to these sweeping conclusions. One principal exception is composed of takings justified by the state's police power. The police power of the state is a freely used, poorly understood concept. Epstein suggests that it is the power of the Lockean state to maintain peace and good order, one of the central purposes for which the Lockean individuals departed the state of nature. However, he stresses that it is not simply any exercise of state power that is rationally related to a legitimate public interest.

14. Id. at 58-59.
15. Id. at 64-66, 88-89.
16. Id. at 93.
17. Id. at 95.
18. Id. (emphasis in original).
19. Id. at 108-12.
20. Id.
In so delimiting the police power, Epstein parts company with much of the contemporary doctrine. Yet, though he may march to a different tune, the tune is an insistent and persuasive one. *Takings* illustrates the different types of police power by drawing an analogy to the private law distinction between self-defense and private necessity. "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."21 Thus, when a citizen uses illegitimate force or fraud to prey upon his fellows, "the wrong of the citizen justifies conduct otherwise wrongful by the state as representative of and in defense of its other citizens."22 But use of the police power is not theoretically permissible to regulate conduct that is itself not wrongful. This narrow reading of the ends to be served by the police power permits Epstein to object to the constitutional validity of statutes that force strip miners to reclaim and restore mined land or statutes that prohibit real estate development of marshlands and floodplains.

Current doctrine assigns a low status to the public use limitation of the eminent domain clause. Since *Berman v. Parker,23* the public-use concept has been thought sufficiently broad to allow the use of the eminent domain clause to achieve any end otherwise within the authority of the state. Thus, in *Hawaii Housing Authority v. Midkiff,24* the Supreme Court permitted the state of Hawaii to compel landlords to sell their property to their tenants at a formula price set by the statute.25 Even though the statute was expressly designed to take A's property and transfer it to B for B’s private use, the Supreme Court found this forced exchange to survive constitutional scrutiny as one rationally related to a conceivable public purpose.26 As might be expected, Epstein is sharply critical of these expansive views of public use.27

As previously discussed, the Hobbesian approach was to grant to the sovereign the fruits of political union and the Lockean notion was to vest all such surplus in the citizens. From these original principles, Epstein finds substance in the public use limitations. He posits that their function is to curb factional jockeying for economic advantage by using the majoritarian political process to compel the surrender of private goods for purely private advantage.28 To assist in drawing lines, Epstein borrows from economic theory. He suggests an equation of public use with public goods.29

21. *Id.* at 110.
22. *Id.* at 111.
25. *Id.* at 233-34, 241-42.
26. *Id.* at 241.
28. *Id.* at 162-65.
29. *Id.* at 166-68.
theory of public goods combines two disparate elements: (1) exclusivity cannot be satisfied in the provision of any public good, and (2) the marginal cost of benefiting a citizen is very close to zero. National defense is a paradigmatic example. No citizen can be denied the benefits of defense, and as a result, it is purely non-exclusive.

Furthermore, the marginal cost of extending protection to the newest citizen in a 240-million member society is surely near zero. The state, therefore, is entitled to use eminent domain to acquire public goods. Yet, Epstein admits that this reading is too narrow, for it could operate to prohibit condemnation of lands for a public highway or park. Because these goods are available to all, they are sufficiently public to satisfy a quasi-public goods test. Rent control or urban renewal schemes are not the same. In Epstein’s view, rent control plans fail the public use test because they simply operate to take the landlord’s reversionary interest and vest it, instead, in the tenant. It is a transaction of private goods, albeit one forced by state compulsion.

Thus far, the student of Epstein’s argument may see little hope for the constitutionality of virtually any form of governmental regulation. Epstein’s theory, however, does not deliver so radical a conclusion. In focusing upon “just compensation,” the final inquiry mandated by the eminent domain clause, he erects a complicated framework to test the sufficiency of the compensation offered in exchange for a taking.

Whenever explicit compensation is required, as, for example, when the government takes the property of a single person rather than that of all citizens, Epstein insists upon compensation at least equal to the market value of that which is taken. In some instances, such as when property taken has a real but subjective value which is imperfectly reflected in market value, bonus compensation may be required to meet the “just” compensation standard which is constitutionally imposed. But in no event can explicit compensation be less than market value.

Rent control schemes which, as discussed above, fail the public use test, also fail the just compensation measure. In essence, a government engaged in rent control seizes a leasehold, imposes options to renew at a fixed or formula price, and assigns its interest in the leasehold to the tenant, to whom the government then delegates its own duty to compensate the landlord for the property interest so taken. The fixed or formula prices are always set at less-than-market rates because rent control schemes are intended to frustrate market operations. Accordingly, the explicit compensation received by the landlord, in the form of controlled rent payments, is always less than that to which he is constitutionally entitled.

30. Id. at 166.
31. Id. at 182-85.
The heart of Epstein's just compensation analysis is found in his discussion of implicit in-kind compensation. Nowhere does the Constitution indicate that just compensation may be only in cash or property. Compensation can assume many forms, so long as it is just. This notion is critical to Epstein's evaluation of "large-number takings in the form of regulations, taxation, and modification of liability rules." To the extent that "the restrictions imposed by the general legislation upon the rights of others serve as compensation for the property taken," there is no fatal disharmony with the just compensation requirement. This inquiry is a pervasive one and requires careful evaluation of the relative costs and benefits of regulatory legislation. Answers are needed to questions like the following. Are the restrictions imposed by bankruptcy legislation upon creditors seizing the assets of debtors constitutionally justified by like restrictions on other creditors? Are minimum lot size restrictions justified by their even impact upon all property owners affected by the zoning?

As an abstract principle, Epstein posits that just compensation is provided whenever: (1) the total size of the pie (including all economic benefits) is maintained or increased, and (2) the size of each individual slice is maintained or increased. Obviously, the second condition cannot occur without the satisfaction of the first condition as well. Yet the first condition can occur without the occurrence of the second condition. From this underlying principle, Epstein derives a disproportionate impact test to probe the sufficiency of asserted implicit in-kind compensation. Reduced to its simplest formulation, the disproportionate impact test seeks to determine whether the legislative scheme in question operates to redistribute property among citizens (alter the proportionate slices of the pie), or to prevent individual action from reducing the entire size of the pie. Rent control schemes, for example, are blatantly redistributive and would fail a disproportionate impact test. Natural resource conservation measures, by contrast, are aimed at preventing individual exploitation from reducing the benefits to all citizens resulting from a viable fishery, a forest, or another such public resource.

The disproportionate impact test becomes a mechanism to ferret out and invalidate all forms of governmental transfer payments, progressive rate-based taxation, and most zoning schemes. Its effect is to make government a truly neutral player in the economic arena. Individual gains or losses are to be had on the battlefield of the marketplace, not in the legislative chambers of Congress or the state houses. Strict application of this theory would, no doubt, swiftly curb factions seeking economic gain through the political

---

32. Id. at 195-215.
33. Id. at 195.
34. Id. at 195.
35. Id. at 197.
36. Id. at 204-10.
process. Surprisingly, this aspect of Epstein's theory bears great similarity
to arguments put forth by John Ely in his 1980 book Democracy and
Distrust.37 Ely asserts that the Constitution is best thought of as a device
to keep open the access of all groups to the political process and to prevent
the dominant groups in that process from converting the political process
to a crass instrument serving their own needs. In the economic sphere,
Epstein's disproportionate impact test fits smoothly into Professor Ely's
analysis. Moreover, because Epstein's argument is so deeply rooted in con-
stitutional text, it is difficult to dismiss it simply because modern constitu-
tional thought seeks to make much more of "preferred freedoms"38 and
fundamental personal rights39 than of property rights secured by the Con-
stitution.

Epstein admits that enthusiastic application of his analysis would cause
great political, social, and economic displacement.40 He ponders whether the
cost of such displacement is too high and briefly flirts with the idea that
there might be such a thing as irreversible constitutional error.41 Yet plainly
Epstein believes that a start should be made to inject more intellectual rigor
and honesty into the takings clause, ultimately to preserve individual eco-
nomic gains from capricious governmental interference.42

II. CRITICISM OF THE NORMATIVE THEORY

It is hard to compartmentalize constitutional rights. Why, for instance,
should the right to speak freely be deemed more precious than the right to
enjoy securely one's home and possessions? Nothing in the Constitution
suggests that one right is more exalted than another. From a doctrinal
standpoint, therefore, much of Epstein's analysis is appealing. His notions,
however, are so radical and counter to accepted dogma that a tremendous

40. R. EPSTEIN, supra note 2, at 306-07, 324-29.
41. Id. at 324-29.
42. The Supreme Court may have begun to do what Epstein urges should be done. In First
English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378
(1987), the Court determined that landowners burdened by zoning or other use restrictions
which constitute takings are entitled to compensation, not simply prospective injunctive relief.
In Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987), the Court held that govern-
mentally imposed conditions upon an owner's use of his property must have some direct
connection with the public purpose sought to be advanced by the regulatory condition. Absent
such a nexus, a taking has occurred.
barrage of criticism, some of it quite ill-tempered, has been levelled. A brief canvass of this critical commentary follows.

A. Epstein's Notion of Property Is Rigidly Formalistic

In order to develop a coherent theory about takings of property, it is imperative to define exactly what is meant by "property." This is no easy task because there is precious little agreement on its meaning. Thomas Grey advances the theory that the term has no unitary meaning, and that in a complex, post-industrial, managed economy it is about as anachronistic as the buggy whip. Margaret Radin states that it is an elastic concept that shrinks or expands depending upon whether the property in question is "personal," such as a wedding ring, or "commercially fungible," such as stocks or bonds. For Bruce Ackerman, Joseph Sax, and Frank Michelman, property assumes meaning in a constitutional context only after there has been some evaluation of the basic values and social purposes that the institution is thought to serve. Epstein, however, is accused of adopting a rigid, formalistic conception of property that cannot consistently be applied to support his conclusions. Yet, Epstein's definition has a decent pedigree in legal history, particularly at the time of the Constitution's adoption, and in ordinary usage and understanding.


47. Radin, supra note 43, at 239.


49. Epstein's definition is lifted wholesale from I W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *2 (1765).

While it is true that the definitional trilogy of "use, possession, and disposition" has an air of inflexibility, the important point, for purposes of evaluating Epstein's theory, is that its intersection with the eminent domain clause is by no means inflexible. Any number of restrictions and regulations upon the use, possession, or disposition of property can be squared with the eminent domain clause through the vehicle of implicit in-kind compensation. While Epstein suggests governmentally imposed conveyancing formalities as examples of such valid regulation, there are substantive regulations that are similarly valid. Speed limits and traffic lights certainly limit use, but the implicit in-kind compensation all auto owners receive in the form of enhanced safety is plainly adequate to satisfy the just compensation element of the eminent domain clause. Building codes, lot setbacks, and building height restrictions undoubtedly impede use but provide all real property owners benefits in the form of safety, air, and light that are probably sufficient to qualify as implicit in-kind compensation.

Moreover, Epstein's definition and its theoretical application offer a decent account for the distinction sought to be made by Professor Radin. She seeks amplified protection for personal, as opposed to commercially fungible, property on the grounds that personal property has a subjective value not


On the other hand, the Supreme Court determined that a governmentally forced easement for public passage was a sufficiently permanent physical occupation to qualify as a taking. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987). In so ruling, the Court noted that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " Id. at 3145 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))). Nollan then reaffirmed that a taking occurs whenever there is a permanent physical occupation by the government "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 107 S. Ct. at 3145 (quoting Loretto, 458 U.S. at 434-35 (1982) (emphasis added)). The emphasized language suggests that the Nollan Court subscribes to the notion that infringement upon the possession "stick," at least, constitutes a taking. Keystone may be distinguished by observing that the permitted infringement was upon use and disposition, not possession.

52. Epstein, supra note 50, at 254-55.

53. An important qualification to this point is the assumption that such restrictions are uniformly applied to all property owners. If that assumption fails, the restrictions' validity is called into question via Epstein's disproportionate impact and motive tests.

Following Nollan, such restrictions survive constitutional scrutiny only if their imposition is directly connected to the furtherance of a legitimate public purpose that is itself served by the restriction.
BOOK REVIEW

123

detected by marketplace judgments.\textsuperscript{54} Epstein argues that his theory deals with Radin's contentions by promising bonus compensation for any governmental taking of property that has a subjective value greater than its exchange value.\textsuperscript{55} To be sure, Epstein offers no handy mechanism for determining the monetary equivalent of this excess of subjective value over exchange value, nor does he explain how the legal system will recognize those instances in which this excess exists. Therefore, Radin's categorization may have some merit as a mechanism to identify readily property which possesses such subjective value.

\textbf{B. Natural Rights and Utilitarianism}

Epstein's critics assert that he begins with a natural rights position (the right to obtain and hold property) derived from Locke, but shifts to straightforward utilitarianism in defending and explaining these rights under the eminent domain clause.\textsuperscript{56} So he does. Ellen Paul, in particular, finds this position to be troublesome and discordant—a mixing of oil and water.\textsuperscript{57} But is it? If Epstein's utilitarian arguments are offered as explanations and defenses for a natural rights proposition, they are mere ornamental buttresses. The transcendent authority of a natural right places it beyond governmental invasion. A utilitarian justification for the natural right merely ratifies the appropriateness of the asserted right. Utilitarianism becomes helpful window dressing by simply illustrating the sound nature of the right involved. In this sense, there is no fatal disharmony, but instead a serendipitous congruence.

Epstein, however, seeks to do more. He admits that his is a utilitarian universe and offers natural rights as a convenient, simple label to attract political support for his theory.\textsuperscript{58} This admission casts a pall over the integrity

\textsuperscript{54} Radin, \textit{supra} note 45, at 959-61, 1005-06; Radin, \textit{supra} note 43, at 239, 243-44.
\textsuperscript{55} Epstein, \textit{supra} note 50, at 263.
\textsuperscript{56} Paul, \textit{supra} note 43, at 153-54; \textit{Proceedings, supra} note 43, at 107-36; Alexander, \textit{supra} note 43, at 228-33. Epstein's natural rights theory stems from a contention that first possession or occupancy gives legitimacy to the right. This notion is troublesome and debatable. See \textit{Proceedings, supra} note 43, at 118 (remarks of Bruce Ackerman). One solution is that proffered by Ellen Paul; ownership comes, not from first possession, but by creating value. \textit{Id.} at 129 (remarks of Ellen Paul). Hopefully, the issue of "value" will be addressed in her forthcoming book, E. PAUL, \textit{PROPERTY RIGHTS AND EMINENT DOMAIN} (1987).
\textsuperscript{57} Paul, \textit{A Reflection on Epstein and His Critics}, 41 U. MIAMI L. REV. 235, 236 (1986).
\textsuperscript{58} In talking about the development of his theory, Epstein admitted: Over the last fifteen years . . . I worked that libertarian calculus more diligently than anybody else . . . and my whole system blew up . . . . The more I thought about it, the more I found plausible utilitarian justifications . . . . Well, the Posner criticism, the one which said, 'Epstein, you can't ride two intellectual horses. You can't be both a naive Libertarian and utilitarian' is correct. So which one am I going to purge? And I was utterly shocked by the time I figured it out: . . . every time I looked, I found, by God, transaction cost explanations. The
of his theory. If Takings is just an exercise in utilitarian calculation, of what permanence is the doctrine? As soon as some other bright economic theorist can demonstrate a different utility maximizing outcome, Takings becomes last week's newspaper. "Utilitarianism is very interpretable and every observer balances and weighs its elements differently to arrive at different conclusions about what will maximize utility."59 If this is what Epstein is about, his advertised "Cartesian clarity"60 dissolves into the chimerical landscape of ever-changing calculations of utility. At one stroke, his theory is transformed from one protective of the autonomy, individuality, and liberty of discrete individuals, into a theory that ignores individual outcomes so long as aggregate utility is maximized.

Another problem exists with Epstein's venture into utilitarianism. In order to determine whether the test of implicit in-kind compensation has been met, courts are required to assess legislative motive, disproportionate impact, and the overall wealth effect of the legislation in question. These judicial assessments will be difficult to apply with precision because they rely heavily on economic theory. The fact that there may be slippage at the extremes (hard cases make bad law) is not sufficient reason to discard an entire theory that may operate effectively across a wide range of theoretical cases. Judicial assessment of legislative motives is not necessarily a healthy phenomenon. The very nature of the inquiry suggests that the courts possess superior wisdom which justifies probing of legislative motives. At worst it casts grave doubt upon the legitimacy of judicial review.

Such fears, however, are probably misplaced. To the extent that motive inquiry is synonymous with disproportionate impact, the phenomenon may be assessed by an exclusive focus on the effects, rather than the intent, of the legislation.61 A more serious objection to the disproportionate impact

---


60. R. EPSTEIN, supra note 2, at 126.

61. Epstein conceives of motive and disproportionate impact to be separate tests. R. EPSTEIN, supra note 2, at 203-10. Motive is a second-guessing of the legislative judgment to ferret out and invalidate acts spawned from an overt or covert redistributive motive. Disproportionate impact seeks to identify legislation lacking suspect motivation, but which nevertheless has a redistributive effect. A recent legitimization of Epstein's motive test may be seen in Edwards v. Aguillard, 107 S. Ct. 2573 (1987), in which Louisiana's law mandating the teaching of 'creation science' in the public schools if evolution is also taught was invalidated as an impermissible establishment of religion. Despite a substantial legislative history disclaiming any religious motivation, the Court had little difficulty in imputing such a motive to the Louisiana legislature.
test is the reliance it places upon economic theory. In many cases, judges will be required to test the constitutionality of legislation by applying a theoretical economic model. It is not clear that an economic template is the proper test of constitutional legitimacy, nor is it clear that the judiciary is the most well-equipped to administer such economic diagnosis. Both the history of antitrust law and some of the more exotic applications of cost-benefit analysis to claims of constitutional right\textsuperscript{62} ought to be reason for sober reflection.

C. Historical Asynchronicity

Several of Epstein's critics make the point that this nation has a long history of both governmental intervention in private economic affairs and economic assistance to the poor.\textsuperscript{63} Nothing in that history, they assert, provides any support for the contention that a redistributive motive or effect was thought to violate the eminent domain clause. For Joseph Sax, "[i]t is precisely because government has so much and so often felt impelled to involve itself in the economy that the takings clause of the Constitution has . . . presented . . . [the] dilemma" of whether, or to what extent, the government should keep out of private economic affairs.\textsuperscript{64} To Thomas Grey, "[o]ne of the most consistent elements in the history of Western political and legal thought and practice has been the acceptance of a communal duty of public support for the destitute, paid for out of taxation or its functional equivalent."\textsuperscript{65} Epstein concedes the force of Grey's argument,\textsuperscript{66} but counters that historical custom, if controlling on all aspects of constitutional interpretation, may lead to such absurdities as reversal of Brown v. Board of Education.\textsuperscript{67}

History may not control, but it does provide some additional useful insights. Governmental intervention in economic affairs has not always been, as Sax seems to assume, for public benefit. Rather, as Horwitz has demonstrated,\textsuperscript{68} American law in the early national period became an instrumental device to foster private economic gain. By promoting economic growth through the system of legal rules, rather than through taxation, ante-bellum

\textsuperscript{62} See Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982) (application of cost-benefit analysis to claim of constitutional right to wear yarmulke during high school basketball game); ACLU of Illinois v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) (use of economic analysis to determine whether city's display of creche violated establishment clause).


\textsuperscript{64} Sax, supra note 43, at 286.

\textsuperscript{65} Grey, supra note 43, at 41.

\textsuperscript{66} Epstein, supra note 50, at 273. ("It is Grey's strongest ground.")

\textsuperscript{67} 347 U.S. 483 (1954).

America made a choice that was, if anything, redistributive towards "the active and powerful elements in American society." Moreover, the notion of compensation for a governmental taking was by no means established in the law of the states at the time of the Constitution's adoption. Even as late as 1820, most of the original states had no constitutional requirement of compensation. These facts undercut Epstein's assertion that his takings theory is solidly grounded in Lockean thought, generally accepted as true by the constitutional authors.

D. Private Versus Collective Preferences

Cass Sunstein criticizes Epstein for "treating private preferences as natural and inviolate" and for ignoring the possibility of equally valid, and contradictory, collective preferences. According to Sunstein, people make choices as public citizens that diverge from their private consumption choices. For example, people may commute by auto but vote for politicians who champion clean air legislation or diversion of highway taxes to mass-transit assistance. They may also resort to mechanisms of cognitive dissonance, adapting their preferences to an unalterable existing order. Some choices, like drug addiction, are so endogenous that it is hard to treat them as a true preference. In these cases, Sunstein thinks it appropriate to interfere with such private choices "on both welfare and autonomy grounds."

But does Takings foreclose the possibility of implementing collective preferences, even assuming that such choices can be articulated without rent-seeking behavior? Takings does not foreclose that possibility. It does impose

69. Id. at 108.
70. Id. at 63-67.
71. Moreover, the eminent domain clause, like other natural rights contained in the Bill of Rights, was not present in the unamended 1787 Constitution. It is also possible that the eminent domain clause hinders only the federal government. Cf. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Epstein assumes, without discussion, that the eminent domain clause binds the states via the incorporation doctrine. R. Epstein, supra note 2, at 18, 307.
73. Id. at 247-48.
74. Id. at 251.
75. Rent-seeking is the economist's label for the situation where a monopolist confronts a monopsonist and the seller's lowest profitable price is less than the highest price the buyer can pay and still reap value from the purchase. The gap is termed a "rent" that market forces will not allocate in this theoretical situation. Economists theorize that resources will be diverted from productive uses to zero-sum argument over allocation of the rent. Rent-seeking can also occur outside of bilateral monopoly. For example, it may occur when there is jockeying for the benefits of governmentally granted monopolies such as cable television franchises and broadcast licenses. Epstein subscribes to the notion developed by Buchanan that political struggle over wealth and income distribution is the collective equivalent of private bilateral monopoly haggling. See generally TOWARD A GENERAL THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock, eds. 1980). This is one of the more provocative assumptions made by Epstein.
a collective cost, in the form of compensation, for certain of those collective
tastes. That uncomfortable fact is certainly one ideological burr in the hide
of some of Epstein's critics, for it makes implementation of some societal
preferences just that much more difficult. For a committed environmentalist,
for example, a theory that would require monetary compensation in order
to prohibit development of a privately owned wildlife habitat might cause
discomfort. Nevertheless, public choice which seizes private rights must come
with a price tag.

E. Epstein’s Constitutional Interpretation

Much is made of the interpretational ethic seemingly employed by Epstein
in *Takings*. Alexander criticizes Epstein for professing to be a textual literalist
while defining a taking in a way that "is not based on the word's semantic
meaning, but on his non-textual argument that the framers did not convey
to the government any power over others' property not possessed by indivi-
duals at common law, except where public goods are realizable and just
compensation is paid."\(^7\)\(^6\) Grey labels Epstein a constitutional formalist, sug-
gest that he is so mired in rigidity that he can only deal with constitutional
law by denying "the legitimacy of the whole process of interpretive doctrinal
development."\(^7\)\(^7\)

Epstein, however, has clarified his interpretative canon and drawn the
sting from such criticisms. In order to make sense of text, or to supplement
its meaning, three types of evidence are legitimate to Epstein. "First, ordinary
usage of the terms contained in the Constitution. Second, reasoning by
analogy from core cases to their close substitutes. And third, exceptions to
a general prohibition that must be accepted as a necessary implication from
the text, given the theory that renders intelligible its central commands."\(^7\)\(^8\)
There is nothing remarkable about these views. They are an articulation of
a desire to find coherence in a principled fashion. There are other types of
evidence that may arguably be equally valid, which Epstein omits,\(^7\)\(^9\) but their
omission is not so grave as to invalidate Epstein's theory.

A weightier, albeit debatable, criticism is the assertion that the Constitution
does not incorporate Lockean political theory, or if it does, that the Con-
stitution can now be interpreted to effectuate more "modern," or at least
differing, theories of democratic union. There is force to these objections

---

\(^{76}\) Alexander, *supra* note 43, at 225.
\(^{78}\) Epstein, *supra* note 50, at 264-65.
\(^{79}\) For example, Charles Black forcefully argues for the importance of construing any
portion of the Constitution by reference to other portions of the document which set forth or
limit the powers and structure of the organic units of government. C. Black, *Structure and
and any general resolution of this continuing debate is unlikely. Those who believe that constitutional exposition is a matter of fidelity to the actuating principles of the framers will be attracted to the synchronicity of Epstein’s analysis with Lockean theory. Those who believe that each generation is free to construe the Constitution de novo will, in all likelihood, part company with Epstein.

While Epstein brings much needed intellectual rigor into the miasmic swamp of “regulation” versus “taking,” his entire normative theory, however elegant and polished, is constructed upon foundational postulates which can be sharply criticized. Even if the Constitution is to be read today in a manner that effectuates Lockean political theory, can we be certain that Lockean thought contemplated an impenetrable barrier to governmental redistributive efforts? In other words, in choosing the phrase “public purpose,” did the postulated Lockean framers intend to limit its definition to the public goods equation used by Epstein? We will never know the answer and, to be sure, Epstein does not argue on the basis of “original intent.” Rather, his contentions flow logically from the premises of the actuating political theory of the Constitution. While that may be a form of original intention, it is an argument that makes no claim to divination of specific intent about specific issues.

The issue becomes one of constitutional hermeneutics. Does expression of specific limits and guarantees, without visible textual reference to Lockean dogma, but concededly stemming from that source, result in an interpretational mandate to include the unspoken ideological origins? Or does the use of ambiguous and open-textured phrases such as “due process,”80 “public use,”81 “just compensation,”82 “privileges and immunities,”83 and “cruel and unusual,”84 to cite just a few, imply an obligation to build an interpretational topography out of the substance of experience? Fundamental questions like these are never squarely addressed by Epstein, although, of course, he provides a clear answer by the use of Lockean postulates to construct his theory. Epstein is no doubt repulsed by the jurisprudential vagaries that seem to him endemic to non-interpretive judicial review.85

80. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).
81. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).
82. Id.
83. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.”); U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”).
84. U.S. CONST. amend. VIII (“nor cruel and unusual punishments inflicted”).
85. Epstein asserts flatly that “[n]oninterpretivism is not a legitimate mode of [constitutional] interpretation.” Epstein, supra note 50, at 264.
Bedrock reliance upon a single political theory enables him to build his elegant edifice. Unfortunately for Epstein, it is a structure which is largely uninhabited by contemporary judges. Will we now move *en masse* into this Epsteinian cathedral? Will we ignore it, however attractive it may be? Or will we attempt to live in two houses, of radically differing design, simultaneously? Epstein’s response is ultimately unsatisfying and compromises his theory.86

Perhaps no ready solutions exist. Certainly Epstein’s willingness to compromise his theoretical doctrine in order to ameliorate the dislocation of settled reliance interests it would otherwise cause is a humane and practical judgment. Yet because his work sparks so many questions about the nature of the constitutional task, Epstein will move debate onto a new and higher plane. Even though *Takings* may contain large areas toward which criticism may be levelled, Epstein has done constitutional theory a great service. This is not a book that will be ignored, nor a theory that will go away.

86. R. Epstein, *supra* note 2, at 324-29.