

University of Miami Law Review

Volume 41
Number 1 *Symposium on Richard Epstein's
Takings: Private Property and the Power of
Eminent Domain*

Article 5

11-1-1986

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Thomas C. Grey

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Recommended Citation

Thomas C. Grey, *The Malthusian Constitution*, 41 U. Miami L. Rev. 21 (1986)
Available at: <https://repository.law.miami.edu/umlr/vol41/iss1/5>

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The Malthusian Constitution

THOMAS C. GREY*

A man who is born into a world already possessed, if he cannot get subsistence from his parents on whom he has a just demand, and if the society do not want his labour, has no claim of *right* to the smallest portion of food, and, in fact, has no business to be where he is. At nature's mighty feast, there is no vacant cover for him. She tells him to be gone, and will quickly execute her own orders, if he does not work upon the compassion of some of her guests.

Thomas Malthus¹

I.

The President and his Attorney General have said that their approach to constitutional interpretation is governed by principles of strict construction and by a "jurisprudence of original intention." To them this means judicial restraint—at least so far it does. But an increasingly right-wing federal judiciary is not likely to be satisfied for long with merely damping down liberal judicial activism. The federal courts have through most of the country's history been the guardians of wealth and property against the excesses of democracy. Why not again?

Enter Richard Epstein, preaching on the Op Ed page of *The Wall Street Journal* that what the country needs is "Activist Judges for Economic Rights." He tells us that the strict construction of an inflexible Constitution need not require judicial restraint. The framers meant the Constitution to prevent all "massive and intrusive government actions" aimed at "the forced distribution of wealth." The clauses protecting property rights were intended to serve as general checks upon "the ceaseless imagination of legislative factions to devise new schemes for the costly and nonproductive transfer of wealth and

* Professor of Law, Stanford Law School. This paper was discussed at a conference on Richard Epstein's book, *Takings: Private Property and the Power of Eminent Domain*, sponsored by the Liberty Fund, and held in San Diego Jan. 30-Feb. 1, 1986. I have made some minor changes from the version of the paper circulated at the conference. I would like to thank the participants in the conference, and my colleagues Tom Campbell, Bob Ellickson, Paul Goldstein, and Mark Kelman for their helpful editorial suggestions.

1. T. MALTHUS, *ESSAY ON POPULATION* 531 (2d ed. 1803, reprinted 1903), *quoted in* G. HIMMELFARB, *THE IDEA OF POVERTY* 122-23 (1983).

power from one's opponents to one's friends."²

Epstein reduces these slogans to a detailed program in his new book, *Takings: Private Property and the Power of Eminent Domain*.³ He calls for "a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had" (pp. 30-31). The goal is nothing less than the constitutional rollback of the welfare state. The book reaches its climax in a savage Malthusian tirade against public income maintenance:

The basic rules of private property are inconsistent with any form of welfare benefits. One way to avoid failure is to throw the baby out with the bath water, to get out of the welfare business entirely. That judgment is not based simply upon some narrow sense of egoism or a belief that private greed is the highest form of social virtue. Nor does it rest on the hidden pleasure of watching small children starve or derelicts freeze on the street. To the contrary, it rests on the belief that once the state runs a transfer system, it can never extricate itself from the intolerable complications that follow. The higher the level of benefits, the greater the demand Rather than become mired in the quicksand, do not start down that path at all. (P. 322).

Epstein translates his program into constitutional terms by way of a construction of the eminent domain provisions in American constitutions.⁴ He claims that the anti-confiscation principle embodied in these clauses "forecloses virtually all public transfer and welfare programs, however designed and executed . . ." (p. 324). Such programs boil down simply to taking the property of *A* and giving it to *B*. Mass confiscation through general law is still confiscation; indeed "prima facie, the greater the numbers, the greater the wrong" (p. 94).

Not a wholehearted Malthusian, Epstein believes that private charity by itself can adequately protect the helpless. "A private welfare system becomes conceivable in principle once it is realized that the system would be much more modest than it is today. Charitable activities were common in the 19th century before the income tax

2. Epstein, *Needed: Activist Judges for Economic Rights*, Wall St. J., Nov. 14, 1985, at 32, col. 4.

3. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter (p. —)].

4. Epstein's focus is on the just compensation clause of the fifth amendment, which has been held to apply to the states by incorporation through the fourteenth amendment. He assumes the incorporation doctrine to be in place, though without quite contradicting Mr. Meese by endorsing it (p. 18, 307 n.2). Incorporation or no, all state constitutions but one (North Carolina—which enforces constitutional restrictions on eminent domain through its due process clause) contain just compensation clauses. Nothing in the logic of Epstein's argument suggests any reason why the federal and state clauses should be construed differently; if the one prohibits setting extra places at nature's table, so do the others.

. . . . Reduce government involvement and private benevolence will again increase" (pp. 322-23).

He is not quite ready for the immediate judicial abolition of public income maintenance. Though as a matter of principle the whole social security and welfare safety net is unconstitutional, reliance interests preclude immediate judicial invalidation. The constitutional error committed in the establishment of welfare programs thus has, for the time being, the force of law (p. 327). But in the longer run, error need not reign; the welfare state can be undone—with, one might say, all deliberate speed. What is needed to bring about this result, Epstein tells his followers, is "political will." Redistributive programs seem legitimate only because a prevailing "intellectual skepticism" has corroded belief in the natural moral basis of private property. He calls for a concerted right-wing intellectual crusade against the "conventional respectability" of this kind of skepticism (p. 329).

In the overall context of his book, Epstein's grudging stay of constitutional execution to the income maintenance system is uncharacteristically moderate. Confronting other aspects of the welfare state, he is ready for direct and immediate action. Thus progressive taxes violate property rights; "[t]he case for progressive tax[ation] is not uneasy. It is wrong" (p. 327). And "[t]he basic tax rate structure is surely a fine place to begin the overhaul. . . . Politics apart, no reliance interest prevents a responsible court from demanding that Congress not increase the levels of progressivity in future years" (p. 327). What about the sixteenth amendment? He brushes it aside with a casual footnote (p. 296).

Similarly, nothing stands in the way of "the immediate invalidation of the minimum wage [law]" (p. 327). And, with such momentum up "[w]hy then stop with the minimum wage? The National Labor Relations Act could be struck down" (p. 328). The search-and-destroy mission ranges at large through the statute book: "Price controls on oil and gas? No reason (if present contracts were respected) why they could not be lifted tomorrow by judicial decision" (p. 328). To the objection that "my position invalidates much of the twentieth-century legislation," Epstein's response is an untroubled "and so it does"—because "[t]he New Deal *is* inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end" (p. 281).

What to make of this kind of stuff? In one sense, *Takings* belongs with the output of the constitutional lunatic fringe, the effusions of gold bugs, tax protestors, and gun-toting survivalists. It is a sign of the times that the book is published not under some vanity or

right-wing specialty imprint, but by the Harvard University Press. Richard Epstein himself is no semi-literate pamphleteer, but the James Parker Hall Professor of Law at the University of Chicago. A scholar who earned a considerable reputation as a prolific and interestingly eccentric commentator on private law subjects, Epstein has become a national figure since he began turning his attention to constitutional law in a serious way around the time of the first Reagan election. In 1984, the Heritage Foundation promoted him as a candidate for the Supreme Court. Today he is "the most requested speaker" at the meetings of the Federalist Society, the leading organization of right-wing law students.⁵

What he has to say in *Takings* is likely to find a wide and receptive audience in today's political climate. Many of those who object to paying taxes to support the poor are eager to hear that their sentiments rest not on prejudice or selfishness but on high principle. And in American political discourse, no principle is so high as a constitutional principle. Epstein effectively exploits our traditional national faith that through constitutional law we can lift our public life above the fallen and compromised realm of factional politics. His potential achievement is to make respectable the view that all redistributive government programs are concessions to expediency, forced on the country by the past mistakes of politicians, but condemned by the logic of principled constitutional argument.

Epstein enlists impressive skills in the service of this end. His exposition in *Takings* has an imposingly systematic structure. He manages generally to sustain a tone of moderation and reasoned argument—in this respect his "baby and bathwater" outburst against the welfare system is atypical. He contrasts the claimed "rigor" of his own position to the fuzziness of standard liberal doctrine with considerable rhetorical effect. His blend of extreme conclusions with an orderly presentation and a relatively calm tone can easily lead those who want to believe the book's message to read it as courageous and unanswerably logical, if a bit impractical, work of idiosyncratic scholarship. It evidently had this effect at the offices of the *Wall Street Journal*, which named it one of the ten best books of 1985.⁶ And it has received some respectful attention in the scholarly journals.⁷

In the face of all this, it seems necessary to say that *Takings* is a travesty of constitutional scholarship. It is clearly written and sys-

5. Abramson, *Right Place at the Right Time*, AM. LAW., June 1986, at 102.

6. Wall St. J., Dec. 24, 1985, at 7, col. 2.

7. See, e.g., Paul, *Searching for the Status Quo* (Book Review), 7 CARDOZO L. REV. 743 (1986).

tematic, but it displays these undoubted virtues in the deployment of a mass of assertion that is riddled with self-contradiction and backed by very little in the way of serious argument. Epstein fails to confront most of the obvious objections to his position. What persuasive force the book has derives from its author's previous scholarly reputation, his considerable rhetorical facility, and his tone of absolute conviction.

That tone is itself an important rhetorical strength of the book. The conclusions reached in *Takings* are too extreme to mark it as any sort of cynically careerist venture; with the baby-and-bathwater passage alone, Epstein must have known he was cutting off any immediate hopes he might have for a Supreme Court appointment. The book presents the reader with the picture of a sincere and intelligent man in the grip of a pervasive obsession.

II.

Central to Epstein's constitutional position is the premise of strict construction. He agrees with Attorney General Meese that judges should confine themselves to interpreting the constitutional text in accordance with a meaning fixed at the point of enactment, subject to change thereafter only by amendment. He rejects as "an invitation to destroy the rule of law" the idea that we have a living constitution, one whose terms "necessarily change in meaning over time, so that each new generation must interpret them afresh for itself" (p. 24).

Epstein's presentation of his own doctrine uses the notion of a fixed constitution in two ways. First, at the most general level, he naturally wants to appeal to the original understanding. No one can doubt that the framers of both the original American constitutions and the Civil War amendments were more devoted to the protection of traditional property rights than have been most 20th century judges and legislators.⁸

Second, Epstein would find it difficult to sustain his particular constitutional conclusions under the standard conception of a living constitution, a conception according to which the Constitution's meaning is gradually adapted to changing historical circumstances through the ordinary processes of case-by-case interpretation.⁹

8. As I shall argue in Section IV, however, the original understanding of the constitutional scope of property rights does not support Epstein's attack upon taxation for the relief of poverty. See *infra* text accompanying notes 34-57.

9. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Hurtado v. California*, 110 U.S. 516, 530-31 (1884).

Whatever the original constitutional understanding may have been, all the programs of the modern welfare state have been fully accepted and integrated into the American constitutional framework by half a century of interpretation. The only way to avoid grappling with this massive body of constitutional law is to deny the legitimacy of the whole process of interpretive doctrinal development.¹⁰

Epstein's approach to constitutional interpretation requires that judicially enforceable constitutional norms must not only be fixed in meaning at the time of their enactment, but must be formally realizable as well. "In order for judges to make principled interpretations," he says, "the language of the Constitution must be clear and precise enough to bind even those who disagree with what it says, for the mission of constitutional government must soon flounder if judges can decide cases as freely with the Constitution in place as without it" (p. 20).

The interpretive canon of formal realizability, like the canon of fixed meaning, is ideologically central to Epstein's presentation. In general, when one is proposing as constitutional law an extreme political program not likely to gain general support, one would rather portray it as unanswerably entailed by a clear text than as debatably inferred from an opaque one. But Epstein's constitutional formalism plays a more specific role in his presentation. He invokes it to reject the interpretation of constitutional provisions by reference to the "ends or social values" they serve (p. 25). For him, constitutional interpretation must turn exclusively on investigation of the semantic meaning of the text, not on the values its framers wished it to implement or the purposes they wished it to serve. Values, he says, must be "expressed in words, often very slippery ones," and these words must themselves then be explicated. This style of interpretation thus "quickly turns into an infinite regress" (p. 26) and in the process undermines the formal clarity necessary if the rule of law is to be preserved.¹¹

For Epstein's purposes, the great virtue of this rejection of value-based or purposive constitutional interpretation is that it allows him

10. The alternative would be to argue that the circumstances of national life have so shifted in the last years of the 20th century as to justify now interpreting the constitutional provisions protecting private property along the lines that Epstein draws. A book arguing for such a "living libertarian Constitution" would have been harder to write, but more rewarding to read.

11. Thus in his newspaper essay, Epstein condemned Justice Brennan for appealing to "human dignity" as a value to guide constitutional interpretation, arguing that "the framers wisely avoided the phrase, not because dignity is unimportant, but because it provides no operational guide in individual cases: whose dignity is to be protected by what means and at what expense?" Epstein, *supra* note 2, at 7, col. 2.

to condemn wholesale, on the basis of canons of constitutional interpretation alone, all the standard modern theories of the eminent domain clause. Thus he writes that "[t]here may be a debate over whether the framers introduced the eminent domain clause to protect markets or autonomy or both. But in the end, greater progress will be made by assuming that the clause is designed to do what it says, to ensure that private property is not taken for public use without just compensation" (p. 26). These sentences brush aside, without confronting their arguments on the merits, the work of those commentators such as Joseph Sax, Frank Michelman, and Bruce Ackerman, who seek to determine the constitutionally protected core of the institution of private property by reference to the basic values and social purposes that institution is meant to serve.¹² It is important to note this point since, as we shall see later, Epstein's own takings doctrine ultimately rests not on semantic analysis of the constitutional text but on claims about the purposes of private property.

Prominent among the values and purposes the modern scholarship commonly invokes are those Epstein mentions: the protection of the autonomy of the citizenry and the promotion of efficient markets. But, as the literature shows, these ends may be at cross purposes to each other. In any case, reference to them in argument inevitably exposes to critical evaluation the laissez-faire version of the late nineteenth century private law that Epstein wishes to establish as *the* constitutional law of property. The goal of autonomy, for example, ("a necessitous man is not a free man"), is commonly cited in support of legal restrictions on corporate economic power; it has also been said to justify treating entitlements under income security programs as property rights.¹³

Similarly, the analysis of property in terms of market-promotion gives rise to the Coasean or law-and-economics theory of the legal assignment of entitlements.¹⁴ Where two activities—say, cattle ranching and farming—interact to produce losses (crops trampled by cattle), the Coasean analysis assigns the legal responsibility for those losses (the converse of the property entitlement) to whichever party can *ex ante* most cheaply avoid them, taking account of transaction

12. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

13. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

14. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); cf. Michelman, *supra* note 12, at 1197 (adopting Coasean analysis).

costs. This approach to the assignment of initial entitlements corrosively undermines the simple, pre-analytic intuitive idea of rights founded upon physical occupation and physical invasion that supplies the axiomatic foundations of Epstein's own theory (pp. 115-17).

A third, and perhaps the most familiar, functional theory of property develops Hume's and Bentham's emphasis on the importance of protecting well-established expectations against undue shock.¹⁵ This notion underlies traditional doctrines of prescription and can easily be extended throughout the whole realm of property law. But rooting property rights in widely shared expectations gives practice and custom a central role, exposing property rules to change as expectations shift. Then, as the initially "redistributive" programs that are Epstein's main target become themselves aspects of the generally accepted distributive baseline, the very rationale of the property system itself ends up protecting them.¹⁶

In general, to consider property rules in either functional or historical terms tends to demystify what remains a powerfully evocative idea, one that if left unexamined can subsume under the single term "private property" such very different social and political phenomena as the immunity of large corporations from government regulation on the one hand and the ordinary person's expectation of secure possession and free use of personal belongings on the other. Critical examination of the conceptual foundations of private property—and it is this critical examination that Epstein calls "skepticism" and "nihilism"—tends to show how extraordinarily ambiguous that concept has become in an economy whose major productive units are complex bureaucracies and whose dominant forms of wealth are no longer land or even goods, but credit, organization, skills, and information.¹⁷

This is not to suggest that any of the modern functionalist theories of property law are themselves fully satisfactory. The point is rather that Epstein fails to confront them on the merits; he uses a

15. See Michelman, *supra* note 12, at 1208-13 (summarizing the Hume-Bentham position).

16. See, e.g., Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1113-14 (1981) (treating the issue of rent control in terms of tenant's rights).

17. For an expansion of this point, see Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980). Epstein responds to this critique by defending the usefulness of vague concepts in constitutional law. He cites Hannah Pitkin, who in turn draws her inspiration from Wittgenstein's anti-conceptual theory of language (pp. 21-24). Epstein's defense misses the point of the critique, which was not that "property" is *vague* but rather that it has become so misleadingly *ambiguous* as to be no longer useful as an operative legal concept. Further, the Wittgensteinian defense is inconsistent with Epstein's often reiterated contrast between the "Cartesian clarity" of semantic meaning possessed by the word "property," and the fatal indeterminacy of adjudication that takes account of the purposes and values behind constitutional provisions (pp. 26, 126).

blanket requirement of formal realizability to brush them aside without substantive argument. But of course this requirement makes its own demands on Epstein himself. One naturally asks how a formalist approach to constitutional interpretation can support the sweeping and radical political coup that Epstein conjures out of so apparently narrow and specialized a provision as the eminent domain clause. The short answer is that it cannot. The longer answer involves showing how Epstein's own constitutional theory of property itself requires complex and debatable judgments in its practical application. To the details of Epstein's doctrine we now must turn.

III.

Epstein's approach to eminent domain issues requires asking in each case four questions—questions that in their initial formulation closely track the constitutional text. First, has there been a *prima facie* governmental taking of private property? Second, if there has been, is this state action justified as an exercise of police power? If so, it is constitutional; if not, the analysis proceeds to the third question—is the taking for a legitimate public use? If the public use test is met, the court proceeds to the fourth and final question—has there been just compensation?

It is in his approach to the first or “*prima facie* taking” question that Epstein makes his most bizarre claims. He proposes the remarkable thesis that for constitutional purposes the very concept of private property generates a “natural and unique set of entitlements” governing all valuable resources (pp. 230-31). The set of entitlements is “natural” in the extreme sense that it is said to obtain independently of both custom and positive law and to maintain its *prima facie* binding force within any political society. No law-making power can alter or infringe upon any of the constituent parts of this system of entitlements without “taking” property.

The set of natural entitlements is “unique” in an equally extreme sense—there is one and only one correct regime of property rights at all times and places, and it is this regime that the Constitution protects. The regime is founded upon the principle that everything (at least everything “possessable”) is subject to original acquisition by, and only by, individual occupation. What constitutes “occupation” is itself an objective factual question, with a unique and determinate answer in each case.¹⁸ The occupation rule means that everything is

18. For a persuasive argument that what counts as occupation is not a question of brute fact, but always involves the interpretation of variable social symbol-systems, see Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

either owned individually, or available for individual acquisition. Thus any government acquisition of even an unowned resource is itself a taking—from those whose opportunities are thereby lessened. Nor is there any legislative flexibility in determining the incidents of the ownership established by original acquisition; they are fully determinate and unlimited rights of undisturbed possession, unrestricted use, and unrestricted disposition.

As Epstein summarizes the position, the institution of property “contains no gaps. . . . For things reduced to ownership, the rules of property uniquely specify the rights of all persons for all times. . . . There are no residual sticks in the bundle that move between the private and public domain at legislative whim” (p. 85). As a result, *any* government invasion of possession or restriction of use or disposition is a partial taking. Every economic regulation, every tax, even every accidental officially caused injury takes a stick out of the bundle of original ownership rights, and hence *prima facie* takes property.

In putting forward this astonishing conception, Epstein has blended together two incompatible ingredients: the classical liberal insistence on the sanctity of ownership, and the modern legal conception of property as a bundle of rights. To classical liberals, ownership rights were nearly absolute in force but quite limited in scope. No incident of ownership was taken if government trespassed on an owner’s land or restricted an owner’s freedom to sell personal property at whatever price a buyer would pay—hence neither sovereign immunity for governmental torts nor traditional price regulation was conceived as raising an eminent domain problem. Under the classical conception, actual dispossession was required before ownership rights were violated and property was taken.¹⁹

By contrast, modern lawyers—or at least modern legal scholars—are nominalists about “ownership”; they see property in resources as consisting of the infinitely divisible claims to possession, use, disposition, and profit that people might have with respect to those things. There is, on this conception, no essential core of those rights that naturally constitutes ownership.

But the other side of the modern conception that sees property rights everywhere is a greatly enhanced toleration of their infringement. If removing one stick from the bundle of rights is to count as a taking, takings can no longer automatically trigger a compensation

19. The classical conception is textually reflected in the eminent domain provisions of those state constitutions that require compensation when property is either “taken” or “damaged.” See Stoebe, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 555 n.8 (1972).

requirement—at least not without giving private property far more rigid protection than even the classical liberals proposed. Hence we are brought to Holmes' celebrated insistence that regulation of the use of property shades into confiscation by degrees, requiring compensation only when it goes "too far."²⁰ The question of what criteria to use in determining how far is too far is the central issue around which the modern eminent domain literature revolves. It is this whole discussion that Epstein simply short-circuits through the rhetorical trick of transferring to each stick in the property bundle the powerful connotations that traditionally attach to full ownership.

Epstein's treatment of the police power simply mirrors his conception of the original "natural and unique set" of property rights. The government may, and indeed must, provide remedies for violation of those rights. Those remedies may themselves include forfeitures, fines, damage awards—takings of property, that require no compensation because they *protect* property. But the police power extends no further than the provision of adequate remedies for the protection of the same set of natural rights whose definition settles the question of *prima facie* taking.

Epstein's takings analysis, with its natural rights theory of property, ultimately plays a less important analytical role in justifying his constitutional assault on the welfare state than initially appears. But the theory does important *rhetorical* work within his argument, and for that reason it is important to note that it does not find the support that he claims for it in the tradition of classical liberalism. Neither the standard common law writers nor the major Enlightenment public law theorists argued that the natural right to private property established a unique and detailed code of property law. As Blackstone expressed the standard position, "[t]he original of private property is probably founded in nature . . . but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages in exchange for which every individual has resigned a part of his natural liberty."²¹ Locke's view was the same; the natural right of property arising from labor applied only in the state of nature, while "in Governments the laws regulate the right of property and the possession of land is determined by positive constitutions" subject to loosely specified restraints imposed by natural law.²² None of the classical writ-

20. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

21. 1 W. BLACKSTONE, *COMMENTARIES* *134.

22. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 320 (P. Laslett ed. 1960) (3d ed. 1698);

ers would have followed Epstein, for example, in attempting to stipulate which among the competing plausible regimes of rights to the use of water or the extraction of oil and gas was the unique deliverance of natural law (pp. 69-70, 220).

The rhetorical role of Epstein's natural law theory of property is to provide occasions for celebrating the supposed rigorous and formal qualities of his theory, which is meant to contrast with the vague and manipulable standards that modern instrumentalist and "skeptical" writers advocate in their theories of eminent domain law. Thus he tells us that under his approach the taking question "admits to a rigid logical answer, so it is always possible to judge which judicial decisions are clearly right or clearly wrong" (p. 85). The issue can always be decided with "Cartesian clarity" (p. 126) and "logical precision" (p. 201). He advertises his theory as "explicit and rigorous" (p. 15) by contrast even with Locke's, which is flawed by the "inexact" proviso that natural property rights remain always conditional upon the continued availability of enough unowned resources to meet the needs of others (p. 11). Claims like these form a constant background drum-beat throughout the book (pp. 229-30, 234).

It is essential to recognize that this formalist rhetoric is all only for show. Epstein's doctrine is not any more formally realizable than the fuzziest formulations of the contemporary functionalists. Even his treatment of the prima facie taking issue itself has less "Cartesian clarity" than advertised. Thus he is unable to decide so central a question as whether constraints on the free disposition of labor count as takings of the laborer's property. Sometimes Epstein says that a person owns his labor (pp. 11, 153, 216, 341), in another passage he says only that the eminent domain clause "perhaps" protects labor (p. 75), and in still others he concedes that this is "unlikely" (pp. 250, 280). This waffling fits a pattern. In those passages where Epstein is trying to supply pseudo-Lockean philosophical foundations for his theory, he treats labor as the paradigmatic object of ownership. Yet in constitutional terms, this ascription produces embarrassing results that carry Epstein beyond his assault on conventional economic redistribution. If labor is property, for example, the military draft and the criminal laws against prostitution violate the eminent domain clause.²³

see also J. TULLY, A DISCOURSE ON PROPERTY, JOHN LOCKE AND HIS ADVERSARIES 98-99, 163-74 (1980) (discussing Locke's view).

23. In oral discussion of this point at the Conference on his book, Epstein stated that his theory did indeed prohibit a military draft, but suggested that prohibition of prostitution might be justified as a protection of rights incorporated in the marriage contract! *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 82-83

The question whether the right to dispose freely of one's labor is a property right is problematic for another reason—it actually lies outside the domain of the traditional common law of property, a body of law mainly concerned with questions of control over land and other tangible resources. In general, when Epstein leaves the domain of traditional property law behind, his pretensions to “Cartesian clarity” suffer. For example, despite his own long and distinguished professional labors in the field of torts, he admits that he cannot “as yet” specify whether contributory or comparative negligence is the uniquely natural rule in accident cases (p. 241). He would have similar difficulty maintaining any plausibility if he attempted to state a “natural and unique” set of entitlements governing a man's interest in his daughter's chastity, or in his wife's domestic services or—switching from old problems to new—to state the natural and *prima facie* inviolable body of private law governing the videotaping of television broadcasts, the use of computer programs, or the commercial, journalistic, and artistic exploitation of the names and likeness of individuals.²⁴

The point is that where property can readily be conceived in terms of control over material things, middle-class people in our culture *do* share a good number of quite clear particular intuitions about what constitutes possession, invasion, and taking.²⁵ It is these intuitions that Epstein exploits when he wishes to portray his enterprise as objective, precise, and “Cartesian.” Only where these intuitions apply can he even pretend to root the constitutional law of property in bright-line rules that require no reference to vague values like human dignity, autonomy, or the promotion of efficient markets. But as a generation of commentary shows, it is impossible to assemble these widely-shared intuitions into a systematic and plausible general theory.²⁶

Like the more candid modern theorists, Epstein too must take

(1986). Taking the point seriously has the virtue of suggesting the difficulty of reconciling the traditional legal conception of marriage as a status whose incidents are not subject to variation at the will of the parties with libertarian theories such as Epstein's.

24. Elsewhere Epstein suggests that “the dominant legal rules of tort, property, family, and contract”—including the rule of acquisition of tangible property by first occupation—were “wired in” by natural selection during human prehistory. Epstein, *A Taste For Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665, 672, 675 (1980). No similar sociobiological fantasies appear in *Takings*, but Epstein's overall approach—particularly his otherwise baffling claim that natural rights have a utilitarian foundation—makes more sense once he is seen to be a devotee of the more extreme speculations of contemporary sociobiology. See *infra* note 31.

25. For an excellent account of the current lay conception of property, see generally B. ACKERMAN, *supra* note 12, at 113-67.

26. See authorities cited *supra* note 12.

general and vague values and purposes into account if he is to produce a comprehensive version of the constitutional law of property. His truly wholesale violation of his own formalist canon of constitutional interpretation comes not in his treatment of the takings or police power issues, but rather in answering the third and fourth questions raised by his analytic framework—the questions of “public use” and “just compensation.” It is in this aspect of his analysis that he deploys his doctrinal wild cards, standards at least as inexact and manipulable as the favorites of the most free-wheeling contemporary liberal judicial activists.

Epstein’s politically dramatic claims—the unconstitutionality of welfare, social security, progressive taxation, collective bargaining, and the rest of the legal apparatus of the modern administrative state—all involve what he calls “large number partial takings” (pp. 93-96). The laws in question do not embody traditional condemnations of property, discrete governmental actions dispossessing one or a very few owners, but rather take the form of general legislation that removes a few sticks out of many bundles of rights. But for Epstein, with his postulated natural right to unrestricted possession, use, and disposition, these nevertheless are takings in the constitutional sense.

In analyzing this kind of general legislation, Epstein blends the “public use” and “just compensation” requirements together to produce a framework that combines six elements. The first element, and the key to Epstein’s whole system, is the notion that the constitutional right of private property is aimed at the prevention of “factional,” which is to say collective, “rent seeking.” The second element, proposed as a solution to the “factional rent seeking” problem, is the principle of fair division of the surplus. The third is the translation of that principle into the language of the takings clause by way of the requirement of “implicit in-kind compensation.” Finally, three subordinate legal formulae implement the implicit in-kind compensation requirement: the tests of overall welfare effect, redistributive motive, and disproportionate impact. These six elements are Epstein’s wild cards, and I must now consider them one at a time.

A. *Factional Rent Seeking*

“Rent seeking” is the economist’s term for what happens when a monopolist and a monopsonist (monopolist of demand) face each other.²⁷ The lowest price the seller can charge while covering costs

27. “Rent seeking” can also occur in circumstances other than bilateral monopoly (for example, where economic actors use resources to pursue the surplus profits available from government-granted unilateral monopolies, such as broadcasting licenses). For a collection of

will be lower than the highest price the buyer can pay and still have the purchase be worthwhile. This gap constitutes an economic surplus or "rent" that market forces alone do not allocate between the parties. In the absence of a determinate price, economic theory predicts that the bilateral monopolists will wastefully divert resources from wealth-generating production and consumption to zero-sum haggling and bluffing over the distribution of the surplus. Epstein follows some public choice theorists in arguing that *political* debate and struggle over the distribution of wealth and income is the collective version of haggling over the surplus, or rent seeking.²⁸ Then, in a most unhistorical way, he applies to this contemporary and controversial theoretical construct the term "faction," familiar from *Federalist No. 10*—the term that Madison used to condemn the corruption of a unified public-spirited citizenry by its fragmentation into opposed parties.²⁹

B. *Fair Distribution of the Surplus*

Next, he argues that the purpose of the constitutional protection of property is to prevent wasteful factional rent seeking by putting all questions of the distribution of resources politically out of bounds through the establishment of a unique, constitutionally mandated distribution under the principle of fair division of the surplus or "rent" generated by efficient collective action. The basic idea of fair division of the surplus derives from Epstein's own translation of the classic liberal fairytale about the origin of the state into the currently fashionable terms of public choice theory.

Absent a state—that is, in the "state of nature"—individuals have their "natural rights" to life, liberty, and property. Self-help enforcement leaves these rights insecure, and free-rider and hold-out problems leave public goods underproduced. The coercive state enters to collectively enforce rights and produce public goods, thus generating a surplus.³⁰

essays developing this concept, see TOWARD A GENERAL THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1980).

28. See Buchanan, *Rent Seeking and Profit Seeking*, in TOWARD A GENERAL THEORY OF THE RENT-SEEKING SOCIETY 3-15 (J. Buchanan, R. Tollison & G. Tullock eds. 1980). Whether the expenditure of resources in pursuing the politics of distribution can in general be made out as wasteful in any economic sense (that is, "inefficient") is most doubtful. Arguments about economic efficiency presuppose some distributive baseline which must be determined by a political process.

29. See G. WILLS, EXPLAINING AMERICA 177-264 (1981).

30. Epstein's account of public goods (pp. 167-69) is strikingly broad; he goes beyond any economic sense of the concept to bring within its scope public roads and parks, enterprises that can be supplied to those willing to pay for them without their benefits necessarily spilling over

Epstein's story departs from classical liberal orthodoxy in two significant ways. First, the state's legitimacy is not founded on any social contract—real, implied, or hypothetical—but simply on its capacity to generate surplus wealth. One might think that this substitutes a fully utilitarian justification of the use of collective power for the classical liberal respect for individual natural rights. Epstein purports to escape this conclusion by imposing a "fair shares" constraint on the state's wealth or utility maximizing function—any surplus generated by state coercion must be distributed pro rata, according to the distribution that would have obtained in the state of nature had natural rights been fully respected.

But, the modern secular inquirer naturally asks, what is the basis of the natural rights? This brings in Epstein's second departure from the classical conception. For Locke and Jefferson, natural rights gained their morally binding force from their divine origin. For Kant, they followed by pure practical reason from the unconditional moral worth of rational choosing agents. For Epstein, by contrast, they turn out to be (though there is some blurring of this point in his text) simply those rights which, if postulated as initially binding, will maximize utility! The theory is thus fully utilitarian once it has been unpacked, though Epstein has formulated it so as to retain its appeal to libertarian true believers in genuine natural rights.³¹

to free-riders as well. Here Epstein accepts the traditional exercise of the eminent domain power to condemn resources that the government is willing to operate (or license for private operation) under traditional "common carrier" regulation—that is, open to all under nondiscriminatory conditions of access. Why is not public income maintenance justified as the supply of a public good, especially under this very broad conception of the term? Epstein is reduced to arguing that the "broad consensus" favoring welfare programs does not suffice; "unanimous consent" would be required (p. 315). But, of course, ordinary majority rule governs decisions to provide public roads and parks.

31. Epstein's fundamental utilitarianism, concealed by his recurrent use of the language of natural rights, appears when he differentiates his own theory from Robert Nozick's strongly anti-utilitarian libertarianism. Epstein argues that libertarianism is "strengthened by a direct appeal to considerations of utility," and indeed that "a sensible utilitarian theory" leads to Nozick's substantive conclusions (p. 336). Orthodox libertarians at the Conference, who had been deflected by Epstein's Lockean rhetoric from absorbing the implications of these passages, were horrified when under questioning during the discussion he announced himself to be a pure utilitarian.

In implementing his "law of the conservation of the original distribution," Epstein never explains how to determine what that original or natural distribution would be. Presumably it does not include the gains and losses that would occur in the state of nature given the pervasive rights-violations to be expected of the "Hobbesian Men" with whom Epstein populates his "Lockean World" (pp. 9, 341). Thus he suggests we can neglect the losses that effective government imposes on those with taste and talent for rape and pillage, though he makes no effort to reconcile this with his utilitarianism (p. 333). On the other hand, in his pragmatic willingness to wash out the results of past injustice through prescription, he suggests a Hobbesian truce in the war of all against all, or (a version of the same thing), a Burkean

Ultimately, then, Epstein justifies his requirement of pro rata distribution of the surplus by the appeal to the allegedly wasteful consequences of political battles over distributive questions: "[T]he takings clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches" (p. 281). Here we find, at the core of Epstein's theory, a fully explicit instrumental and functional rationale. What has become of Epstein's own explicit rejection of those theories that base eminent domain doctrine not on the semantic meaning of constitutional language, but on the inevitably indeterminate pursuit of values and purposes?

C. *Implicit In-kind Compensation*

Epstein portrays most state action as forced exchange—condemnation of property—in which individual "natural right" claims are taken from their holders subject to the aim, imposed by the "public use" limitation, of increasing total social wealth. The requirement of just compensation enforces the "fair distribution" principle by ensuring that those subject to takings get equal value in return for what they give up.

In an ordinary condemnation case, tangible property—or some valuable intangible given protection by positive law—is taken, and explicit money compensation measured by market value is paid directly in exchange. Under Epstein's theory, this is not yet full compensation; market value does not give the "takee" her fair share of the surplus generated by the taking. She receives this other part of her constitutionally required compensation in "implicit" form, in her role as a member of the general public.

In Epstein's system, a tax or a general law that restricts the disposition or use of property is equally a taking, though ordinary doctrine does not traditionally recognize it as such. Here Epstein cashes in on his adoption of the modernist Hohfeldian bundle of sticks conception of property to insist that no line can be drawn between complete and partial takings—those that do and those that do not infringe "ownership." In these cases—"large number partial takings" in Epstein's terminology—the Constitution requires the same just compensation as in traditional condemnation cases. But no explicit compensation can be paid to those whose "property is taken." The

acquiescence in whatever is, rather than any genuinely Lockean scheme of natural justice (p. 348). Nor does he say whether adjustments are to be made in the distributive baseline to take account not of rights-violations but of unfairness—free-riding and holding-out. Perhaps Epstein does not pursue questions like these because he senses their Never-Never-Land quality; perhaps he knows that the fantasy of a pre-political distribution can never be more than a dramatic metaphor.

compensation requirement in these cases must be met entirely by the "implicit in-kind compensation" flowing to those affected as members of the general public.

This formulation merges the notions of public use and just compensation. The idea is that those whose natural property rights are violated by a law or a general tax are compensated if, but only if, the benefits flowing to them from the collective action equal the value of what they have lost plus their pro rata share of the surplus generated. It is under this doctrine that Epstein invalidates all the programs of the welfare state—and it is this doctrine that he is wholly unable to reduce to formally realizable terms.

D. *The Total Wealth Test*

It is a striking consequence of Epstein's doctrine that any economically inefficient public action—one that generates a net wealth loss rather than a surplus—is an unconstitutional taking. In every such case, by definition some owner ends up with less than she started with. On this point Epstein finds one of his three legal tests of implicit in-kind compensation: courts should strike down those laws that, according to "general economic theory," reduce overall wealth (pp. 200-01). He adds that "general economic theory" creates a constitutional presumption against legislation that collectivizes well-defined individual property rights (p. 203). This test would thus, all by itself, invalidate legislative abolition of the tort system (p. 239), and it provides a "powerful argument" against generalized price controls (p. 278) and for a constitutionally required flat tax (p. 299). Epstein seems to recognize that there is an "odd, if not perverse" element in the notion of "don't reduce total wealth" as measured by "general economic theory" as a formally realizable constitutional standard, but he helplessly protests that "the conclusion seems inescapable on formal grounds" (p. 200).

E. *The Redistributive Motive and Disproportionate Impact Tests*

Nevertheless, Epstein does not think that courts should often invalidate laws on the wealth test alone. It is usually a bit hard for judges to tell whether legislation increases or decreases total wealth. Much more important in implementing the requirement of implicit in-kind compensation are two other tests familiar from the constitutional case law developed by liberal judicial activists in the areas of race, gender, free speech, and religion. The first prohibits collective action based on a redistributive motive; the second prohibits such action if it has a disproportionate distributive impact. For Epstein, laws are of

suspect constitutionality under the eminent domain clause if they have demonstrably disproportionate impacts upon the holdings of those whom they affect or if their supporters avow a purpose for them that is either explicitly redistributive, as with progressive taxes and welfare laws, or is conceptually linked to redistributive policies, as with laws justified by the supposed "inequality of bargaining power" between rich and poor.³²

Only a reader willing to absorb the hundreds of pages of "application" that makes up the body of his book can fully capture the reckless quality of Epstein's performance as he careens through the statute book flailing his crude doctrinal weapons. But some sense of the tone of the enterprise can perhaps be conveyed by a summary of his treatment of one of his own specialties, the law of accidental personal injury.

He begins with the scheme of natural entitlements, and quickly concludes that the very "idea of ownership necessarily entails" a tort system based on strict liability (p. 239). This means, breathtakingly, that the uniform adoption by courts in the nineteenth century of the familiar common law negligence doctrines was a massive "large number partial taking" of the property of those plaintiffs injured by non-negligent defendants.

The next question is whether this taking meets the test of implicit in-kind compensation. Is negligence as a whole a more efficient regime than strict liability, thus creating a surplus from which implicit in-kind compensation can flow? Well, as readers of Epstein's work on tort law know, he thinks strict liability probably is more efficient than negligence.³³ But he is not sure enough of this conclusion to be willing to strike down the negligence system as unconstitutional on the basis of the wealth test alone. What about the redistributive motive or impact tests? Well, there is no evidence of motive, and he thinks the distributive effects of the change to negligence are relatively small and unpredictable, so that there is no demonstrable disproportionate impact (pp. 239-40). The negligence system thus passes constitutional muster.

The change from a negligence tort regime to worker's compensation, however, is a different story. Though there are efficiency arguments for the change based on the savings in administrative costs, worker's compensation is rendered constitutionally suspect by "the undeniable element of class conflict" (p. 251). The compensation laws pit against each other employers and workers whose "intense histori-

32. *Cf. Coppage v. Kansas*, 236 U.S. 1 (1915).

33. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 188 (1973).

cal opposition is too plain to bear recounting" (p. 252). Here Epstein contrasts auto no-fault laws, which likewise reduce the level and broaden the scope of compensation while aiming to save administrative costs. These laws "apply to all drivers from all social classes and income brackets" (p. 252).

A further ground for constitutional suspicion of the worker's compensation laws is that legislatures justified them on the basis of claims that the workers' bargaining power was inferior to that of their employers, a rationale that is "*constitutionally* defective because it permits government intervention to shift wealth from one class to another in cases where the classic police power ends of controlling force and fraud are wholly absent" (p. 252). Balancing the arguments, Epstein swoops to his conclusion: worker's compensation laws violate the eminent domain clause unless they permit employees and employers to contract out of the statutory liability they create.

Epstein's basic rhetorical strategy is simple. First, he celebrates formalist method in terms that recall classic 19th century formalistic jurisprudence. This allows him to reject, without confronting them on their merits, contemporary eminent domain theories that would require courts to make contestable judgments of value or complex social fact in their application.

Then his own doctrines reintroduce through the back door, by way of "implicit in-kind compensation" and its associated tests, standards that call on the courts to make essentially utilitarian judgments as uncertain, subjective, and political as any entrusted to them by the various modern functionalist doctrines. And Epstein himself is ready and eager to make these judgments on the basis of a cocktail-party empiricism that is remarkable in its casual assertiveness. This is illustrated by his "analysis" of tort, worker's compensation and auto no-fault regimes. He repeats this pattern throughout the book, as he selectively invalidates a wide range of modern welfare state programs. The cumulative impact of the performance becomes so remarkable that one is tempted to go on and on, summarizing and quoting—but enough must finally be enough.

IV.

So much for Epstein's claims to have put forward a doctrine characterized by "Cartesian clarity." Now let me turn to the other aspect of the strict constructionist approach to constitutional interpretation. How does Epstein's attack on the welfare system comport with his claim of allegiance to the original meaning of the constitu-

tional right of private property?³⁴ Treatment of the question might sensibly begin by considering the historical relationship among the relevant institutions and practices: private property, taxation, and poor relief.

The fundamental lesson of the history of public relief in the West is that the modern welfare state, while an important innovation in scope, is not one in principle. One 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. Both Jewish and Christian traditions proclaim a duty of support and a corresponding right to subsistence, to be implemented not merely through the appeal to conscience but through law. The medieval Christian Church enforced the duty of charity to the poor through compulsory tithes.³⁵ In England, responsibility for poor relief shifted from the Church to local government with the adoption of the Elizabethan Poor Law in 1601; thereafter the indigent were supported out of local rates.³⁶ It was this system of poor relief that the American colonists brought with them, and it was firmly established in the colonies at the time of independence.³⁷

Nor did Americans treat the provision of basic needs out of the community surplus as a feudal or archaic notion to be swept away with the coming of liberal individualism and its associated concept of property rights. When the newly independent American states established their constitutions, they of course proclaimed natural and constitutional rights to private property in the standard language of the Enlightenment. And in realization of these conceptions they abolished such preliberal English institutions as the established Church, primogeniture, and entail.

Generally, the period of early independence was characterized by an outpouring of writing on the rights of property, much of it in the

34. I put the point in terms of the original understanding of the constitutional right of private property rather than of the just compensation clause because in the early years of the republic, and on through the 19th century, it was almost universally accepted that legislatures had no power to violate basic property rights. This understanding was advanced in a wide variety of doctrinal forms, many of which made no reference to eminent domain provisions. Many early state constitutions lacked such provisions, and in the states that had them they were often construed quite narrowly. See Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

35. W. TRATTNER, FROM POOR LAW TO WELFARE STATE 2-7 (1974); 1 S. & B. WEBB, ENGLISH POOR LAW HISTORY 1-6 (1927).

36. 1 S. & B. WEBB, *supra* note 35, at 7-100.

37. S. MENCHER, POOR LAW TO POVERTY PROGRAM 39-48 (1967); W. TRATTNER, *supra* note 35, at 15-28.

form of attacks on the many real or imagined contemporary threats to those rights—the authorization of paper money, debtor relief legislation, agrarian redistribution laws, and the like. In the literature of the time, taxes were recognized as *prima facie* infringements upon property; the slogan “no taxation without representation” had been based upon the Englishman’s natural and constitutional property rights.

Yet there is no record of any attack upon the system of public poor relief as a violation of the rights of private property during the period of the framing of the first American constitutions. The framers carried forward undisturbed the familiar system through which local government authorities provided relief to the indigent out of local taxes.³⁸ On this record, one must conclude that at least *prima facie* the original constitutional understanding was that government had the legitimate power and indeed the duty to tax its citizens in order to meet the basic material needs of the poor. This coexisted with the familiar understanding that government was to protect and secure the basic rights of private property.

Nor did the constitutional understanding on this question change during the course of the 19th century, the period that forms the historical background for the enactment of the Civil War amendments. Even after the Civil War, during the period in which the constitutional defense of private property against state power reached its most extreme point in American history, there was no attack at all on the universally recognized power of government to tax its citizens to provide the basic needs of the poor.³⁹

This last point is particularly striking, for it was after the middle of the 19th century that lawyers first began to invoke the constitutional right to property as a limitation upon the substance of taxing and spending programs under the rubric of the public purpose tax doctrine.⁴⁰ In *Takings*, Epstein basically adopts this doctrine in his own treatment of the public use requirement and its application to transfer programs.

The public purpose doctrine applied to the powers of taxing and spending the paradigmatic constitutional taboo against taking the property of the worthy *A* and giving it to the undeserving *B*. If the legislature could not decree transfer of Blackacre from *A* to *B*, surely

38. W. TRATTNER, *supra* note 35, at 28-41.

39. There were Malthusian and Social Darwinist arguments against public relief (and indeed against private charity) as a matter of policy during this period. See *id.* at 77-90; S. MENCHER, *supra* note 37, at 284-99. For the English background of these controversies, see generally G. HIMMELFARB, *THE IDEA OF POVERTY* (1983).

40. For an account of the origin and development of this doctrine, see C. JACOBS, *LAW WRITERS AND THE COURTS* 98-159 (1954).

the same principle must prohibit it from decreeing transfer of *A*'s bank account to *B* by the simple expedient of calling the transfer a tax on *A* and a public expenditure to *B*. Calling a governmental expenditure "public" does not make it so; the concept of public expenditure must have some limiting normative content.⁴¹

The 19th century laissez-faire constitutional writers then made the decisive step of generalizing this point from its application to legislative transfers between discrete individuals to those between classes of taxpayers and beneficiaries; this generalization produced the extension of the public purpose doctrine to the condemnation of "class legislation." A number of later 19th century courts invoked these doctrines to invalidate government activities and expenditures that were not properly "public"—whose beneficiaries were, in the courts' view, not the public at large, but a class of persons in their private role.⁴² Toward the end of the 19th century, the Supreme Court of the United States recognized the public purpose doctrine as a requirement of substantive due process.⁴³

The public purpose doctrine was the obvious vehicle for any constitutional attack that might have been made upon public welfare or poor relief as a violation of the constitutional property rights of taxpayers. Taxing the solvent in the community to feed the needy would naturally be seen as taking the property of one class to give it to another if poor relief were not conceived as the fulfillment of a fundamental public responsibility. Indeed, though the federal courts never went so far, there were a few late 19th century cases in which the more extreme laissez-faire state courts invalidated partial and novel welfare measures aimed to benefit not the poor as such but other classes deemed needy, such as the blind and students, under the public purpose doctrine.⁴⁴

But no court and no commentator invoked the public purpose doctrine to attack the basic structure of public relief. The unanimous view was that stated by Judge (later Justice) Brewer in one of the most reactionary and restrictive of the public purpose cases: "the relief of the poor, the care of those who are unable to care for themselves, is among the unquestionable objects of public duty."⁴⁵ Thomas Cooley,

41. See, e.g., *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664-65 (1874).

42. See, e.g., *State ex rel. Garth v. Switzler*, 143 Mo. 287 (1898).

43. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

44. *Switzler*, 143 Mo. at 287; *Lucas County v. State ex rel. Boyles*, 75 Ohio St. 114 (1906).

45. *State v. Osawkee Township*, 14 Kan. 418, 421-22 (1875); see also *Kelly v. Pittsburgh*, 104 U.S. 78, 81 (1882) ("[T]axes . . . for support of the poor are a public purpose in which the whole community has an interest and for which, by common consent, property owners everywhere are taxed.").

who both in his role as judge and as commentator was the leading exponent of the public purpose doctrine, treated the provision of public charity as among the unquestionably legitimate functions of government.⁴⁶

What does Epstein make of the unbroken consensus of American constitutional history in favor of public duties to the poor? He makes nothing of it; indeed, he does not draw it to his readers' attention. This might be justifiable if he were putting his theory forward as a pure exercise in political philosophy, but he claims to be demonstrating that public income maintenance is, in principle, *constitutionally* illegitimate under a constitution that is to be given its original meaning.

An argument based upon the concept of a fixed constitution cannot ignore fundamental historical context in this way. The very rhetorical power of the strict constructionist case is that it enlists the prestige of the framers on the side of the constitutional doctrine put forth. Especially when the issue addressed so directly involves the basic security of the most vulnerable, it is irresponsible to invoke the great authority of the framers without making any reference to the abundant evidence of what they thought about the issue.

Epstein justifies his general neglect of evidence of the original understanding on the ground that the duty of interpretive fidelity runs only "to the text as written and not to the framers' views of the consequences it entailed." Where these conflict, "the unwritten expectations of the framers . . . must yield to the internal written logic of the text" (p. 28). He illustrates the point by supposing that "the framers believed both *A* and *X*, when *A* entails not-*X*." In such a case, "[i]f *A* is the constitutional text, then *X* is not allowed" (p. 28).

This kind of talk presupposes that constitutional interpretation involves the application of concepts precise enough to permit reference to the logical relation of entailment, those for which the substitution of algebraic variables is suitable. But private property is not that kind of concept; it rather refers to a complex network of interaction between particular practices and general ideals. When Epstein claims Langdell-style access to the "internal written logic" of property, he is again indulging in his standard rhetorical ploy of selective formalism.⁴⁷ He contradicts these claims to mathematical exactitude repeatedly and/or insisting that the constitutional right of property must be construed to prohibit "rent seeking" and "faction"—"those practices, and only those practices" (p. 281). This is in no sense a clear, objec-

46. T. COOLEY, TREATISE ON THE LAW OF TAXATION 88 (1876).

47. Cf. Epstein's Pitkin discussion (pp. 21-24).

tive, formally realizable interpretation; it is purposive, functional, utilitarian. When the verbiage about rigor and natural rights is stripped away, Epstein's core position is that "private property" means that set of rules governing resource distribution and allocation that will produce the greatest good for the greatest number.

In the absence of any kind of precise internal conceptual logic, the interpreter of a term like "property" is left with the lawyer's usual resources—history, practice, and usage. When the question is the application of such a vague and contested concept to a practice that, like poor relief, was well-known to the framers, Epstein cannot in good conscience claim fidelity either to their original intention or, in any meaningful sense, to the language that they used, while entirely disregarding all evidence of how the relation between the concept and the practice stood in their time.

Epstein's failure to take account of the obvious arguments against his treatment of the welfare issue runs still deeper. He claims the authority not only of the constitutional framers, but of the tradition of classical liberal political theory. He repeatedly invokes the Lockean metaphor of government as a delegated authority possessing no more than the aggregation of the powers of its constituent individuals "in the state of nature"—that is, under a hypothetical ideal system of private law rights and duties (p. 12).

The metaphor cannot be more than that in Epstein's conception—by contrast, say, to Nozick's—because he concedes to the state the sweeping and indefinite power to go beyond the enforcement of private rights to the broadly defined supply of public goods.⁴⁸ But he invokes the metaphor of delegation and of aggregated private rights where it suits him; on the issue of welfare laws in particular he makes much of the fact that common law traditionally imposes on the individual no private duty to rescue a stranger, even where life is at stake and rescue would be easy. This, he suggests by way of analogy, means that the state cannot institute income maintenance, which is in effect the compulsion of rescue by way of taxing and spending (p. 318).

Yet the most obvious analogy from traditional private law to welfare is not the rescue situation—in which a liability rule would oblige the rescuer to act—but the situation in which the property of one person is required to preserve the life or meet the basic material needs of another (p. 110). Indeed, behind the classical liberal acceptance of the public obligation of charity lies a long tradition of legal and political discussion of the question of the rights and duties that

48. See *supra* note 30.

govern this very situation, the situation of the conflict between property and subsistence. And as Epstein must be aware, the consistent upshot of these discussions, repeated over centuries, has been the conclusion that every person has a right to have basic material needs met, a right that in cases of necessity operates as a lien upon the property of others.

Thus Locke wrote that "Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extream [sic] want, where he has no means to subsist otherwise."⁴⁹ The two greatest of the European liberal public law theorists, Grotius and Pufendorf, recognized the same right and corresponding duty.⁵⁰ The major common law commentators, Hale and Blackstone, similarly recognized that an aspect of the natural right to life was the duty of others to permit access to subsistence in cases of need. Both noted that in England the system of tax-financed public assistance was the collective mechanism through which this original natural right and its correlative duty were implemented. They argued that it was the existence of the Poor Laws that allowed English law to reject poverty or economic necessity as a general defense to a charge of theft, a defense that some of the continental theorists regarded as required by natural law.⁵¹

Further, Anglo-American common law has always recognized a privilege to invade private property in order to supply necessities in those emergency situations where the public assistance system could not provide subsistence. Though the person exercising this privilege has a duty to compensate the owner for the property taken, the standard common law writers recognize that ability to pay is not a legal precondition for the exercise of the privilege. A starving indigent, wandering in a storm, who must break into another's cabin and take food to survive is legally privileged to do so even though he knows he will not be able to pay for it.⁵²

How could the doctrine be otherwise, even under the most ruggedly individualistic classical liberalism? On what defensible basis could one conclude that a starving man "in the state of nature"

49. J. LOCKE, *supra* note 22, at 188.

50. 1 H. GROTIUS, *OF THE LAW OF WAR AND PEACE* 193 (F. W. Kelsey trans. 1925); 2 S. PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* 301-06 (C. & W. Oldfather trans. 1934). For a good discussion of the traditional doctrines, see Hont & Ignatieff, *Needs and Justice in the 'Wealth of Nations': An Introductory Essay*, in *WEALTH AND VIRTUE* 26-35 (I. Hont & M. Ignatieff eds. 1983).

51. 4 W. BLACKSTONE, *COMMENTARIES* *31-32; 1 M. HALE, *PLEAS OF THE CROWN* *53-54.

52. R. PERKINS, *CRIMINAL LAW* 851 (1957); *cf.* 1 H. GROTIUS, *supra* note 50; 2 S. PUFENDORF, *supra* note 50.

should not be privileged to take a subsistence portion of food from another who had more than enough? What could support the position that a shipwrecked sailor who had secured a floating board large enough to support two could nonetheless exclude another from it by virtue of first possession, even if exclusion meant the other's death? The conceptions of natural right at the basis of classical liberalism arise from shared reflective intuitions about situations such as these, intuitions thought universal among human beings of sound mind and moral sensibility. On this question, the history of both institutional practice and speculative and casuistic thought in the West converges on the conclusion that where claims to life and property collide, life must take precedence.⁵³

Epstein rejects this traditional liberal position, and instead reads into American constitutional law the view with which Malthus scandalized the civilized world at the beginning of the 19th century—the view that government must leave the weak and the helpless to their fate.⁵⁴ When we look for the arguments that lead him to this conclusion, so freighted with misery for so many, what we find is pathetically feeble. He does not accept the grim but self-consistent Malthusian logic that all charity is ultimately self-defeating; he not only endorses the utility of private charity, but even argues that there is a private moral obligation to sustain the needy (pp. 319-20). Why then cannot this form of utility be pursued, this moral obligation be enforced, through law?

Epstein has no answer better than another invocation of the tired rhetorical ploy of selective formalism. He says that the duty to supply the basic needs of the poor out of surplus must as a matter of principle remain “imperfect” (i.e., extralegal) because a judgment of degree is required to decide what is necessity and what is surplus (p. 319)! The benefactors and foundation bureaucrats who finance and administer private charity can make such judgments, but legislators and government bureaucrats cannot. “No one has a theory of how much benevolence should be shown,” Epstein says, and from this he concludes that to make legal rights turn on standards as fuzzy as need and ability to pay would be to “transform the legal universe” (p. 319).

This is stark nonsense. Anglo-American law is pervaded by standards that require similar judgments of degree and reasonableness. Children are legally entitled to exact the provision of their “neces-

53. For further on the historical treatment of this issue, see Hont & Ignatieff, *supra* note 50, *passim*; G. HIMMELFARB, *supra* note 39, *passim*.

54. *Supra* note 1.

saries" from the adults responsible for them.⁵⁵ Property and person are subject to official search or seizure when such action is "reasonable."⁵⁶ The boundaries of the basic right of self-defense, on which the liability of a tort defendant (or the life of a criminal defendant) may turn, are marked out by the standard of "reasonable force."⁵⁷ A small woman may use deadly force against a large man who is threatening her with his bare hands alone, because he is strong and she is weak. Make her the aggressor and him the defender and deadly force would be unreasonable. The very legal right to life turns on what the one has and what the other needs. The law is permeated with similar determinations. As I have shown at length, Epstein's own doctrine requires any number of judgments that are no less subjective.

Of course to the extent he is convinced by his own arguments, such as they are, Epstein is not bound to follow his predecessors in the common law and the classical liberal tradition. Perhaps they were wrong about the implications of the fundamental principles of their own theory. Perhaps the constitutional framers could not accept the Poor Laws consistently with their respect for private property, even if they did not realize it. And perhaps the late 19th century laissez-faire constitutionalists likewise did not see the true implications of their own legal and political theories. Perhaps Grotius, Pufendorf, Locke, Hale, and Blackstone all had it wrong, too; perhaps the "internal logic" of a regime of private property does demand that one man must have the legal right to hoard his plenty while his fellow man starves alongside.

But Epstein claims more than the authority of speculative logic for his conclusions. He speaks as a constitutional lawyer, a lawyer who places a high value on fidelity to origins. When he speaks in this role, he invokes a complex tradition—one that includes, beyond the constitutional text and case law, American constitutional theory, common law doctrine, and the principles of private right as the theorists of classical liberalism expounded them. Any conception of responsible argument requires him to interpret that tradition and at least take account of the development of the issue of the relative claims of property and human need within it. In *Takings* he has entirely abdicated that most basic responsibility.

55. RESTATEMENT OF RESTITUTION § 114 (1937); see also *Greenspan v. Slate*, 12 N.J. 426, 97 A.2d 390 (1953) (holding that a physician could recover the value of necessities furnished to a neglected child).

56. U.S. CONST. amend. IV.

57. R. PERKINS, *supra* note 52, at 888.