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Proceedings of the Conference on Takings of Property and the Constitution

RICHARD: I want to thank Larry for the opportunity to give people a chance to examine the book.¹ What I'd like to do is to talk about some of the arguments made against the book to explain why I think in general that they are misguided, erroneous, and wrong. In doing so, I wish I could state the argument again with some sufficient fullness: to outline the progression from the definition of ownership, to the account of taking, to the elaboration of the ends and the means of the police power, to the discussion of public use, and to the very detailed discussion of implicit in-kind compensation. I think one of the problems of these papers is that in their effort to criticize the book for all its various weaknesses, nobody troubles himself to summarize its arguments with sufficient fullness. In other settings I would do that, but I'm going to trust that everybody has read it, and therefore, begin by and large with my own points on other papers.

Joe Sax's paper² is the subject for this morning. Let me start with the first point, which is that he believes I have made a fatal concession by recognizing some kind of necessity exception in formulating any kind of constitutional doctrine, including mine on eminent domain. The way I reached my position was by an examination of the case law as it developed in other areas, most particularly with respect to the first amendment—although certainly analogies could be found in other kinds of national security cases, such as, for example, *Korematsu*,³ the Japanese internment case. It seems clear that the law faces the following type of dilemma: if you have a system which is so rigid and so powerful that it permits no exceptions to enormous necessities from the outside, then it runs the danger of being the stout tree that is blown over by the strong wind. Everybody recognizes that some degree of "give" within the legal system is imperative if it is to survive the kinds of shocks that constitutions, at least in part, are designed to deal with.

Unfortunately for Joe, he doesn't see that there is another side of this dilemma which is, to recall John Milton, "necessity [is] the

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

2. Sax, Book Review, 53 U. CHI. L. REV. 279 (1986).

3. *Korematsu v. United States*, 323 U.S. 214 (1944).

tyrant's plea."⁴ That is, suppose people recognize an exception to ordinary rules of governance in circumstances of abject necessity. They could take it upon themselves to say that we must prepare for that necessity in advance. Accordingly, they could introduce an entire set of anticipatory regulations and rules of such gravity and importance so that the necessity itself will never arise. Now in a world in which there is only one kind of error, the error which exists from revolution by dark and distant forces from within, that kind of strategy might strike you as rather attractive.⁵ But this is a world in which we have two kinds of error. One reason for constitutional government is to create a situation in which we make sure that government does not use the plea of necessity with such promiscuity that it will then erect whole series of repressive statutes, which turn out to be the very evil which we're fighting against.

I think courts have long recognized this peril. Where they have managed to stick to their guns, they have come out with the right answer. Where they have accepted an elastic definition of necessity, broad enough, for example, to accommodate the New Deal, then they have gone very far astray. So the usual test is: you almost have to wait, to use the expression at Bunker Hill, to see the whites of their eyes. Before you start to invoke the necessity plea, you must have an imminent threat of civil disorder, for which there are no alternative means available to repress the perceived dangers. The person whom you'll want to choose to administer your necessity defense is not the fellow who is going to allow it to expand with the eagerness that Joe embraces it. Instead you'll find somebody who genuinely loathes this defense, but nonetheless recognizes the intellectual reasons for its existence.

I fear Joe Sax's world. I recall just the other evening on TV they showed Martin Luther King and his marches through Chicago, with all the bigots yelling and screaming at him. One could take Joe's necessity arguments and conclude that we turned the guns the wrong way. What we really should have done was to send the police against Martin Luther King. By his logic we could have banned the march in order to forestall the violence that would otherwise and in fact did occur. Once you start taking that line you'll ban every march. If Joe is going to be consistent about a constitution, then instead of taking his ad hoc approach toward the clauses you don't like as opposed to

4. 1 J. MILTON, *PARADISE LOST* 393 (F. Prince ed. 1961) (1674) ("So spoke the Fiend, and with necessity, the tyrant's plea, excused his devilish deeds."); see also Speech by William P.J. in House of Commons, Nov. 18, 1783 ("Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.").

5. See Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985).

the ones that you do, you have to be prepared to constrain that necessity defense in each and every case in which it is urged. We cannot treat it as open sesame to comprehensive social and economic legislation. The thought, for example, that minimum wage legislation could be justified by the necessity defense strikes me as nothing short of grotesque. Indeed, it is so grotesque that all the people in the 1920's and 30's who defended it never did so on the grounds that only it kept us from the abyss. Rather they did so on a grounded moral theory that it was the right and proper thing for a just society to do, in ordinary times as well as extreme ones.

I happen to think those arguments are wrong, but I don't regard them as having very potential totalitarian effects. Joe, in his great effort to discredit the entire structure of my book, seems to have committed the far greater sin of excess: throwing out constitutional governance in its entirety to try to constrain what he regards as an unpalatable and unacceptable set of social conclusions.

Now this necessity ties into the second of what I consider to be the major blunders of the Sax paper. It goes under, I think, the somewhat condescending heading, "Sorry, But It's a Complicated World."⁶ I'm sure that we're sorry that it's a complex world. The problem with Joe's paper is he doesn't understand the full nature of the complexity, and he does not understand the reasons why simple rules are appropriate for trying to deal with huge numbers of complex situations.⁷

Let me see if I can unpack the situation and explain it to you just a little bit. One of the weaknesses characteristic of Joe's paper is that he makes no specifications of the kinds of individuals the law governs and the kinds of situations to which these people react. It is written in the standard law review style; without assumptions you can reach pretty much any conclusion. But let me give you a set of assumptions that I think his paper must rest on if it is to be intelligible at all. It's the assumption that there are greedy people out there in the world, people who are prepared to engage in all sorts of sneaky, underhanded, deceptive conduct. The purpose of government is to control these people, knowing that their kinds of behavior will be strategic, multifarious, deceptive, and cruel.

I agree with that assumption, but the other assumption that he makes is wrong. He assumes well-functioning legislatures, that is,

6. Sax, Book Review 13 (unpublished manuscript); *see also id.* at 14 ("Sorry, Richard, but things are not nearly as clear as your book says they are.").

7. *See Epstein, Simple Rules for a Complex World*, Wall St. J., June 27, 1985, at 30, col. c.

that somehow or other these same types of people, when they run for political office, curry votes, and obtain public office, can now be trusted to divine and to enforce the public will. If I thought we had legislatures which were well-behaved, if I thought legislatures had very solid knowledge of the private preferences of each of their citizens, then I might be very much in favor of a set of rules that Joe devises, because society would have satisfied the condition of Platonic guardianship essential to any system of large government.

But now let's run with the problem and make it much more difficult than the way Joe has stated it. Let's assume the legislature is composed of people no better or worse than the larger group from whom they were drawn. So, if it turns out there is a wide array of people from noble to profane in the world at large, that's the distribution you observe in the legislature. Indeed, knowing what we know about political selection, we'd probably expect that the variance would be still broader. There might be people with higher ideals of public service, but on the other hand there will be those who are more craven and depraved. The error cost of having one of those bad types in charge is far higher than the benefits of choosing one of the good and fortunate people to rule. Now, when you're thinking of constitutionalism, the world isn't as simple as Joe makes it appear. What you have to do is develop a set of rules that simultaneously constrain both the individuals who are governed, and those doing the governing. I believe that the enemy of liberty is the very kind of legislative discretion that Joe wishes to create.

Joe at one point makes what I regard as an astonishing assertion, that voluntary transactions between people should not be regarded as mutually beneficial in the general case.⁸ He treats it as empirical and as unproved. What I would want to reply is that if he is correct, then every piece of modern economic theory from the year 1776 to the present is largely incoherent. Unless you are prepared to accept the mutual benefit point as a general proposition, maybe not a universal one, but as a general proposition, then you have no possible way in which to describe individual behavior. Accordingly, you have no possible grounds for choosing one form of constitutional regime over another.

The great vice of the Sax idea, with its large degree of governmental discretion, is that it creates a regime of indefinite property rights, in which bad folks can move to acquire resources more rapidly

8. See Sax, *supra* note 6, at 22 ("To charges that his views of reality are simply assertion, [Epstein] responds that the benefits of private transactions . . . have proven themselves through the ages.").

than good ones. So, the reason you have to have very powerful constraints upon public behavior is precisely the same one that makes you so concerned about private behavior.

If Joe had seen that point, he might not have been so dismissive of the whole argument of disproportionate impact which I tried to develop in the book (ch. 14). In essence, the point of that section, which I regard as one of the major contributions of the book, is to present a way in which you can constrain government behavior without constraining explicitly, by dollar amount, the level of overall expenditures government makes. In the limiting case, any individual preference function will in effect be a simple constant multiple of the collective social welfare function. In so arranging matters, if you don't have direct information about what is good and bad socially, you can constrain the process in a way congenial, for example, to John Ely⁹ so that you are more confident that only good results will survive in an equilibrium position.

One doesn't see in Joe's paper any trace of recognition of the collective choice problem. So what Joe does is to accept the obvious solution: if people are bad and legislatures are good you go to the corner. Which corner? That of full legislative power.

You make the world more complex, as Joe would have it, and that simple constitutional solution is simply indefensible as a matter of general theory. You must be able to find some intermediate solution. The reason for a clear simple straight boundary line, or flat taxes (ch. 18), is to constrain the degree of legislative discretion.

Before closing, I want to talk briefly about two particular situations. On the navigation servitude (pp. 68-70), I simply note that Joe did not bother to read very carefully what I wrote.¹⁰ I make no effort there to describe the current law as representing my view.¹¹ What I'm trying to do is in effect to attack the current law as exemplified in *Willow River*¹² rather than trying to defend my account of riparianism.¹³ My basic point was that the navigation servitude rests on weak grounds if the state acquires it by mere assertion, as that case holds (pp. 67-68). I may be wrong, but I can assure you that this position

9. See J.H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

10. See Sax, *supra* note 2, at 288.

11. *Id.*

12. *United States v. Willow River Co.*, 324 U.S. 499 (1945).

13. See Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985) [hereinafter Epstein, *Alienation*].

has impeccable credentials.¹⁴ I would basically incorporate Joe's definitions by reference as I did in the footnote (p. 69 n.20).

The more important substantive issues are in his treatment of the *Just*¹⁵ case. When I put the *Just* case in the book (pp. 121-23), it was only directed towards the question of whether or not the ends of the police power would allow the particular action of the state to go forward, without payment of compensation to individual land owners, for the loss of what is normally regarded as development rights. One should note that the argument is not unique to wetlands. I have heard of a recent case in Florida where the question of development of the highlands was challenged on environmental grounds because it was the breeding ground for panthers. If the argument is that any environmental consideration can constrain development in the wetlands, then the same objections that Joe raises can be raised with respect to any and all property at any and all times so that the only issue is one of political will.

Now why do I passionately resist the idea that somehow or other as we know more about the interactions of various kinds of natural behavior and phenomena, we should feel free to "redefine" the underlying property rights? The answer I think is very clear from what I've said before: somebody is going to have to do the redefining. If Joe is correct, then, in effect all development rights cease to be well specified. They may stay with the individual, or they may be blocked by the state, but there is no process which prevents the alternation back and forth from one side to the other. It then becomes the classic rent seeking dynamic driving you to a social minimum.¹⁶ But compensation rules have forestalled that risk. Joe may be right about the technology; interactions that move across the boundaries might need a single unified approach. If he is, the public use requirement will not stand in the way of any kind of condemnation. But the compensation requirement means, in effect, that the people who are going to force the change in the existing distribution of rights are going to have to be careful that the gains to the public exceed the owner's losses. What the compensation requirement does here, as it does in the private law, is to monitor collective behavior and to place some constraints on government to avoid suboptimal social decisions. Under those circumstances no one's being "contemptuous" of facts for saying that

14. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 19-31 (1963).

15. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); see Sax, *supra* note 2, at 289-91.

16. See TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1981).

Just is wrongly decided.¹⁷ What I'm saying is that the important question is not the environmental one as such, but the choice of institutional framework on which environmental decisions are made. The book deals extensively with the "in and out" of common pools (ch. 15), but there is not the slightest bit of reference to or about that set of issues in anything that Joe has said. But it's the response to that particular problem which motivates the maintenance of the clear line, as a way to uniquely specify property rights against whatever subsequent action that the government should take.

Now there's another issue which raises exactly the same problem: airplane overflight. To read Joe's paper,¹⁸ one would think that I was deeply troubled by this situation and could offer no coherent explanation as to why overflights should be permitted without explicit compensation. Joe thinks that my acceptance of the common view was just inconsistent with my view of property rights, and that eventually I would have to abandon my entire position as utterly without principle. But a decent account of the doctrines of implicit in-kind compensation, as they were developed quite explicitly in the book (pp. 235-36), yields exactly the opposite conclusion. In effect, my discussion was designed to explain the limits of the physical invasion test. I'm not being simple minded. I understand the force of Frank Michelman's discussion of the coming to the nuisance cases.¹⁹ I also think he's wrong (pp. 117-21).

The overflight case is easy because all three measures of implicit compensation cut in the same direction. If you are going to try to estimate the overall wealth effect, you minimize hold-out problems by allowing overflights, which generally is going to be a good. If you look to motive, it's very difficult to find rent seeking behind the rule. If you look for disproportionate impact, you're not going to be able to find it. Now when there are large-number takings, the evidence could conflict on implicit compensation. It doesn't have to conflict. This turns out to be an easy case.

What is so nice about the theory is not only does it explain the present rule with respect to the high space, but it also explains the low space rule as well, because close to the surface, the disproportionate impact test shows there's a problem with uncompensated trespassers. Now we can have very sophisticated solutions where sophisticated

17. See Sax, *supra* note 6, at 18-19 ("It is Professor Epstein's total unwillingness to deal with such issues and his contemptuous disregard of inconvenient facts, that take both analytical and moral force from his arguments.").

18. See Sax, *supra* note 2, at 291-92.

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

solutions don't work. The optimal answer assumes we know there's high space and we know there's low space. We can try and figure out how to separate them by some probabilistic test, so that if you're at 14,000 feet you're at .99 high space and .1 low space, while at 750 feet it's 80-20 the other way. But that is a rule you can't work, so you draft a statute and you convert the principle into a line: above 1600 feet is public space.²⁰ This is an effort to explain why much of what government does is successful; it is not an effort to insist that everything government does is perverse. When someone does not bother to take the conceptual framework with the rigor it deserves, it's very easy to ridicule individual cases without seeing how they fit into the overall scheme.

This observation leads me to my last point, which is the question of how you beat a theory with no theory. Joe takes great pride in mocking my yellow dog contract paper,²¹ in part because it insists "it takes a theory to beat a theory."²² But I think it does take a theory to beat a theory. At the least it takes an argument to show why it's incoherent. In Joe's case, he says I am at my most plausible in talking about land use control. We have no idea of what the social optimum is, as Joe would conceive it, under some alternative point of view. We're told, for example, that all the Constitution deals with are individualized big takings. But the entire modern doctrine of "regulatory taking," the residual constitutional limitations on taxation and on changes in liability rules, suggests that nobody thinks that they can adhere to that line steadfastly even if it were intelligible, in the way that Joe insists. I'm very sorry to say that one does not see here anything like the coherent statement of an alternative position. I must say that in terms of its breadth and scope, if Joe would like to defend his 1971 article in the *Yale Law Journal*,²³ I'd be quite happy to attack it.

JOE: [Professor Sax declined to publish his response.]

BRUCE: I read a larger theme into Joe's paper, and I stand ready for immediate disclaimer from Joe, but I will be happy to raise it on my own. To put the point in a single line: it is the unlawful character of Richard's book. Here is a person who has a highly conceptualist view of the common law and has made a tremendous con-

20. Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1982).

21. See Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983) [hereinafter Epstein, *A Rejoinder*].

22. Epstein, *A Rejoinder*, *supra* note 21, at 1435.

23. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

tribution in forcing people to confront this view. Unfortunately though, he has utterly failed to make any methodological adaptations as he moved from a discussion of the common law in his earlier work to a discussion of the Constitution in his recent book.

The normal law book generally has two parts to it: The first tries to make sense of the cases, by which I mean not selected cases from different periods of time, but rather the case law of the present day. First and foremost, this part of a book should ask whether the cases reveal a doctrinal pattern that makes any sense. Then, but only then, the normal book takes a second step to propose one or another revision in existing law. Now this book contains nothing like this two-step pattern. Rather, it immediately springs over the doctrinal part of the normal legal enterprise to present a radical reform, masquerading as the true theory of the takings clause. So the question that I take Joe to be asking is: what would the missing doctrinal part of the book look like?

Richard Epstein's failure to ask this question suggests that he is a closet Crit—for only a fellow who believed present doctrine was “utterly indeterminate” would fail to consider systematically preexisting efforts to make sense of current doctrine. There are, after all, at least three familiar descriptions of the doctrine of the just compensation clause. There is the description in my book *Private Property and the Constitution*,²⁴ which describes present law as the relatively consistent development of an ordinary observer's approach to the clause. There's a second theory, which is Frank Michelman's. I take it that Frank's view is that present law can be understood as an effort by the courts to apply a scientific policy-making approach of a utilitarian variety—one that focuses upon a “demoralization cost calculus.”²⁵ And you know we could work that one out. Finally, there are Joe Sax's theories, presented in two well-known articles in the *Yale Law Journal*.²⁶ I actually like the first article better, Joe, and I take it that it is not only a proposal for reform, but also an effort at positive description. Rather than examining these, and other efforts carefully, however, Richard does not explain why any of them fail to describe the contours of existing law.

It's safe to assume, though, that Richard does believe that all prior efforts *are* failures. Fine. Now this is where Richard reveals that he is a secret member of the Critical Legal Studies movement. It would seem that the next task, unless you're a super Crit, is to pro-

24. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

25. See Michelman, *supra* note 19, at 1214-18.

26. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964); Sax, *supra* note 23.

pose another way of understanding the contours of existing law. Isn't *that* the first obligation of the conservative legal scholar? Shouldn't he at least consider whether there's some wisdom in this existing law?

But Richard's book is an exercise in trashing. It says that modern law on the fifth amendment couldn't conceivably make any sense, right? That's why I'm not even going to spend a page in a sympathetic effort to reconstruct the law. The question I would imagine a conservative would have asked is: What justifies me in simply junking the existing legal structure? Not a word, not a word about that. There is only the claim that Richard Epstein, with a little help from Locke, has discovered the one and only true meaning of the just compensation clause. We should demand more from a legal scholar. If the courts have actually been struggling to make sense of the just compensation clause for some time, and they have articulated a meaning which has a structure to it, shouldn't we at least find out what the prevailing theory is before rejecting it?

FRANK: This will follow nicely from Bruce's comment, although it was initially inspired by the exchange between Joe and Richard on a water law point. So, just to tie it into Bruce for a second, I want to come momentarily, just for a very brief moment, to Richard's defense. I don't agree with Bruce that there is not a word in the book in defense of, or justification for, a revolution in constitutional doctrine as it respects takings of property and all the allied matters in Richard's vision of the clause. There is a word, more than a word, although some of it is pretty elliptical. I'll come back to this at the end of these fairly brief remarks and say something more. As I listened to Joe and Richard go back and forth on the water law point, I was moved to say this. I think that one of the major reasons why a lot of people, some people at least, are having a lot of trouble with the book is that we can't securely locate it as a genre. We don't know what kind of declaration or assertion this is supposed to be, in the way it treats common law authority, judicial interpretation of the Constitution, or even the Constitution itself. There are times when the work seems to be positive and descriptive. It seems to be telling us what the common law has been like and to be trying to use that description as a premise for an argument. There are times when it seems to want to draw sustenance from certain judicial interpretations of this or that clause of the Constitution. But at other times, as I think Bruce quite fairly says, it simply ignores the whole history, or at least sets aside the whole history, of judicial struggle, and its irresolute inability to arrive at a master coherent theory of the clause.

One experiences a certain degree of frustration in wanting to

know Richard's theory of authority. How is it that Richard knows when it is appropriate for him to appeal to prior decision and when it's appropriate for him to attack them? What is his theory, in Ronald Dworkin's terms, of mistake?²⁷ He needs a theory of mistake, I think, if he is going to argue in this way, and we don't have it. It's fairly clear to me, that this is an enterprise in normative theory of constitutionalism. It also purports to be an exercise in the normative theory of *this* Constitution—though those, of course, are two different possible genres. Or one could have been writing a book about how a constitution for a liberal society ought to be. One could be making a claim that this Constitution is that constitution.

There is a certain embarrassment in having both projects possibly together without being explicit about the linkage between them. And the possible embarrassment is Herbert Spencer's *Social Statics*.²⁸ If there was any punch or force to Justice Holmes's dissent in *Lochner*,²⁹ it's not unfair for the reader to ask himself or herself, "How is Epstein's theory not Mr. Herbert Spencer's *Social Statics*?" The point about Herbert Spencer's *Social Statics* is this: You may have here a possible rationalization of the Constitution, but certainly not a self-proving or an inevitable rationalization of the Constitution. By rationalization, I mean something that is in some measure Procrustean.³⁰ By rationalization, I mean a theory of the Constitution that has a degree of plausibility inasmuch as it assimilates and works from some of the given material, including texts and decisions, but which has to set aside a certain amount of that material, including texts and decisions, as anomalous. If you have decisions that seem to be based on a particular controversial political philosophy, which is at best a rationalization in the sense that it is Procrustean, that has to cut off a limb here and there or ignore a whole organic hunk of the material in order to work, then you're in at least some degree of difficulty. Now here's where I get to the word that I think is in the book.

SPEAKER: Get to the what?

FRANK: The word. I said there is a word, and Bruce said there is not a word in defense of it as a theory of this Constitution. I say there is. Richard, I believe, means to argue, means to appeal to two

27. See Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165, 168 (1982).

28. H. SPENCER, *SOCIAL STATICS: THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED AND THE FIRST OF THEM DEVELOPED* (England 1851).

29. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

30. Procrustean is defined as that which "is marked by complete disregard of individual differences or special circumstances and that arbitrarily often ruthlessly or violently forces into conformity with a subservience to something (as a system, policy doctrine)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1809 (unabr. ed. 1981).

sources of justification. One is history, general history of ideas and the history of the Constitution. The appeal to Locke, I believe, is meant to be an appeal to a set of ideas that was in the air and in the heads of the framers. Consequently, it is fair then to ascribe Locke's ideas to the document, which the framers wrote and offered to defend, and eventually persuaded the states and their conventions to adopt.

There is also an appeal to a kind of internal logic of the document. Richard plainly means to argue that you can't finally make sense of the document as a unified institutional framework without going to a theory like his. Now I'm going to stop here, because we have two days. All I want to say is, Richard, there is at least one person here who is prepared to fight you every inch of the way on both the history of ideas claim and on the internal logic claim. I think that you've only really just suggested them in the book, and thinking about it now, my major unhappiness is that there is so clearly another side to both those stories that you haven't taken account of.

I will simply say, perhaps somewhat provocatively because I know we'll have a chance to talk more about this, that the Constitution is a liberal document in the sense in which you describe it. I believe it is also a democratic, or if you like, a small "r" republican document in a way that you utterly ignore. I believe that makes the document plural. I believe that it makes it not unified, not finally coherent in the way that you insist that it must be. To my mind, this book is beset at its foundation, by the following problem (but to your mind perhaps virtue): it has no tolerance for plurality, for irreducible plurality, for the possibility that this Constitution is not reducible to one unified coherent set of principles, but that instead it's at war with itself in the deepest possible way. The incoherence that you see in the takings decisions, among others, is a reflection of a conflict that was built into the Constitution, that was in the heads of the people who created it, and that remains with the people who construe it. It is irresolute, and that ain't bad. That is the last thing I want to say.

BRUCE: I'd like to defend myself against Frank Michelman's vicious attack. I deny that Richard appeals to history in any serious way. He shows no evidence in his text or in his footnotes of having read and wrestled with the work of writers like Pocock, Bailyn, and Wood, whose books cast grave doubts on Hartz's thesis.³¹

SPEAKER: Who's Hartz?

BRUCE: Louis Hartz's thesis is that the Lockean consensus

31. L. HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 59-61 (1955).

monopolizes American political thought. There is no effort to wrestle with anti-Hartz historiography, and consequently, no legitimate scholarly appeal to history. Second, I deny that Richard has tried to place the takings clause in the text as a whole. Of course, there are possible ways Richard could have rendered his work historical or contextual in the lawyerly way. There are possible things that he might have done so that he could read the takings clause as one of a whole set of clauses. Particularly, Richard should have addressed the 1787 Constitution, which we should recall, apparently was ratified without any takings clause.

I want to say that he is not lawyerly, first, because he doesn't take the history seriously; second, he doesn't address the whole Constitution, he just fixes on a single clause and pours everything into it; and third, he doesn't take the judicial decisions that have been trying to make sense of that clause as a source of law. What then is he doing? As I suggested initially, he is applying his highly conceptualistic view of the common law to a new territory, constitutional law, without any compromises, without any recognition that lawyers play the interpretative game in *this* territory under different rules.

STEVE: I believe that Bruce's remark in his first comment equivocates on two different senses of "conservatism." Your remark, if I understood you correctly, was that Richard's position, being a "conservative" one, is that one ought to try to assess and build on the wisdom of existing law. If it were the case that Richard was in some sense a Burkean conservative,³² he might well be bound to do that. But I don't take him to be a Burkean conservative. Instead, his book presents a libertarian, natural rights account. That may be a conservative position, but it is not a position that requires him to unpack and distill out the worth of existing decisions under the takings clause. So your comment seems to mix up two different senses of "conservatism."

I would like to mention a broader point. I think it is the case that, for every general theory of government takings of private property, there will be a political theory underlying it, and then some constitutional account that bridges the two. What does not seem obvious to me is that the same type of bridge account is going to be appropriate for every such pair of theories. In particular, if your underlying political theory is libertarian or natural rights in character, the kind of bridge account that you need or might find appropriate would be

32. For a recent statement on Burkean conservatism, see Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913 (1986).

rather different from what it would be if your underpinnings were different.

LARRY: Is yours a follow-up, Ellen?

ELLEN: Let me say that I agree with much of what Bruce has said about the book. It is something of an eclectic effort, but I think it is fundamentally, as Frank said, a work of political philosophy, and not the typical kind of work that you get from a legal theorist, and I don't think that's all that bad. Political philosophy is an engaging enterprise, and I think that Richard has asked some of the fundamental questions. The main one being that if we started from blank slates, would we have an eminent domain clause? That really gets to the heart of what governments are usually about—taking property and redistributing it to others. He has asked the fundamental question.

But it's something of a misnomer, Bruce, to call Richard a conservative. If someone wants to repeal the last fifty years of political development in this country, it's strange to call him conservative. Richard is very much a radical, and he's after a radical enterprise. The validity in what you're saying, Bruce, is that Richard, like many people who believe in property rights, would like to have the respectability that comes from saying that everything he believes in, everything he'd like to protect under property rights, can be attributed to the founders and the Constitution. And everything that the Court has done since the mid-30's is illegitimate because it violates fundamental constitutional principles. The property rights defenders' arguments would be much stronger if they simply said, and I think the dominant view in Richard's book is to say this, that property rights can be defended irrespective of arguments from authority. They're valid and important principles, and let's see what emerges from taking a natural rights, Lockean position. The inconsistencies in Richard's book come from trying to marry different kinds of enterprises, mostly political theory, while still trying to stay within the constitutional framework. That is why you get this peculiar aspect to Richard's book that Bruce fastened upon. The eminent domain clause seems to subsume the entire Constitution. The rest of it falls away, and the whole theory of government is plugged into the clause. Richard just expects this one clause to do an awful lot more than it was intended to do, which is, as one of the papers says, to prevent takings of property by force as occurred in the revolutionary period.

CASS: I have three points. The first two are mild criticisms of Bruce and Frank. During Bruce's remarks, I thought of his *Recon-*

structuring American Law book.³³ I think there are three or four times in the book where he says the task of American legal theorists is to make sense of the existing legal order. I don't know why that should be so. But I thought also of the examples of influential common law or constitutional law scholarship during the last twenty years, and most of it does exactly what he says. I think of Ely on representation reinforcement,³⁴ Gunther on the equal protection clause,³⁵ Posner on the common law,³⁶ Michelman and others on welfare rights.³⁷ They all seem to build from existing legal materials.

But I don't think it's necessarily the case that what the legal academic has to do is to make sense of the existing legal order. Here are three counter examples: Unger on equal protection and contract.³⁸ He doesn't try to make sense of the existing legal order. Ackerman's work on environmental law³⁹ doesn't try to make sense out of the existing legal order. Instead, it abandons the regulatory framework in favor of an incentive-based framework. Bork's writing on the first amendment⁴⁰ doesn't try to make sense of the existing legal order, but instead tries to reason out—badly, I think—what the first amendment doctrine would look like from first principles. I think that all of those three efforts are honorable efforts, so on that score I think that what Richard has done is odd, but a perfectly legitimate form of scholarship. One would associate it more with Critical Legal Studies people than with the Right, but that's fine.

The last part of Frank's remarks disturbed me a little; he said the conflict between republicanism and liberalism is irresolute and "that ain't bad." There are cases that one has to decide, and there are republican and classical liberal themes in the Constitution and in current constitutional doctrine. One ought to decide in what direction doctrine should be pushed. The fact that there's a conflict may well be bad if one is too far in one direction or the other on what some see as a continuum from liberal to republican. I think what Richard is

33. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).

34. J.H. ELY, *supra* note 9; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

35. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

36. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

37. See Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

38. R. UNGER, *KNOWLEDGE AND POLITICS* 7 (1975); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 602-48 (1983).

39. See Ackerman, *The Jurisprudence of Just Compensation*, 7 ENVTL. L. 509 (1977).

40. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

saying is that we are very far down the republican road and that's bad. I think Richard is wrong on both points; I don't think we're very far down the republican road, and I don't think to the extent that we are down on that road that's bad. The conflict may be irresolute at its base, but one can argue about where we are and should be on the continuum.

Third point, and a very quick point: Sometimes when I try to make sense of what Richard is doing I suppose that in first amendment law the Court had gone Judge Bork's route. What we would have had was something like the law at the time of the *Dennis*⁴¹ decision, where political speech was the only speech that was protected, or was the speech that was disproportionately protected, and even political speech wasn't protected all that much. Suppose someone had written at that time a book saying there's an internal logic to the first amendment which compels an alternative view, and the book said that much of first amendment doctrine was wrong because it was a cost-benefit analysis with respect to political speech and it excludes lots of categories of speech which ought to be entitled to protection. That book would have presaged at least some of what we now have. I think that would have been an honorable book, so on all of those scores I'm mildly coming to Richard's defense. I guess I'll just stop there.

LARRY: Why don't we do the following at this stage. If we're about to move to a different point, I'd like Richard to briefly respond to the ideal versus the real constitution and where the normative and the positive fit together.

RICHARD: Well let me address several points. First, I agree with Ellen that one could talk about ideal constitutions or about our Constitution. What I found very nice and congenial about the enterprise is both of them seem to have the same provisions. The reason for the overlap—one that I think that Frank just does not understand or will not accept—is you don't draft constitutions out of law reports; you don't take one clause from one case and one clause from another and put them together and find some composite. The reason the Constitution is a great document, the reason it has lasted as long and as well as it has, is that it does make fundamental choices about government and it does decide that certain paths are necessarily excluded from the operation of a sound polity. Here it is quite clear that all of us believe that proposition with respect to other provisions of the Constitution. For example, Cass's point about the first amendment is very well taken. There were times when it was much more narrowly

41. *Dennis v. United States*, 341 U.S. 494 (1950).

construed than it is today. In many ways I would construe it, perhaps, even more broadly than it is today. Yet behind that choice lies a clear vision that enables us to reconcile the demands for individual autonomy on the one hand with the needs for collective governance on the other. It is wrong to describe this as a theory of minimum government, although it is often described that way. The minimum government is zero. Nobody wants to drive you towards that extreme position because it leads to a highly unstable and unfavorable equilibrium. That then leads to the question of how do you get from minimum government, which is zero, to optimum government, which is obviously going to be somewhat larger. What I've tried to do, in effect, is to generate that account. It is wrong to treat it solely as an account of the single clause. I talk about the single clause here but I can fit the rest of the Constitution into that same basic theory (pp. 16-18).

In thinking about constitutions the first cut is where do politics begin? Where do collective institutions begin? And where do both end? This is not a world without politics; this is a world in which, unfortunately, there is ample scope for politics, since I can't think of any other way to live. Nations decide whether or not they're going to go to war, how they're going to maintain defenses, how they're going to engage in all sorts of foreign transactions, how they're going to set up their court system, and so forth.

Indeed much of what ordinarily passes for politics, unavoidably, necessarily, and properly passes for politics under the eminent domain clause as I view it. For example, when I talk about the flat tax (pp. 295-302), the theory is to limit the degree of discretion in the raising of public funds. This is not because there aren't public choices to be made—choices which will have lumpy impact. It is because you'll have better public choices made with those lumpy impacts if you limit what is essentially unnecessary discretion on the opposite side, the revenue raising side. If fundamental decisions as to where politics begins and ends have to be part of a constitution, the flat tax gives a sensible line. It strikes me as being essentially indefensible to argue, as Frank does, that all these points are essentially confused and disorganized, and therefore, that any side of a contradiction is as good as any other side of the contradiction. I will freely admit that any rule could create difficult borderline cases, which we could argue about one way or another. But nonetheless, under my view, you're going to have a series of powerful and clear cases when you move from the muddy middle to the clear extremes. So on the question, "Do we

have politics?" Clearly the answer is yes. But on the further question, "Does politics cover everything?" I think the answer is no.

The second point on which I want to comment concerns the source or pedigree of *Takings*. I put the Lockean chapter (ch. 2) in it simply to try to explain to my readers what I thought to be the substantive problem of government. I didn't say he got the solution right, because, remember, I disagree with Locke on the definition of common property, on the need for the Lockean proviso, and on the rule of tacit consent (ch. 2). It is, however, necessary to state the dilemma of governance. The great contribution of Hobbes and of Locke is that Hobbes stated a dilemma, a choice between endless war and an omnipotent sovereign, while Locke tried to use limited representational government as the answer to escape that bind. I would utterly dispute anybody who denied that those themes dominated the thinking around which our own Constitution was organized.

But when it comes to argumentation, I place zero weight, zero weight in the book on the authority of Hobbes or Locke.⁴² Similarly, I do not use individual snippets of history for or against my position. I don't cite history in my defense. It's not a matter of my being selective in its use. It seems to me that the only way to use history is as an aid to figure out what the words that the framers wrote, meant. When the framers drafted the Constitution, they called for the destruction of the various documents used to prepare it on the theory that no text can be self-contained if everybody was allowed to leak his own private understandings of it.

My view about legislative interpretation and contractual construction is very much the English view, which is all of that material has to be kept out. The danger of letting it in is that it opens up a world in which anything goes. You can find some history here, some argument there. The choices are wide open: if you like the history, you use the history; if you like the text, you use the text. You could always find a way in which you can mix, match, and weigh these things to the point where you could come out with your convenient answer.

The problem is that there isn't one of us who can't play that game. It seems to me that the reason that you want to restrict access to the sources is that otherwise you cease to have determinacy with respect to doctrine. I might add I don't think this is only my point of view; I'm not going to try to rely on historical sources. Any quotation I take from previous cases, I use strictly and solely for the moral force

42. Indeed, the book was written originally without chapter 2.

of its own argument, not for the fact that Judge *X* said it. Any conclusion that I reach I defend on the ground of its coherence, and its superiority to the alternative position.

The only way in which you could do fundamental work is to start from that assumption. Otherwise we are prisoners to dominant errors. For example, do we assume that there is such a thing as "regulatory takings," but there are huge areas of regulation that don't go "too far"?⁴³ If so, we can now debate whether it's this or that version of the regulatory taking doctrine that is correct. Yet that utterly precludes somebody challenging the prior distinction between regulations and takings as illegitimate. Bruce's mode of discourse is a form of agenda forcing. It's an effort to try to set up the arguments so that only the class of answers that he would regard as acceptable, i.e., post-1937, remain on point. Life would certainly be easier. There's no doubt that trying to undo the mistakes that other people have made, if they are mistakes, is a lot more difficult than getting the decisions right the first time. But at least if we're talking about high principle, you have to be univocal with respect to your choice of standards. You have to have a criterion of selection that doesn't allow these kinds of irreconcilable dualities to take over the entire law.

PEGGY: All right, two things that are unrelated. One's more important than the other. I'll tell you the less important one first. The less important one is in response to Bruce. There is another theory of the taking clause, namely mine.⁴⁴ I'll say a word about it because it might be lurking around in the way Richard compares property to the first amendment, although he doesn't bring it up. Secondly, Richard makes a very important point jurisprudentially that he calls an institutional point, but he doesn't develop it at all. That is this business that the only way to make the best decisions under collective action and to constrain rulers and so forth is to have simple rules and clear lines. The whole thing is a jurisprudential problem that is complicated and interesting. I want to say a little bit about that just to put it on the table.

About the personhood theory about taking, I only put it forward as a partial theory, but it certainly was an attempt both to describe existing law and to take into account property, ideology, and tradition in the same way that these other theories do; and it was an attempt to plug into this tradition of resting private property on ideals of autonomy, self-development, self-constitution, and so forth. Richard has an interesting paragraph where he says the first amendment is about

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

44. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

that and so is property (pp. 25-26). But the interesting thing is that Richard says there are gradations in the first amendment depending upon how well they serve these ideals of autonomy and self-development. The implication is that this is not so in property. Yet, the point isn't discussed. I do think it is so in property, from the history of the institution and from the implications of the ideology. The distinction is roughly between commercial and personal property, which Richard does bring up at one point. I sometimes call it wedding rings versus widgets or homes versus parking lots. We do have a more intuitive appeal against the taking of homes than the taking of parking lots, and it is up to us property theorists to explain, justify, or reject that. Well, enough said about that for the present; we might get back to it.

I don't have a complete view on the jurisprudential point. It has to do with the model of rules, and whether the model of rules as part of the ideal rule of law is the only way to achieve efficient or useful government under collective choice. There are three things Richard thinks are self-evident, so the problems they pose are not confronted in the book. The first thing to say, which I just want to throw away, is that the lines he thinks are clear, like those needed to apply a physical invasion rule, are not clear lines. He certainly admits it attenuates as you get to close questions. But throw that one away.

Secondly, under what circumstances you want to have what he would call a simple rule and a clear line is a complex normative question. It depends on the risk of error with regard to what you're trying substantively to accomplish. The choice between a blanket rule (what he'd call a simple rule) and what he'd call case-by-case discretion is complex. Those rules are not either wrong or right for every single kind of thing that you're trying to do. We know that blanket rules have certain types of errors. They are sometimes very unfair, overinclusive, underinclusive, and yet they give the impression of looking general or of fulfilling the ideals of the rule of law. We know that case-by-case discretion and treating things by degrees might be more fair by providing individualized treatment. While this is important, it might also look arbitrary or costly and unworkable.

It's also unclear whether either of these approaches are able to constrain the kind of "Crit" that some of you say Richard might secretly be. I would say that neither of them do. The blanket rule situation leads to what some people call definitional balancing in order to bring things within the terms of your rule.

Perhaps I could bring up examples of the context in which each of those kinds of rules might be a better jurisprudential choice.

Maybe just as a homely example you could think about grading students. Even though multiple choice tests and computers give you something that looks more concrete, more like simple rules, it's not clear that in every single context this is preferable to essay questions and individualized judgment. Those of us on faculties have a lot of fights about this, and it applies to lots of things.

My third point is that the debate about clear rules versus discretion is also about the formal realizability of rules, or of rules versus standards. I think—having thought about this a little bit—that it's really about the vagueness of the words in the rules. You can make a rule that says, "No unreasonable physical invasions." But you have the word "unreasonable" which is vague, so you would have to conclude that the rule is unworkable because it's not simple and clear. Alternatively, you could call it a standard, or you could say it doesn't have formal realizability, but it is individually tailored. Standards are rules with vague words in them, like public use, or physical invasion. Many of the rules in the Constitution, and some other ones that we think are normative underpinnings of the Constitution, like "persons should be treated with equal respect," are vague.

If you have a model of rules, you eventually have to make many more specific sub-rules which try to defuse the vagueness of the main words. This is the enterprise that you're partially engaged in, albeit covertly, when you find a lot of things inherent in the concept of property. Words like "21 years old" in a rule are less vague than words like "unreasonable." I'll stop there, but we might come back to it. It is a point about the nature of language and how this language problem figures in interpretation of the Constitution.

LARRY: All right, Eric, you're next in line, but I wanted just to raise the same point that Peggy did, and maybe get a response on the rule or standard question. As I've heard Richard today in responding to Joe Sax, one of the claims he made was the preferability in this area of bright line rules to vague standards or case-by-case adjudication. It seems that Richard made essentially five different kinds of claims that seem to be linked. Actually, two of them are in link, but one of them is that your rules are clear, they're not disguised standards, they're clear rules.

This is an area where clear bright line rules are preferable to vague standards. The clear rules that you in fact endorse are the common law rules, at least the common law rules circa 1787 or thereabouts. Then, you make the following claims and I'm not sure how they're linked. Those common law rules are in fact the constitutional rules with respect to property. But I still can't tell from your book

whether they are deontologically correct rules, they're the right rules to have, or whether they are the instrumentally right rules under a more general teleological kind of theory. Consequently, I'm left with that five-fold break down with some of the arrows pointing in opposite directions. So I'd like you to respond to that kind of structure.

RICHARD: This last exchange raises a problem which oddly enough I first addressed thirteen years ago in a piece called *Pleadings and Presumptions*.⁴⁵ It ties in with a debate that H.L.A. Hart had over the defeasibility of ordinary language concepts published in 1949⁴⁶ and the replies to it by Geach⁴⁷ and Pitcher.⁴⁸ Peggy basically has fallen into the same trap that Hart fell into. The trap arises in making any effort to draw relationships between certain inputs, and "yes" or "no" conclusions about liability. It is the trap of thinking legal rules all take the form of strong logically necessary and sufficient conditions. Anybody who believes in clear rules, simple rules, non-complex rules of that stark form is going to get himself caught on a concrete suicidal pathway. You take a stock truism: you can never lie. Then you redefine "lie" because you've got to handle the self-defense cases.⁴⁹ Hart assumed that this kind of difficulty raised a semantic difficulty in the way ordinary language operates. In his view, the reason we couldn't figure out whether or not contracts should always be enforceable is that we didn't know what the meaning of "contract" was. His mistake was not to distinguish between two questions. The first question is, what's the semantic meaning of the given term? The second question is, what's the relationship between a state of affairs that falls under that semantic meaning—that is, making a contract—and the legal conclusion, or the moral judgment, of its consequences—that is, is there or is there not liability?

I think we have a perfectly good definition of contract, which covers more or less all cases of promises made by individuals to either perform or to abstain from the performance of certain kinds of actions. Nonetheless, having proved the promise and the nonperformance thereof, you haven't necessarily proved the breach. Why? Because we have all sorts of excuses or justifications that come in by way of affirmative defenses to limit the relationship between not performing a promise on the one hand and liability on the other. The important notion, then, that allows us to escape the dilemma between

45. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

46. Hart, *The Assumption of Responsibility and Rights*, in LOGIC AND LANGUAGE 151 (A. Flew ed. 1973).

47. Geach, *Ascriptivism*, 5 PHIL. REV. 221 (1960).

48. Pitcher, *Hart on Action and Responsibility*, 5 PHIL. REV. 226 (1960).

49. For example, someone who lies to protect their children.

logical connection and no connection is basically the idea of presumption. The relationship between certain facts and legal conclusions is not wholly contingent, but nonetheless not fully necessary. You start off with a *prima facie* wrong. Then you try to find out what can override the presumption, and so forth. That model is certainly taken up in my book where I talk about the *prima facie* idea of the taking, which in most cases is indeed clear. I then talk about the "anti-taking" (pp. 108-12) as a way of trying to limit the inference from the fact that your property has been taken to the proposition that compensation must necessarily be provided by introducing a series of justifications for all forms of takings.

Now there's a precise mathematical equivalence to this approach, which basically uses sequential programming models in order to solve social questions. We don't have the direct information about a course of action, so we try to make a series of successive approximations. Each time we obtain more information than we had before, we have better approximations, even though we will never get the certainty that allows the strong logically necessary and sufficient connections between fact and judgment.

You're basically playing a game. How many iterations could you play in court to get matters right? The formal problem is basically to develop an equilibrium between the additional costs of administration on the one hand and the number of iterations that you make.

Now there are two important ways to run these iterations, one of which I didn't understand early on. One way is by the standard libertarian moves of what does and does not count as a defense. So doing something *prima facie* wrong is hitting another individual. The defense that you could raise is that he hit me first; so you're starting to talk about self-defense. Then you could iterate beyond that by arguing the defensive force was excessive. Justifications aren't the same as liberties, but presuppose violations of rights. Still, having so constrained the process, sooner or later the iteration breaks down. You then have what would be formally called a "residual," which you can't define and that always gets captured in the legal discourse by the word "reasonable." The problem with Peggy's argument is that she introduces the "reasonable" in the first stage of the argument where it functions as a huge variable term against a relatively small base, whereas in the sequence that I've given, it enters in about the fifth stage of the argument, after you've already bounded the inquiry in a very important and profound way.⁵⁰

50. See Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 411-20 (1975).

These iterations also work in a second dimension with forced exchanges. One of the weaknesses in the book is that it wasn't rigorous enough on this point, and may have abandoned its own model. People hinted that I'm ontological in one breath, and a consequentialist in the next. But basically if you look at the chapter on the unity of ownership (ch. 5), what I'm really trying to say there—though I don't do this formally as I do in my restraint on alienation piece⁵¹—is that the cohesion of rights in the bundle of possession, use, and disposition, finds its ultimate justification as the first approximation to minimize the number of bilateral monopolies, with all of their degenerative consequences, by creating compact property rights. The eminent domain clause, which allows for forced exchange of those rights is essentially the second iteration. Where these initial bundles of property rights create common pool problems, e.g., in the *Just* situation, eminent domain offers a mechanism to escape the bilateral monopoly problems that well-defined property rights can create. The government brings about the amalgamation while the compensation requirement, express or implicit, is a way to constrain the political process.

Once this basic structure is established, you may have some odd marginal cases in analyzing these forced exchanges. What does become clear, however, is the link now between common law and constitutionalism. That link is that the state works on some kind of "agency theory" and all of its rights have to be derived from the parties it governs. You now have a "summation" principle which allows you to work this entire scheme of forced exchanges through to its conclusion (ch. 8). The rigorous defense of the summation point in chapter eight is designed to set the stage for the rather difficult questions of implicit compensation in chapter fourteen. It all fits into a model, so that you're not faced with this false dilemma of case-by-case or straight absolute rules. The presumption sets a type of algorithm, where each element is added into the picture in a systematic basis. Successive approximations lead to an even richer mosaic. The failure to see the method explains, for example, why Joe did not understand how I solved the "coming to the nuisance" problem.⁵² It wasn't only a simpleminded physical invasion test: I decomposed Frank's solution, the standard solution. I first looked at the problem with respect to space, and then I took time into account (pp. 118-19). The first determined the issue of liability; the second determined the scope of

51. Epstein, *Alienation*, *supra* note 13, at 971-72.

52. Sax, *supra* note 2, at 289-91.

remedy. It's much easier than trying to allow both elements to vary freely and simultaneously, where you can't solve the problem at all.

PEGGY: Just on the language point. I think what you say underlines my feeling that there's a debate about language and interpretation that's not being made, because you have an implicit philosophy of language that you think is *the* way to view language. You have these mathematical analogies, algorithms, and so forth, and you assume that if we have a vagueness problem iterations will lead us closer to some kind of formal resolution. That's not the way that all language theorists would view vagueness. Some of us would view iterations as always inevitably introducing other vaguenesses. That's my view and that's what the debate is all about.

ERIC: Well there are a lot of things I wanted to talk about, but I'll try to pick one and I won't speak at length. I wanted to ask Richard about what he said about the wetlands case and how it fits with some of the things we talked about at breakfast. But I want to take the simple case—not the AIDS case, but the syphilis case. As I understand your position with respect to the wetlands, we're not supposed to inquire now whether or not some process occurring on the person's wetlands is in fact very detrimental to whatever riparian rights somebody else has. We're not supposed to enter into that.

RICHARD: That's not what I said, I said in effect you can make all the inquiries you want but if you wish to change the balance . . .

SPEAKER: We're not supposed to change our view about where the rights lie . . .

ERIC: Well what I don't understand about that is, compare it to the case where we used to think, let's say, that there ought to be no restraints on the prostitute. But now we know about syphilis. We knew it existed before, but we had no idea of how it's conveyed. Now we know how it is conveyed. Now I take it to be your position that we can impose all sorts of constraints on the prostitute. In other words, we can deny and we can take away certain rights, which we would have ascribed previously to the prostitute, based upon a changed view about the causal relationship between the different bits of property.

RICHARD: Because of the actions that she's done.

ERIC: Well you like to speak as though she has a property in herself, so let me speak in that same language. We now have a different view about the causal relationships of these bits of property, in some cases human bodies. On the basis of this new, better, more correct view, we don't say, "Well, we'll have to buy off this person and pay her enough so that she will willingly not engage in prostitution."

But we, i.e., you, favor the suppression of her use of herself in that way. So why not hold to the analogous position with respect to the wetlands? Now that we know that these wetlands are connected in this causal way with damage to others' holdings, we take away, we impose, a further restriction on the wetlands, or on the owner of the wetlands.

RICHARD: There is a key difference. In the first case we can now say that the prostitute has done some things, injurious things, whereas before we didn't think she had. Having that knowledge *ex post*, we would be quite prepared to impose tortious liabilities upon her. Therefore it seems to me, unlike *Just*, we have a justification for some prior restraint. The problem with respect to the wetlands case is that you can know more and more about the cycle, but you can't say anything about the owner or what he's done. It's not how much you now know about it; he has never put pollutants into the water, which were then released. The change in circumstances you would have to identify, for example, occurs when it turns out that people regularly put pollutants and dangerous toxins in ground water when everybody thought they did not. Once it is established that by placing toxins in the environment, there would be damages *ex post*, and in principle there also could be an injunctive remedy.

You also have to be careful, Eric, about the word "suppressive." The first stage of the inquiry is to show that you now have a legitimate end because of the wrongful conduct of the other fellow, but you still have many questions about the choice of remedy in conditions of uncertainty. My argument for intermediate scrutiny is not very mysterious.⁵³ When you're dealing with ordinary property cases, unlike speech cases, you weigh both kinds of risks equally. Intermediate scrutiny is basically the verbal equivalent to the formal view which says that in property rights cases, type one and type two errors are basically of the same significance.

ERIC: If there's a certain object on my wetlands which I've discovered to be emitting highly toxic materials naturally . . .

SPEAKER: Or simply building on them, simply building.

ERIC: Well no. I want to have something where I'm not doing anything at all. I'm the owner of the wetlands, but I'm not in any sense doing anything at all. But the land is emitting this highly toxic stuff. I have to be paid to take it off. That's your view.

RICHARD: But there's a trick about that, and it's the same problem with the vaccination case. A lot depends upon the time in

53. Sax, *supra* note 2, at 287-88.

which the regulation is put forward with respect to the risk. Suppose one were to have a comprehensive regulation that in the event that any toxic substance should be found on *X*'s lands it shall be removed at the expense of the owner. I don't mind that statute particularly, because under my theory, you have implicit in-kind compensation since the rule has no disproportionate impact. Still there is no police power justification because there's no wrongful conduct by the owner. The danger arises when you get very close to the event, so that you now have strategic information about the distribution of these sources of danger. Now you're no longer behind the veil of ignorance and you pass the same statute. At that time it seems to me that the disproportionate impact is going to be marked, so that therefore the compensation is going to be required.

SPEAKER: I'm sorry, I did not understand. This is just a plea for clarification. Eric's parallel is really quite compelling, but I don't understand the answer. We learn through the science of ecology that there are atoms and molecules going from the marsh to the ocean, just as there are molecules going from the prostitute to the receiver.

RICHARD: No, it's not the right answer; she's sending them out.

ERIC: One second, wait one second now. Let me just state my point so as to emphasize the similarity and then you can tell me what the difference is. Now I understand, of course, that I have a property interest in my body (to use this language) and that I don't have control over the physical environment. But these atoms go out. At one time we believed that the atoms going from the prostitute to the receiver were innocent. Now we've learned something about these patterns—that there's a danger. In your mind, the presence of dangerous atoms legitimates denying the prostitute her property right. Now we learned something through science about the way these atoms interact with other atoms that kill them. All right, they're little mollusks, but they are dead. As a consequence of our learning more about the science of ecology we take that right out of the marsh owner. If one is okay, isn't the other one okay?

RICHARD: The line that you're trying to draw is the line between something which the defendant has done, and an act of God which happens to harm both defendant and plaintiff alike. The general presumption will be when you're dealing with individual action by the defendant, you could hold him responsible. To the extent that you had acts of nature which start on one property, or both properties, or in the environment, then its consequences are neutral with respect to responsibility. That seems to be the standard common law

line, and it's the standard line which people use as good libertarians when they say individuals are accountable only for the consequences of their own actions. The difficulty that one has with every such line, and here I do agree with Peggy, is you can find, as in *Miller v. Schoene*,⁵⁴ some cases which are close to the line, cases where it is very difficult to say whether or not the defendant did or did not do harm. But I would submit to you in the typical wetlands case that the fellow has not done anything to put something into the marsh. You are not very close to the line, and cannot say that he has polluted the external environment. If you had two adjacent land owners, and this deadly thing decided to harbor itself on one's land in its natural condition, then this is not a case in which the first fellow can enjoin the second for harboring that thing. Given the fact that you might be able to generate public benefits in this case—that is, shared benefits in the same sense as the Mill Act cases (pp. 170-75)—you could pass statutes, which would allow you to cut down the cedar tree for the benefit of the apple tree owners, while paying compensation with the appropriate division of the surplus. The social power of control remains, but not because the wetlands owner is a wrongdoer whom you are going to try to constrain. The general theory of individual responsibility is being tested, but I don't think it is being tested in a very difficult way.

LARRY: We're into the break, but with your indulgence I would like to continue because I'm not following an assumption that Richard is working with in this hypothetical, and I don't think questioners are following it either.

RICHARD: Nobody wants to say that the building itself has emitted pollutants into the water which destroy fish.

JULES: All right, I just want to follow up on this. In your view, there's an enormous ambiguity in the relationship between causation and responsibility. Half the time, the notion of causation, as a nonnormative concept, is separate from responsibility. Yet, at other points, it's who's responsible. Sometimes when you allege the existence of causation you make the next leap to responsibility, as in "did a wrong." But there can be causation without responsibility, without doing a wrong, and there can be responsibility in doing a wrong without causation, so . . .

RICHARD: The last no, the first two yes.

JULES: No, the notion of causation and of responsibility from a normative point of view are not coextensive, but you seem to be play-

54. 276 U.S. 272 (1928).

ing on them in this little story as if they were. Suppose, for example, the wetlands did not cause anything, but from some normative point of view, in the light of some theory of responsibility, they should be accountable for what happened. Assume furthermore, that we could have prevented some damage at a very low cost, but we didn't. We did not cause the damage, though from a reasonably plausible moral point of view we are responsible for its emission. The prostitute, on the other hand, caused it because she did something, but from a normative point of view we might not blame her. I think you want to invest an incredible amount in the notion of causation because you want it to do all the work of the notion of responsibility, and it can't . . .

RICHARD: No, Jules that is just plain wrong. I have gone at great length to explain my view of the relationship. You first state something, which if true gives a presumption of liability. My argument is once you get a decent account of causation it creates a *prima facie* case of liability, but all the defenses and further refinements demonstrate that there's a necessary and analytic distinction between the causation—what you did—and responsibility for it. But that line is different from the line in *Just*.⁵⁵ The line in *Just* is the *non-actio* line.⁵⁶ You say to yourself I can do anything. It's as though, for example, there was a boulder at the top of my mountain which I've never seen. Rains come and erode the foundation, sending the boulder through someone else's house. Have I caused that damage? No, no, categorically no!

LARRY: We're going to stop, but we're going to continue this, I am sure, in fifteen minutes.

* * *

RICHARD: I do want to talk about a number of things in Tom's paper. I will take them in textual order. I am happy to learn that I am now a clone of the Reagan Administration, that this is some part of a large arrangement. I should like to say for the record, Tom, to date I've had one informal contact with the Reagan Administration on legal matters and that's been my effort to try to tell them that they're wrong on *Miranda*,⁵⁷ that by and large it's a good rule rather than a bad one. My own sense with respect to Posner, Bork, and Scalia is that the tensions between them and me are if anything, as intense or more intense than some of tensions that go about this room.

55. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

56. *Weaver v. Ward*, 80 Eng. Rep. 2284 (K.B. 1616).

57. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Those of you who were here in the 1983 session⁵⁸ will, I think, remember the fact that it was not a love-in or a love fest. The thought that in some way, shape, or form that I have some ulterior motive to make their arguments respectable is profoundly misguided. Our disagreements on these issues run deep on important matters in constitutional adjudication.⁵⁹ If you wish to keep to the arguments about covert alliance, I wish you to know that they are categorically, totally false. On the other hand, I'm friends with these people; I'd like to think that I have friends on the other side of the spectrum. We may all disagree, but I don't regard myself as intellectually shabby and morally indefensible.

Now let me try to defend myself. I think Tom's paper has some nice points in it. I also think these points are so nice that in the end he would recoil from the implications of some of them if precedent were treated in an evenhanded way. First, I want to talk about the ubiquitous term "formalism." Second, I want to talk a little bit about the historical status of welfare rights. And third, I want to talk about our favorite illustration, prostitution.

I don't think the word "formalism" appears once in the book. The word which someone could put in its place, if he wanted to be more charitable about it, would be "systematic." It would suggest starting with a series of premises, figuring out their implications, then applying them to a series of cases in order to develop some comprehensive theory. Unless you're prepared to believe that words could hold constant meanings at different places in the argument, then it's hard to see how certain propositions could be either true or false or at least verifiable. Without constant usage, it's possible to make any legal theory support any position on any substantive question.

The key question to me is not whether or not one likes my conclusions in chapter seventeen on regulation, in chapter eighteen on taxation, or in chapter nineteen on welfare rights. The most important point is the progression of the argument from the simple case of taking one man's land for a post office, through takings of partial interests from large numbers of individuals. What I conceive to be the formal structure of that particular argument is that we essentially have a function about takings which turns on two variables. One, the extent of the stock of a given individual whose property is taken, and

58. On the book, B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

59. Compare Scalia, *On the Merits of the Frying Pan*, REGULATION, Jan./Feb. 1985, at 10, reprinted as Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703 (1985) with Epstein, *The Active Virtues*, REGULATION, Jan./Feb. 1985, at 14, reprinted as Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985).

two, the number of individuals from whom it is taken by any particular government action. My formal argument of what is wrong with the modern doctrine of regulatory takings, on taxation and liability rules, is that it assumes that as you decrease the amount of property which is taken from any one individual—that is the first variable—and expand the number of individuals from whom it is taken—the second variable—you will be able to cross over from a line of individualized takings of a sort that Joe referred to in his paper, to a set of collective actions which are not takings and are therefore beyond constitutional scrutiny. My argument is basically that both of these variables are infinitely indivisible and perfectly continuous, so that there are no coherent values for them where you can draw the line between takings and that of something else. The only way that you can understand the situation is to recognize that, as the distribution of what is taken and the number of people from whom it has taken shift, the implicit compensation function may shift with it. The ultimate question is how you secure a match between benefits and burdens so that you can satisfy the Pareto condition.⁶⁰ To the extent that this view relies upon the various elements of standard welfare economics or decision theory, it is meant to be formal. But I would treat formal, not as a synonym for the perjorative “formalism,” but as a synonym for “rigorous.”

It is characteristic of Tom's paper that we are told that all of these particular errors have been exposed to the satisfaction of first year students throughout the world. I must say I've given these arguments in lots of places with lots of advanced students. I'm not at all clear as to how this exposure has taken place. I also think that argument, in which you say that “everybody else has shown you to be wrong, so I don't have to do it again” is not the strongest type of reply when faced with a novel argument. I agree my position is a radical departure from conventional wisdom. It is not for that reason wrong.

A second point I want to talk about is history. Here I am very systematic again. Bruce is quite right. I don't rely on it one way or the other. Now it turns out that in the welfare rights case, there's a certain kind of irony about this. Tom says the thought that some

60. Pareto Optimality is a distribution of rights from which nobody can be made better off unless someone else is made worse off. One arrangement is said to be Pareto superior to the second if everyone is at least as well off under the first arrangement as the second, and at least one person is better off under the first arrangement than under the second. Simply because arrangement *A* is Pareto superior to arrangement *B* does not necessarily mean it is Pareto Optimal. Further improvements might be possible. By the same token no one should want to stop with any situation that is not Pareto Optimal. If one person can be made better off, when no one is left worse off, then why not do it?

branch of government should not have a welfare function is utterly inconsistent with the practices of Elizabethan times and before. Because ours is a federalist system, the key question is at which level was the welfare question handled? Historically, the eminent domain clause was binding only on the federal government,⁶¹ where it prohibits welfare transfers. Yet in a sense the point is of little consequence. My own view of the commerce clause and kindred powers is that there was no affirmative federal jurisdiction to support welfare transfers in any event. The thought that the eminent domain clause imposed a flat prohibition at the federal level, therefore, is hardly exceptional, because it simply reaffirms through an amendment that which was otherwise implicit in the basic federal jurisdictional grant.

The key historical question therefore is that of incorporation, whether or not that understanding of government power survives when you carry it over to the states. Interestingly enough, I'm not wildly committed on that issue one way or another. I do think for the sake of completeness page 307 in the book should be referred to if you're going to treat this as though it's a massive intellectual blunder on my part, because I do note there that there's nothing in Article I, by which I include the commerce power, that covers the question.

The second question is what lessons do we draw from the history, even if we assume that this clause now binds the states. What Tom does is to move all in one direction. He says, "Look at the Elizabethan practices with their poor houses." Therefore it necessarily follows that provision of basic needs through the state is a long established practice. Hence everything that Epstein says historically is misguided.

But there are two responses. First, you're writing on an historical slate, and there are all sorts of other imperfections about the world;⁶² the Elizabethan times were known for their mercantilistic restrictions of all sorts. Now it is not a question of whether you believe in basic welfare rights as a matter of first principle. The arguments for the poor house is simple, "we screwed these people in so many ways from sundown we have to give something to them by way of compensation for all that we've taken from them by way of blocked opportunities" and so forth. If the federal government can write in on a blank slate, then all of those arguments about poor houses to handle imperfections simply vanish, because we've got ourselves the just constitution, without this accumulation of historical inequities.

The second point is that you could read English history in two

61. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

62. See Epstein, *The Uneasy Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201.

ways. You could read it as affirming basic rights, but I don't think you'll find any text which talks about this. Alternatively, you could say what we've done in effect is to recognize a tradition of poor houses and therefore permit poor houses under the federal Constitution. But there are other lessons to learn. We could recognize, for the reasons I tried to elaborate about moral hazards and trying to control the supply of people who want these benefits (pp. 314-24), an absolute prohibition against all cash transfers, unless you can find something in the historical practice which shows that simply giving money to people by virtue of their poverty was thought to be an appropriate function for the state.

Now I'm not at all sure the way history goes, because interestingly enough all of these particular details show the restricted nature of the welfare transfers. The embarrassments imposed upon people look like a non-price form of rationing, which is remarkably consistent with the general fears, which I tried to identify, about why it is so extraordinarily difficult to set up a transfer system.

This leads to the last point. I cannot say how strongly I believe that the theory of imperfect moral obligations through charitable giving is not simply an escape or dodge for the greedy (pp. 314-24). I think this country could not have survived unless people regarded obligation as a total, absolute, binding commitment on their behavior. At a personal level, a lot of us here would have died in the pogroms or holocaust if it hadn't been for people like HAIS, the Hebrew Aid Immigrant Society, and our open immigration policy. The thought of dismissing the millions of people and the thousands of dollars involved to provide charity is misguided. To treat that charity as something which you just call "extra legal" and to drop it, without taking into account the enormous amount of blood and sweat and tears of good people is, I think, bizarre.

What's the strength of the situation? Again, it's a game theoretical point. It's simply that the institution of private charity is individually conducted, so that no scoundrel can prevent the rest of us from giving it. And so if you have a wide array of persons, some of whom are so narrow-minded, egotistic, and bigoted, they are not going to be players in this particular game.

The rest of us can still participate. So before one is so confident that the system of imperfect obligation has to collapse, one has to show that a theory of "basic needs" can be satisfied without upsetting the basic political equilibrium. My argument is not that the differences in wealth across persons are utterly immaterial. If somebody doesn't believe in risk aversion, he's crazier than any man alive. The

argument is that there's no stable, satisfactory, political equilibrium that can redress income inequality through coercive means, once we start to convert the rhetoric of risk aversion into the language of rights. The political dynamic is such that you will get wild overproduction of transfers. My argument is that given the disastrous political equilibrium, the zero point of coerced transfers is the appropriate point (pp. 314-24). Since people have moral conscience, we recognize that the sub-text of imperfect obligation is so incredibly stringent that religious institutions—the Jewish and Christian charities—continue to develop and to thrive. And I just don't see anything in Tom's paper, or in Joe's paper, which addresses the question of whether or not there's a stable political equilibrium when you introduce welfare rights into the system. Nor do I see any effort to try to encounter the rent seeking explanations which suggest that things go awry.

Finally, I want to talk about the draft and the prostitution points. I'll say a sentence or two about each. I don't think it's a matter of textual weaknesses to say that personal service and private property don't mean the same thing, although many modern constitutionalists are trying to milk the eminent domain clause by talking about personal services as being a form of private property. I think it's a generally hard textual point that I didn't want to push (p. 280). Therefore, the Lockean theory creates a kind of constitutional discontinuity, which is nicely overcome either by the contracts clause,⁶³ which covers both services and property, or by substantive due process theory, for which I have increasing affection. Once you understand that approach, the draft becomes a paradigmatic illustration of a situation in which there may be a public good in defense that has to be supplied. But you don't provide that public good in a form of an implicit tax by drafting some guys and paying them well below market wage. Everything I have talked about with respect to disproportionate impact and takings would carry over.

Is there a limit? Well, if the Russians are at the door and if we're suffering enormous casualties—if it's the siege of Leningrad—then we recognize abject necessity, and start to conscript people on the simple ground that if we don't conscript them they're all dead anyhow. So there's compensation of sorts.

On the prostitution case, the externality problem is far more serious than the usual statement makes it out. If you look back to historical times, the total ignorance of the transmission of disease would lead somebody in medical ignorance, knowing that death is one alternative

63. See Epstein, *Toward A Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703 (1984) [hereinafter Epstein, *Contracts Clause*].

and sexual gratification is the other, to be in favor of prohibition against a practice which looks dirty, even though he can't quite figure out why.⁶⁴ As I said at breakfast, the rising concern about the public health threat of AIDS is intimately connected with sexual transmission, as it was with syphilis and gonorrhea, even though these mechanisms were completely unknown at an earlier time. In addition I may be sufficiently old-fashioned, but prostitution seems problematic because many of these men are married. They took vows which said "exclusive unto thee" and now they're in breach of the marriage contract. The law of inducement of breach of contract is generally a recognition of the inadequacy of direct remedy against the other contracting party.⁶⁵ Sometimes you have to go after third parties. Much of the common law responds exactly to those circumstances, when you can't get the right wrongdoer it may well be necessary to accept broad restrictive practices.

TOM: As to the business about the Reagan Administration, the Right and so on, and the political language in my paper, I believe this is a very political book and it's primarily a political book because of the genre problem that Frank referred to in the previous session. It's put forward as a constitutional argument. The substance of it is primarily an abstract political theory argument, but the bulk of the book, the middle sixteen chapters, is detailed discussion of case law. The book purports to be a construction of the United States Constitution. As such, it calls for political consequences that I regard as grotesquely damaging to this country, and to lots of human beings in this country. Richard can disclaim his influence if he wants, but he can't get rid of it. He's an influential person. Whether he wants to be or not he's an influential person—much more so under the Reagan Administration than under a Democratic or a liberal administration. It's not a point of intent, and it's not a point of what you want. It's a point of who you are and the objective and foreseeable consequences of your acts. That's why the tone of my paper is angry and that's why I'm angry about the book.

Now to formalism. By formal, I obviously don't mean systematic. I mean formally realizable, objective, clear. I said the book was systematic, and it is systematic. Richard's point, which he makes quite explicitly in chapter three, the chapter on constitutional interpretation, is that constitutional doctrines must be formally realizable;

64. See Epstein, *Morals Health and Safety Under the Police Power: The Case of AIDS* (unpublished draft).

65. See Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. — (1987).

they must be clear, or else the rule of law virtues are lost and we have a political judiciary. He says that very clearly. That hypothesis is his only guiding point about constitutional interpretation, except that he's going to stick with the original meaning. He doesn't have any truck with living constitution notions, which are bad because they violate the rule of law virtues, the virtues of clarity. Now that's my point about formality.

My main argument, of course, was that his own argument is grossly informal, and here I refer back to this morning's discussion. The oldest trick in the book is the one he just elucidated. You make the affirmative case relatively formal and then you build in defenses that are highly informal and you claim that you have a formal standard. But the point, of course, is that the rule of law virtues address the question of ultimate liability. What we're interested in is ultimate liability. Now it's one thing to have a rule that is formally realizable and has a little exception that is vaguely phrased. It's another thing to do what he does. The first step in his analysis is the taking step, which is vast and covers almost everything the government might do. But he then has an enormous exception—implicit in-kind compensation—which covers most of the interesting and politically controversial cases, and which is grossly informal. At that point you have an informal doctrine, and you have lost the rule of law virtues. That was the thrust of my argument and he hasn't answered it.

Now, he asks, where would I break between individual small number takings and large number takings? Richard, I would break just where you do. You make a break between cases where you require explicit compensation, which is a relatively clear cut and an objectively decidable procedure, and cases where you require only implicit in-kind compensation, which is this enormously vague wild card that you can—and do—play as you see fit.

Now, history and welfare: He says he doesn't care about history, and that he cares only about the meaning of the words. You cannot know the meanings of the words, like property and so on, without knowing something about history. You have to examine history to claim the authority of the framers. Even in this textualist, as distinguished from some sort of an intentionalist, account, you have to know something about the history. You have to examine the history and I'm sure he knows a good bit about the history.

On the federalism point, I can't believe you're serious! I can't believe you're serious in a book that is this politically theoretical and this general. You're attacking state regulations. You're attacking wetlands regulations and so on and so forth. I cannot believe that you

want to confine this to the federal government. Although most of the state constitutions formed in the 1770's and the 1780's did not contain just compensation clauses, a couple of them did, and all of them contained statements that there was a natural right to property. Most state judiciaries assumed that their constitutions protected a vested right to private property. That was the vehicle under which the early eminent domain law was made in this country. I assume that Richard would agree that in so far as the fourteenth amendment carries with it something like a just compensation clause, it is because it carries over from state law the natural right of property—the vested rights of property—that was common place in state constitutional law of the mid-19th century. I didn't spell that all out in the piece, but because I obviously was misunderstood, I'll drop a footnote in the final version, but to make this a federalism argument strikes me as bizarre.

He speaks of the Poor Laws as Elizabethan, preliberal, mercantilist. I address that point clearly in the paper.⁶⁶ Obviously it sprang up in Elizabethan times, but the crucial question is what happened to it during the formulation of classical liberal theory during the 17th and 18th centuries? The issue of property versus necessity was discussed over and over again by those writers. Now, it's possible as a matter of general political theory, as Ellen Paul thinks, that they were wrong. The other point she makes is that those are life boat cases and we can ignore life boat cases for the purposes of general legal or constitutional theory. I don't agree. Maybe in the beginning all the world was America, but today all the world is a life boat. It seems ridiculous to try to put life boat cases to one side. But in any case, classical liberal theory does address this question. The classical liberal writers wrote extensively about the question of the validity of the poor laws. There's an interesting article by Ignatieff and Hont about the way Adam Smith addressed the problem of the corn distribution laws in times of need and famine.⁶⁷ There was controversy in liberal theory there. But as to the basic proposition—leaving the state out of it—that one individual has, as I put it, a lien on the property of others in cases of need, there is very little controversy within the liberal tradition at its high point. It's not mercantilism, it's not preliberal thought, it's not an Elizabethan concept. It's a concept that persists through the high water mark of classical liberalism in the late 19th century. American state constitutional law went further than Ameri-

66. See Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 41-42, 46 (1986) [hereinafter Grey, *supra* p. —].

67. 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).

can federal constitutional law with Herbert Spencer's *Social Statics*, but the public taxing, public purpose doctrine was never construed to exclude a meeting of basic material needs as a paradigmatic public purpose.

It's not that those arguments can't be confronted, but this is where my claim that the book is shabby comes from. These arguments must be stated and confronted if you're going to make a constitutional argument; and if you're going to claim the prestige of a constitutional argument with the potential political consequences that are to be drawn from a constitutional argument.

Finally, I won't talk about the draft or the prostitution example. They are just examples of equivocation, and I should add, why aren't antidiscrimination laws discussed? They're obviously unconstitutional under the analysis, as the shopping center case discussion indicates. Why isn't that made explicit in the book?

Now, the stable political equilibrium point. I assume we'll talk about this throughout. If it means something other than a game theory point, if it means something about a fact in the real world, then it is in my favor and I'd like to hear debate the other way. The most stable political regimes through the 20th century are the social democratic regimes of Western Europe and the British Commonwealth. These regimes recognize more explicitly than our own the principle of the meeting of basic needs by the state. Those are the most politically stable regimes going, if political stability means something real about ongoing functioning political stability. Enough.

FRANK: I want to talk a little bit about federalism and welfare transfers, which is something that both Richard and Tom touched on. I want to do this in part, because federalism is one of the places where the plurality of this Constitution's values, and its ambivalence towards democratic republicanism becomes quite evident.

Tom points to a long tradition of endorsement, of support, for poor people as a part of the accepted range of functions of government. Richard responds by suggesting a partitioning of governmental functions. He says the Constitution, meaning the large set of arrangements and understandings, left that function to the people in their states. It simply ruled out this function for the national government by virtue of the commerce clause and the eminent domain clause. Well, I think that's right. I think that it's quite clear from the original history going back to the preconstitutional and postrevolutionary periods. Historians like Gordon Wood⁶⁸ have resurrected for us this

68. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1770-1787* (1969).

period, and the Marshall Court's use of history—particularly *Barron v. Baltimore*⁶⁹—constitutionalized it. That is, the people in their states were left free to decide on the degree to which they would redistribute property through political activity, at least so far as the eminent domain clause was concerned. If you read Marshall's opinion in *Barron*, I think you will see that it is in part a republican document, just as the *Slaughter-House Cases*.⁷⁰ Chief Justice Miller's opinion is an endorsement of the idea that the Constitution fundamentally values a republican political process. They thought redistribution was feasible at the state level, but not the national level.⁷¹

I want to say before going on that there's a nice paradox here, in so much as *The Federalist No. 10* concerns are more salient at the state level than at the national level. There is something very funny going on here, but that is a problem with *The Federalist No. 10*. As a general argument, the way it organizes a government is in a state of tension with the federalist principle of the Constitution, in so far as it leaves the national government a government of strictly enumerated and delegated powers. If the residual political authority is left with the people in their states, then the political safeguards against factionalization and rent seeking that Madison wrote about so shrewdly and acutely⁷²—I mean checks and balances and all that—only apply to the government at the national level where the danger of factionalization and rent seeking, according to Madison's analysis, was less. There is a tension there.

Now I've already mentioned the *Slaughter-House Cases*.⁷³ I wanted to do that because that same notion of leaving the people in their states to settle their own problems survived in the minds of the generation of elite lawyers who lived through the whole experience of the Civil War and the second American revolution and the reconstitutionalization that the civil war amendments represented. Miller's view prevailed for a while, that the basic understanding was undisturbed, that the states were still republican forums in contrast to the national government. Tom is shaking his head.

TOM: *Davidson v. New Orleans* in 1877.⁷⁴

FRANK: Okay, we will come back to it. But what I'm getting to, I guess, is now clear. It seems to me that the total picture is one in which you cannot say that the Constitution reflects an understanding

69. 32 U.S. (7 Pet.) 243 (1833).

70. 83 U.S. (16 Wall.) 36 (1873).

71. *Id.* at 62-64.

72. THE FEDERALIST NO. 10, at 5 (J. Madison).

73. 83 U.S. (16 Wall.) 36 (1873).

74. 96 U.S. 97 (1877).

that redistribution in the form of welfare support is generally an illegitimate governmental function. All you can say is that, as a possible governmental function, it was assigned to the states. What that means is that if you attack the legitimacy of the New Deal revolution, you are attacking only a change in the understanding about allocation of the welfare support function as between the states and the national government. You are no longer in the position of being able to say there has been a reversal of a fundamental principle of political morality about whether redistribution or support for the poor through taxation is in or out of the range of legitimate governmental functions. You can only question whether it belongs to the nation or to the states exclusively. The "revolution" is about the commerce clause, not about the fundamental political morality of welfare support. What needs to be said in favor of its legitimization is to that extent reduced because most people would think that the question of allocating a function between the nation and the states occupies a lesser order of fundamentality than the question about redistribution or no redistribution. You say the latter was at stake in the New Deal revolution, but I say it was not, because from *Barron* on, it was uncontroverted that at the state level, at least, redistribution was legitimate, subject to any state constitutional limitations.

ELLEN: What has your left wing critics so perturbed is your desire to repeal the welfare state by using history. When history is on your side, you might as well use it. But Tom's argument that welfare existed in the colonies and in England in the form of the Poor Laws, and therefore the federal government was legitimately involved in it in the 1830's, just moves too rapidly. If you look at what happened in England, the Poor Laws were a local affair up until the Philosophical Radicals got their hands on them in the 1830's. Poor Laws became nationalized in the 1830's.⁷⁵ This presented absolutely no problem in the British system because they have no constitution and parliament is supreme. But the nationalization of welfare does present a problem in the American case when it occurred a hundred years later. There's nothing in the Federal Constitution, which as Frank reiterated is a document of enumerated and delegated powers, that would sanction such a move. This is an historical point which, as Frank said, really doesn't carry an awful lot of weight because the battle is then just removed one step lower down the ladder. Should the states be involved in distributive welfare? That's when Richard's arguments

75. For an historical account of this period, see E.M. LEONARD, *THE EARLY HISTORY OF ENGLISH POOR RELIEF* (1900).

from principle come into force. Should the states ideally be allowed to provide this redistributive welfare?

And another point. You spoke a lot about the natural law theorists, but one theorist that you didn't mention was Montesquieu.⁷⁶ He was tremendously influential on both the framers of the Constitution and the anti-Federalists. There was an ongoing debate between these two groups about whether a republic could work over a large area, or whether it would turn into some kind of autocracy. But neither side of the debate envisioned a federal government that would have such extensive redistributive powers. There is no indication in the Constitution that such an expansion was ever anticipated.

TOM: Poor Law wasn't considered redistributive. There was a lot of talk about redistribution, but it was always about agrarian laws, which Montesquieu, by the way, thought were legitimate. The point is, you don't hear any complaint against the Poor Law. Subsistence is accepted as a basic right of human beings. When the government collects taxes to provide subsistence, there's no redistribution. Subsistence is part of the distributive baseline, and that's why I use the concept of a lien.

SPEAKER: You don't call something redistributive, Bruce; you think it justifies the basis of a right. Nobody ever has favored redistributions, so I don't think that's a good . . .

TOM: No, the lien based on necessity was internal to the concept of property itself, certainly as Locke saw it—the notion of God having given the world to mankind, in common. The proviso is fundamental and inherent in Locke's argument, but I won't pursue that point. The framers did worry about the dangers of the extended republic, including dangers we haven't mentioned. Poor relief is one of the dangers that, if they were libertarians, they should have worried about. But they didn't. Now it's true that in England poor relief was a local responsibility, but on the Continent there were precedents for national governments having poor relief responsibilities. There were plenty of dangers the framers talked about, the standing army and all the rest of it, the standard stuff of the republican tradition—which as Frank says Richard takes no account of—but poor relief was not something anyone talked about as a threat to liberty or property.

BRUCE: There are two steps in Richard's systematic argument that I want to attack, and which I think Tom is also attacking. The first step has to do with both the definition of the concept of property, which, after all, is the thing that grounds the *prima facie* case, and

76. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 133-52 (T. Nugent trans., J. Prichard rev. ed. 1912) (1748) (Book VIII).

Richard's notion of what constitutes a taking of "property." That's what Tom was moving toward in his last set of comments. The second point, of course, is (once we grant the *prima facie* case that a taking has occurred) whether redistribution represents a legitimate purpose. I want to focus on Richard's definition of property first. And once again, I resist deeply, almost as a matter of passion, this left wing-right wing stuff. I am talking about the legal tradition, however embarrassing that might be. I apologized last time for using the rhetoric of a conservative lawyer. I was trying to articulate the structures of the legal tradition before we talked about moving one way or another. And here once again, I want to say that Richard has distorted utterly the common law idea of property by taking this Blackstonian view, which does not represent a common law conception of property (if by common law we don't mean some figment of the late 19th century).

After all, the idea of property was central to the historical development of the common law, much more so than torts and things of that kind. The first thing I want to attack is this incredible claim by Richard—and it's very central—that the common law concept of property was committed in a profound way to free alienation. Now, there was something called entail,⁷⁷ which was a fundamental structure of common law property, if by the common law, you're talking history. The idea of entail was that I own something, but I couldn't transfer it because of something that might have happened 300 years ago. Where does he get the idea that I have a right to transfer property as a common law right? Where does he get it from?

Now second, the fact is that the common law of property never was liberated from its feudal roots in the King. The common law of property is deeply socialistic. The idea of fee simple is not that a person is an absolute owner in some Romanist sense. The entire historical development of the common law of property is one which, in one way or another, conceptually recognizes that William the Conqueror owned everything.⁷⁸

Third, I want to address the idea that possession is the root of title. The possessory actions, of course, came into the common law because it was so cumbersome to figure out who had title. The truth about the matter is that possessory actions and title are, in the historical development of common law, very different things. Moreover, the

77. Entail is defined as "A fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs." BLACK'S LAW DICTIONARY 476 (5th ed. 1979).

78. For an historical account, see M. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 6 (1931).

fundamental thing which both 20th century property lawyers and 15th century property lawyers learnt, was the concept of an estate. Now, what is an estate? An estate means that although someone is in possession we mustn't suppose that this fellow can do just anything he wants to. Possession has to be translated into some kind of an estate, which often does not empower the estate holder to do anything he want to do with "his" real estate. How then can Richard say that possession is the root of "title" at common law? How, then, can he tie "title" and free alienation together the way he does?

Once again, this book contains nothing on the history of the common law. It only contains this little snippet from Blackstone (pp. 22-23). There is not a serious confrontation with historical reality. Now, on the textual side, we have these clauses in the Constitution—a clause about contract and a clause about property. One would imagine that these two clauses invite a theory of the property clause that does not swallow up a theory of the contract clause. A natural suggestion is that transferability, which one would imagine is what contract is about, is to be generated by a theory of the contract clause, and that the property clause has something to do with the power to exclude people. Once again, Richard doesn't look at the text of the Constitution as a whole anymore than he looks at the historical development of the institution of property. Suddenly the right to hold and the right to transfer are lumped together in one idea.

LARRY: Okay, Frank, Jules has ceded a couple of minutes for your anxious reply.

FRANK: I will be very quick. Bruce's invocation of the history of entail is twisted 180 degrees. There is a potted lawyer's history which is in Richard's favor. The potted lawyer's history sees the history of legal doctrine affecting entailment as a dialectic between politics represented by the King and Parliament on the one hand, and the common law as reflected through the judicial organ on the other. And it goes something like this: In the earlier part of the 13th century, people tried to create entailments. They left land to *A* and the heirs of his body. The courts broke the entailment by, in effect, making it last for a generation only. They did this by putting it in the category of what was known as a fee simple conditional. The political powers responded by enacting, in 1285, the Statute De Donis.⁷⁹ The common law responded by inventing disentailing conveyances.

There were other legislative developments, but basically the next major development is said to be the Statute of Uses.⁸⁰ This created

79. *Id.* at 11.

80. *Id.* at 14.

the possibility of using executory interests so as to get around other forms of anti-restraint-on-alienation doctrine, such as the rule in *Shelley's Case*⁸¹ and the doctrine of worthier title.⁸² Lawyers came up with the notion called "strict settlement," which the courts responded to with the rule against perpetuities⁸³ and other like doctrine. So the general potted history is one of "the law," as represented by the judges, constantly fighting off pols who were trying to restrict the alienation of property.

I just want to add that you can find a lot of other common law anti-restraint doctrines—I've mentioned some of them, but there are also doctrines about privity of estate, touching and concerning, and doctrines opposed to easements in gross. The list goes on and on. A lot of common law doctrine is quite nicely explicable as opposed to restraint on alienation. So I think on this theme, Richard could make a pretty good case.

BRUCE: If that's the defense, I hope that Richard does better. Unless of course we establish that medieval statutes suddenly have been excised from the common law—a great surprise to me. I really think that you've just established that the concept of alienation was essentially contested throughout this period.

JULES: I'd like to say a little something about the use of game theory, decision theory, and bargaining theory in this context. First, as to one argument from game theory for welfare of transfers; the existence of the assurance problem. Suppose individuals actually had a desire to distribute to others privately, but that there was a problem. It's a waste of your effort to distribute privately without some assurance that other people would distribute as well. Thus, one argument one could make for redistribution is the existence of the assurance problem. That is, even people who have an interest in being privately charitable, have a need to have this done in a way that's not counter-productive. This might suggest a desire that this be done in some coercively enforceable way, and therefore there is some argument from the game theoretical point of view for redistribution. The next question I want to ask you comes from the discussion of the idea that once you allow redistribution, the whole thing unravels. I'm a little troubled and I'm not sure exactly what that means. I'm not really sure what the claim is.

LARRY: Tom, can you explain it very briefly?

TOM: The claim is that there is a social optimum of a little

81. *Id.* at 63.

82. *Id.* at 83.

83. *Id.* at 362-64.

redistribution. That once you allow "a little redistribution," there is no clear definition of how little is little, and rent seeking runs wild, and you degenerate to disaster.

JULES: I want to go to the pie picture—this is my chief concern (p. 4). It's not an accurate characterization of the problems. The way the problem is presented today by Hobbes and others, you're in a prisoner's dilemma situation. That is, you're in a state in which everyone can be made better off by foregoing individual utility maximizing behavior. Now, the question is, aren't you bargaining over various possible institutions all of which can create this surplus? In the particular picture that you've drawn, the bargain solution is pro rata. Now what is the theory of bargaining that generates the pro rata solution to the bargaining problem? It turns out, of course, that there are alternative theories that do not generate a pro rata solution, especially if you take, for example, the compliance problem seriously. Suppose we think about it in this way. We're bargaining over the creation of institutions to distribute the cooperative surplus. But bargaining over the creation of such institutions is a waste of our energy unless we have the compliance problem solved at some level. Why? Because we're in a prisoner's dilemma, and if we don't have the compliance problem solved, we're going to be in a prisoner's dilemma after we bargain. So, the question is, what's your theory about the distribution of the cooperative surplus which solves the compliance problem? Now, it's an open question, it seems to me, that the pro rata solution is the solution to the distribution of the cooperative surplus that solves the compliance problem. In fact, we might think of it in the following way, (I'm now reiterating a view that I share with David Gauthier⁸⁴) that the correct way to think about the solution to the compliance problem and the distribution of the cooperative surplus, is by distributing according to marginal contribution. It has to be a fair distribution in the sense that one's share of the cooperative surplus is a function of one's marginal contribution because compliance with unfair bargains will be unstable. Now let's say that the pro rata is an approximation of that, but maybe not a very close approximation. Well, then you have an argument for redistribution from stability or compliance.

SPEAKER: Doesn't matter. It's an argument in favor of redistribution first.

JULES: I'm making a different point about redistribution. I

84. D. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL THEORY OF THOMAS HOBBS* (1979).

thought the original argument about redistribution and the unravelling just was about rent seeking.

RICHARD: I just don't know whether your pauses are finishes.

JULES: Well, I take a breath while I'm talking. (Laughter). The general point I want to make is, suppose you had a theory different than yours about the just distribution of the cooperative surplus and that this was tied together to the solution to the compliance problem, and, moreover, the pro rata solution was not an adequate solution to the compliance problem. Nevertheless, it was a solution adequate to get the game going, period. Then you can understand continual redistributions after the fact as a way of getting closer to what would have been necessary in the first place to have solved the compliance problem. You have an argument for redistribution. It's a contingent question as to what direction the redistributions go, and it's an argument that is independent of the unravelling story that you then tell. Redistribution can be grounded in the original bargain and need not involve self-destruction, as the rent seeking argument you present suggests.

STEVE: My point is connected with what Jules was saying, and maybe Richard would want to respond to us both together. It's connected in that I have some related doubts about what you say about imperfect obligations on page 319 and following. You don't define what you mean by "imperfect obligation" in the text, but you do give a quotation from Justice Story.⁸⁵ I took it to have three components: An obligation is imperfect if, and only if, it's indeterminate and vague; it may not be enforced by the law of the state; and it binds only the conscience of the individual person.

Now, the argument that you to give on page 320 and following for why charitable obligations are imperfect, if I understood it correctly, addresses only the first two elements—the vagueness and indeterminacy of such obligations, and their weak candidacy for being set and enforced by the state. But this argument doesn't establish the third element: That they ought to bind only the conscience. If it's the case that you want to say, as I understood your oral remarks earlier today, that there really are charitable obligations that bind individuals (tr. 81), and if you also think that the failure of individuals to perform those obligations has some consequences for other people (here, needy

85. "We call those rights perfect, which are determinate, and which may be asserted by force, or in a civil society by the operation of law; and imperfect, those which are indeterminate and vague, and which are not asserted by force or by law, but are obligatory only on the conscience of the parties." *Natural Law*, in *ENCYCLOPEDIA AMERICANA* (1936) (unsigned article), reprinted in J. McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 66 (1971) (quote attributed to J. Story).

persons), then it should be an open question whether you want that charitable obligation to be enforceable by the state. State enforcement could take the form of allowing individual needy persons to bring an action against those who were in a position to aid them, or it could take some other form. Now, such enforcement might be very messy, but what Jules was saying about the assurance problem is quite pertinent. If you came to the conclusion that charitable obligations are serious in a way that not only binds the conscience but also affects others, then state enforcement should not be ruled out. Many people may regard their charitable obligations as serious in this way, but want to be assured that others will perform too, because that is the only way to have an effective system. In short, providing effectively for the needy also involves a compliance or assurance problem. That's the gist of it.

ERIC: I had problems with the pie too (p. 4). My problem with the pie is that it wasn't clear to me whether the surplus to be divided pro rata is the surplus that will exist over a sort of Hobbesian war of all upon all or even a Hobbesian equilibrium, or whether it's the surplus between two states: the Lockean sort of state and what we get when we have that plus the generation, the financing, of various additional public goods. Now if it's the second, then there's a partial answer to Jules; namely, that the first thing we do is create this Lockean state which includes all these entitlement rules—which may be a public good in itself—to enforce these Lockean rules.

Let's imagine that these rules are a public good; you have that problem solved. Now, the next step that you may make, which Richard poses as a matter of political theory, is that we also coercively finance other public goods of various sorts. If that's Richard's picture, all one has to worry about is the division of the surplus generated by that last move. The division of that surplus would not at all be, can't conceivably be, redistributivist in the way you were talking about. There are all these people with all of this stuff that they put out under these entitlement rules. Now there's something else, right? Now there's something else, namely, a way in which we can all advance ourselves through the generation of these additional public goods and those goods don't yet exist. But when they come into existence we all get in-kind compensation to share and so there's no question of redistribution.

JULES: No, its not going to work. The first point about the property rights scheme itself is that the entitlement rules are themselves a public good. Moreover, there are any number of property

entitlement rules differing with respect to one another precisely in their distributive property . . .

RICHARD: That's the whole point of the minimization of a bilateral monopoly. It turns out that it has very desirable compactness theories and because of the way in which it facilitates disposition it can be superior to the alternative distributions which have built into themselves a powerful collective choice problem.

CASS: There are three strands here. The first has to do with pies, the second has to do with welfare and imperfect obligations, and the third, which is what we started out with, has to do with formality and informality. Now, on welfare and imperfect obligations, the answer Richard gives in the book is as follows: Charitable obligations are regarded as imperfect (p. 320). Charitable obligations are regarded as imperfect, but not because of rights constraints. That's not Richard's primary response. The primary response is, instead, about problems of system design. Here the argument involves the problem of moral hazard; the idea is when you create a welfare program, people will get poor. Thus the informal policy argument is made: "The common argument today notes that thousands of persons now receive welfare benefits, which is taken as a sign of the necessity that the present system must answer, but it is better understood as evidence of the system's manifest failure to constrain the demands for its services" (p. 321). Now that is the kind of ad hoc empirical argument for which there is very little foundation. Before we had the welfare system, before the war on poverty, one quarter of Americans lived below the poverty level.

Now this is an example of exactly what Tom is talking about, about the nonformal policy arguments interacting in an arbitrary way with the formal arguments to make the book's point. The primary argument on imperfect obligations is one of these empirical arguments for which there is little support and on which there is a lot of empirical literature. Finally, and this is my last point, this is rhetorically an exceedingly interesting four pages. The discussion ends, "[What does this have] to do with the takings clause. Quite simply this," and then the next sentence continues that "the basic rules of private property are inconsistent with any form of welfare benefits" (p. 322). Note the retreat here to formality as if one can kind of deduce, by arithmetic, from rules of private property, a prohibition of welfare benefits. So I think this passage is extremely informative in its confirmation of the sort of thing Tom's paper is about. What sort of question does this leave? I guess none.

RICHARD: Frank's model of federalism is very important his-

torically. The model, he said basically, is unconstrained states coupled with a federal government with clearly enumerated powers. One interesting point is that the federal Constitution does not have precisely that design. There is clearly the contracts clause.⁸⁶ Interestingly enough, that clause was an effort to try to constrain at the federal level, state limitations over trade, as a kind of complement to the Congress's grant of authority under the commerce power. One of the reasons I've always construed the commerce clause narrowly is that it is complementary to the contracts clause.

Interestingly enough, Frank's argument also doesn't work. The argument that he makes with respect to welfare could be tested with respect to the first amendment. We had that crisis in *New York Times Company v. Sullivan*,⁸⁷ where those Alabama judges managed to do a job with the common law rule of defamation, which broke down the model that a state government should be free to act as it chooses. And national governments by and large are just going to stay their hand. I've always been a great champion of *Sullivan* insofar as it indicates that you cannot trust that state autonomy model.⁸⁸

Returning to transfer payments, I am very open historically as to the way in which the textual argument as to redistribution carries over to the states. What is interesting about all the other things which Tom and Frank and everybody else implicitly concedes is this: to the extent that you're not talking about redistributive transfers from rich to poor—the rent control case and a lot of other stuff—their argument does not work. I mean that under my theory of eminent domain, everything from chapters four through eighteen, if it's right, will survive relatively undisturbed, because you don't have any coherent normative vision of the world which talks about the moral necessity of having transfers from poor to rich.

Another point: The element of jurisdiction is quite material to total theory. One reason for federalism relates to my question of the stable point on transfers. You're going to be much closer to that social optimum if persons retain the right of exit than you will be if you've got a national welfare system. So my own political attitude is that I am much less concerned with state welfare because the political process works better given exit rights, while it won't work as well at the national level. If we could treat it as a "contract" in which the states are constrained against capricious redistribution, allowed to do

86. U.S. CONST. art. I, § 10, cl. 1.

87. 376 U.S. 254 (1964).

88. See Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

welfare distribution with no federal role, then I will surrender historically, to everyone else. I'm perfectly happy. I kind of like it.

There is, however, a tentative possible federal solution. You'll note in the book I take a much more relaxed view towards the charitable deductions (pp. 319-22). My view is that a charitable deduction is basically a situation in which some individuals can make large lump sum transfers by themselves and thereby bind the rest of us to make parallel contributions in minor amounts. So it's a kind of federal matching grant which will overcome the assurance problem that Steve and Jules refer to.

Now that presupposes a very large question. How powerful is the level of consensus? If you're working in a society in which the break comes in, with persons *A* through *N* behind the charity and *O* through *Z* opposed, then I am uneasy about the charitable deduction. On the other hand, if you're reared in a society in which it turns out that people *A* through *X* believe that way and *Y* and *Z* do not, then it might work. So my answer to Frank or to Tom is that if they push the logic of their argument, they basically surrender to me 90% of the welfare and transfer programs on the federalism grounds. I think that transformation is utterly unachievable today even if we wanted to do so. I mean it's just not possible. And I make that very clear.

SPEAKER: What's your answer to the formality point?

RICHARD: The answer is very simply this. My sense is that behind the rhetoric of private property there is a lot of covert utilitarian capitalism. The reason we have per se rules is that we recognize implicitly that case-by-case adjudication will unravel. We try to form our rules to allow us to proceed to a favorable general equilibrium. I structure the argument to show how the institution of property helps achieve that end by preventing political intrigue.

One point that is insufficiently argued in the book is that the public use requirement demands a pro rata division of any surplus brought about by forced exchanges. One virtue of that rule is that it offers the cheapest means possible to preserve the definiteness of rights in the new legal order, after forced exchanges, that you had in the old one. If you don't have pro rata distribution, then you can have a universe in which the outer right is going to be up for grabs, which will lead to rent dissipation.

The second stage of the argument, which I did not mention fully in the book, but I talk about at great length in my alienation paper⁸⁹ ties back to Jules's point about marginal contributions to the public

89. See Epstein, *Alienation*, *supra* note 13.

good. With water rights, in a natural flow jurisdiction, whenever there was a shortfall, the cutbacks were made pro rata. Nobody ever made a case-by-case examination as to the marginal cost of the cutback for each person. The standard economic argument against that practice⁹⁰ was that it ignores the relevant marginal value of water to the different participants, and therefore, is inefficient. That conclusion is true in a world in which there are perfect monitors at zero cost. But remember, when you're dealing with public goods you don't have the cheap monitoring device. The answer to Jules's argument in part is that the pro rata distribution works to some extent automatically. In a sense everybody gets defense, and they get it roughly proportionate to the property holdings. Now it is not pro rata in fact. But it looks pro rata (i.e., it is without obvious systematic bias) so you don't have to shift money back and forth for some sharing of the surplus. This automatic rule can stop the rent seeking dynamic from taking place.

That then leads to my last point which is a standard public choice point that legislation just doesn't happen—somebody's got to push it. One of the things that needs pro rata compensation—if you could figure out how—is the input that people generate in order to create benevolent legislation, i.e., bankruptcy liquidation, statutes of limitations, and so forth. My own view is that it's strictly a second order problem, because the opposition to this sort of legislation is going to be so tiny and small, so that basically any trading group would be quite happy to subsidize this particular activity, because the general overall gains would give them an ample return. It's just probably not worth trying to correct the problem even after its recognized.

Moving on, I have a long paper on Bruce's point.⁹¹ Peggy can verify that we talked about it in great length in another conference, *Time and the Common Law* last November.⁹² I talked there about entails and other restraints. The key distinction is between two forms of restraints on alienation. The first restraint is imposed by a grantor upon a grantee—the question is whether the grantee should be able to escape it. The second restraint is that imposed as a matter of positive law upon parties independent of any grantor/grantee relationship. Interestingly enough, that relationship became utterly confused in the early common law by virtue of the fact that the original grantor happened to be the King. You never knew whether you were talking

90. *Id.* at 979-82.

91. Epstein, *The Temporal Dimension of Property Law*, 64 WASH. U.L.Q. — (1986).

92. *Symposium on Time and the Common Law*, 64 WASH. U.L.Q. — (1986) [hereinafter *Symposium*].

about the sovereign on the one hand, or whether you were talking about the grantor on the other hand. But once you follow the history of the fee simple, the whole question of restraint of alienation does not involve the inherent nature of the common law, but nature of the grant. A grantee might have received the fee simple—"to *A* and his heirs," whatever that meant—from the King. The King basically says I want the tenant for life, the tenant in possession, to be able to alienate only the life interest. The claim is that there was an implicit contingent remainder in the heir, which the grantee could not alienate because he did not own it. About 1226, the case law settled on the distinction between words of purchase and words of limitation. It thereby basically converted the life estate with the remainder into the fee simple as we know of it.⁹³

My own sense is that to figure out what alienation looks like you have to look at natural modes of acquisition. Now with respect to land we have them, but you have two sources which go very strongly against Bruce. First, you have the natural acquisitions with respect to personal property, where alienability was routinely accepted. Second, you have adverse possession. The general rule is the adverse possessor always takes free of the restraints and settlements of prior possessors. He acquires what we would call the natural alienable fee. So looking at those cases, you would basically want to distinguish between the artifacts of state grants and the theories of natural acquisition. But nobody could see any welfare gain to a system in which there were no rights of alienation in anyone. I would think that the statute which simply said that all landowners in the city of Chicago are no longer free to convey their property would be regarded even under contemporary laws as a taking precisely because we can't draw the line between rights of disposition and rights of property.

Bruce's other point about the overlap between the eminent domain and the contract clauses fails because it ignores the jurisdictional levels of federal and state governments. The constitutional theory was that the contract clause bound only the states, while the eminent domain clause in the original Constitution bound only the federal government. They were operating at different levels, so there was no contradiction. The real problem is the enormous wrench to the system that incorporation necessarily works at a conceptual level, which Frank and I have already discussed in connection with the question of welfare.

93. Y.B. 33-35 Edw. I.R.S. 362 (1306). See R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 52 (4th ed. 1975); see also 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 106-07 (1923).

Turning last to Cass's point, again I just think it's wrong. There's a lot of evidence about the level of poverty under contemporary standards being higher today than before, but one has got to be very careful about the statistics used. The question is, what is the rate of decline in poverty as a function of the introduction of the welfare system? Here the rate of decline in poverty was in many ways more rapid before a benchmark point of 1965,⁹⁴ and the wholesale federalization of welfare. Since then, the situation has been relatively stagnant. On those issues you could look at a book which Cass doesn't like, the Murray book, *Losing Ground*.⁹⁵ It's interesting to note the criticism of him in Victor Fuchs's⁹⁶ review, which attacks him, not on the ground that he got it wrong with respect to welfare for the poor, but on the ground that he ignores the gains to the elderly, say through Medicare. But of course those gains are perfectly consistent with the rent seeking model. The elderly are powerful political folks who take more from the poor and therefore exacerbate their poverty.

The other point is that empirically capital formation is impaired by coerced transfers, and the moral hazard problem is a serious one. If you're prepared to ignore the significance of this hazard, then you have to forsake generations of insurance law and practical business experience. You do this at your peril. Here there is a problem that the welfare system has to face, even if you take, as Tom would take, a totally utilitarian point of view.

TOM: No more, no less than yours.

RICHARD: I mean as opposed to Pareto. Pareto is a very constrained utilitarian system. It talks about welfare as being the ultimate good, but it has constraints on the distributional side. But it seems to me that although the question is empirical, it is not for that reason unanswerable.

CASS: There is little support for the proposition that the size of the welfare rolls is a result of the welfare system.

RICHARD: The definition of evidence is critical. The inferences drawn from theories based on individual self-interest count as much as evidence obtained by somebody counting numbers. But numbers are there. It's not only Murray's conclusion; the Gwartney study in the *Cato Journal*⁹⁷ reaches exactly the same conclusion. And he's a fine economist. Not only that, the Headstart surveys are

94. See C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* (1984).

95. *Id.*

96. Fuchs, Book Review, 11 POP. & DEV. REV. 768 (1985).

97. See Gwartney & McCaleb, *Have Antipoverty Programs Increased Poverty?*, 5 CATO J. 1 (1985).

clearly wrong because they don't take into account the adverse selection of program participants. The stuff about the wealth transfers to the rich folk through Medicare and so forth and from Social Security is consistent with the general theory.⁹⁸ There is a vast literature of public choice which is consistent with the idea that if you create indefinite property rights, people are going to start to chisel away at social wealth. To make welfare transfers you need non-price controls. I will be happy at any time to look at that empirical evidence, but my sense is that it will not support the proposition that welfare generates positive gains. I just don't believe in it.

BERNARD: My initial concern is Frank's interpretation of *Baron v. Baltimore*.⁹⁹ It was quite an unusual interpretation, in that it said the case meant not only that the federal government was solely bound by the Bill of Rights, but that the states could do most anything they wanted to. Or at least they could go into redistribution. There would be no constitutional bar as far as redistribution.

RICHARD: Subject to their own constitution. And of course the contract clause¹⁰⁰ as far as federal contracts.

BERNARD: I think the idea is questionable that the states were left to do as they wanted as far as redistribution; that there was no longer any federal constitutional bar. My other thought is that Miller's interpretation of the fourteenth amendment in the *Slaughter-House Cases*¹⁰¹ is grotesque. My reading of the 1866 Congress would suggest just the opposite of what Miller said. If anything, it called for greater restraint on economic activities of the states. Neither of these cases therefore stand for the proposition that the Constitution left the states with maximum prerogatives in this area.

FRANK: I just want to say a word about Miller and *Slaughter-House*. The more you say that Miller's opinion in *Slaughter-House* is remarkable—grotesque was the word—the more you will support my citation of that opinion for the powerful persistence of the republican vision in our constitutional tradition—despite everything you say about the history, and despite the fact that the due process clause eventually was set to work on what the privileges or immunities clause was not permitted to do in the *Slaughter-House* case, and despite the fact that Field's dissent eventually became, for a period, the law of the land. Miller's opinion shows that the spirit of republicanism and the notion of the states as the locus of republicanism in

98. See Fuchs, *supra* note 96.

99. 32 U.S. (7 Pet.) 243 (1833).

100. U.S. CONST. art. I, § 10, cl. 1.

101. 83 U.S. (16 Wall.) 36 (1873).

the total constitutional scheme of the country was very powerful—powerful enough to produce what you call a grotesque interpretation for the fourteenth amendment. The more interesting debate in *Slaughter-House* is not so much between Miller and Field, as it is between Miller and Bradley.¹⁰²

SPEAKER: Why is that?

FRANK: Because the interesting—this is really a sideline—controversy in *Slaughter-House* was about what the fourteenth amendment had done to federalism, as opposed to what it had done to natural rights, but I don't think we should . . .

BERNARD: Certainly that opinion can rest on federalism. I referred to it as grotesque, though, because the fourteenth amendment was an effort by the Thirty-Ninth Congress to limit federalism. The concern was that federalism had reached its heights in the Civil War, and if we cite *Slaughter-House* as a high point of federalism I think that is not consistent.

SPEAKER: Bradley's position is a very powerful position. What I meant to say was that if Miller had been bested in *Slaughter-House*, it was by Bradley who understood that the fourteenth amendment is evolutionary and is meant to change some fundamentals of federalism. Are you saying that if there was any redistribution, it was not affected, but other aspects of the federal rules were affected?

FRANK: I'm saying that Miller's position, which was the prevailing position, reflects a remarkably strong resistance to Bradley's on its face quite persuasive view that the Civil War experience and what led up to it, led the people through the fourteenth amendment to revise drastically the understanding of the scope of authority in the states to set the fundamental terms of communal existence. Miller's argument was essentially that if we read the substantive guarantees of the fourteenth amendment so as to limit states in the way that the petitioners in the *Slaughter-House* were contending for, the effect would be to nationalize essentially the whole range of the common law. All contract law, all of tort law, all of property law, would in effect, be nationalized because they had trouble distinguishing between ordinary common law issues and fundamental questions of political morality. Each question—the difference between strict liability and negligence, the question of whether you had to have consideration to support a promise—was thought of as going to the root of fundamental questions of politics. Miller points all along to section five of the amendment. He is saying that not only the federal judi-

102. Compare *id.* at 57 (Miller, J.) with *id.* at 111 (Bradley, J., dissenting).

ary but the federal Congress will have been invested with authority to legislate the ordinary law of the country. He said this cannot be. He pointed to a tradition in which not constitutional law but politics in state legislatures were supposed to be making those determinations. That's the republican tradition which I say is spoken for by Miller in *Slaughter-House*.

BERNARD: Field's position at that time was Locke's economics, and it's the economic area that we're concerned about here. There was a serious limitation on the economic powers of the states in the Bradley and Field opinions, and both were warranted by the debates of the Thirty-Ninth Congress, where a great concern was exhibited about the economic area. My precise point is that questions about how much power the states would have to redistribute wealth and to control economics raised serious questions and I'm inclined to think that the Thirty-Ninth Congress would not be favorably disposed towards such power.

PEGGY: I'm not sure my point fits here. Back to formalism and what is inherent in the concept of property, and what we do or do not have to take into account in its historical development. I agree with the people who said that the concept of alienability was essentially contested. I don't agree with Richard's views about restraint on alienation, but we've debated that elsewhere.¹⁰³ What I want to say is that he needs a formalist concept of property to make his theory work. What I mean by formalism here is also known as conceptualism. It is the idea that a timeless list of things is inherent in the concept of property. It hurts or maybe destroys his argument about the obviousness of the *prima facie* taking if the concept of property is both contested and evolving over time.

In fact, it is both contested and evolving over time. What was included in property changed over time, and therefore, why is property not now changing also? The objects of property also changed over time; property rights in human beings were okay in 1789, but not now. The same for public offices. A more mundane example is what I call English window rights. You could prescribe the right to have your windows overlook somebody's unbuilt property if you were there long enough, which was therefore a common law property right, but which, under Richard's view, is certainly not now a property right. Who can hold property also changed over time. After women got married they lost their rights to contract and to alienate their own property, but that changed over time. Moreover, the indicia of prop-

103. See Symposium, *supra* note 92.

erty changed over time, for example, whether you could dispose of it by will.

The book has an interesting paragraph, at least to a property teacher. "The conception of property includes the exclusive rights of possession, use and disposition. The right of disposition includes disposition during life, by gift or by sale, and it includes dispositions at death which are limited only by the status claims of family members protected, for example, by rules relating to dower and forced shares" (p. 304). My response is that wills didn't come into being until late in the common law. Mill in the 19th century had an argument, not just an assumption, that disposition by will is inherent in the concept of property.¹⁰⁴ Hegel was against him, and said no, only inheritance is inherent in the concept of property.¹⁰⁵ It's always been contested. For example, forced shares; why in the world aren't those statutes a taking, Richard?

Does your right of disposition by sale mean that everything is salable? If you're going to say that one has property rights in the body, then you're going to have a hard time arguing for the sale of body property rights, although that is heavily contested and may be changing now. The main point I want to make is that it's a contested concept, it's an evolving concept, it always has changed, and it's changing now. Why shouldn't we acknowledge that while development rights might have looked inherent, they don't look so inherent currently; especially since what development means has also changed over time? Development means something else now than in the 18th and 19th centuries. I'm with Tom in thinking that you can't understand the meaning of something without the history.

MARK: A couple of points, Richard. I have the feeling that you're not hearing how we're hearing you, so let me briefly summarize points that we listeners think you have conceded, or critical points in your argument where people disagree with you. If people think you're wrong on three points, your argument is in serious trouble. First, what you've done by emphasizing the federalism argument is to strip your book of its natural rights aspect. You've changed the claims against redistributive taxation from claims of property rights into claims about which authority is entitled to make the choice whether to tax or not. I had thought formerly that the book was a natural rights interpretation. I don't think you really want to concede that. But I believe as to that whole part of this discussion you should just say, "I'm sorry, I got mixed up, it was the

104. 2 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* ch. 2, § 3 (1886).

105. T. HEGEL, *PHILOSOPHY OF RIGHT* §§ 178-80 (T. Knox trans. 1952) (1821)

heat of the moment.” As I hear it, you conceded the whole natural rights aspect of the book in not doing that.

The second point relates to environmental regulation zoning. For those of us who don’t understand your view of how the regulation is not misfeasance regulation, but rather a nonfeasance regulation—even if we care about that distinction—we now believe that all of what you said about zoning as an illegitimate replacement for nuisance is nonsense. You have abandoned the natural rights attack on redistribution, and for those of us who disagree with you about whether environmental regulation prevents harm in the same way that nuisance law might, all of your attacks on environmental zoning go out the window too.

Third point relates to Cass’s comment. You’re making an economic mistake so insane that I think you want to withdraw it. The existence of moral hazard, like the existence of a downward slope in the demand curve, tells you nothing about the elasticities of demand curves, or the extent of moral hazard. That is what the empirical question is about. It may well be true that there will be more poor people in the world where there is a welfare system than if we let people die in the streets. The question is how many more there will be. You derive nothing at all that’s relevant to this from the abstract theory of moral hazard or the downward slope in the demand curve. If your theory is going to be constitutionalized in any way, you have to persuade us that courts are going to be able to build an incredible consensus around issues like these. This is very risky constitutional factual finding. The magnitude of the increase in poverty that might be caused by welfare is not derivable from the theory. The theory simply tells you the direction of the effect. It doesn’t tell you any more than that. I will agree with you to some degree on the direction of the effect, although I believe the effects are extremely weak in this case.

FRANK: Richard, I also take it that you have conceded that the concept of property has evolved. This follows from your statement that at some point the people were confused by the fact that the King gave them this land, gave them these property rights, and at a later point, this confusion about the nature of common law property was clarified. We have to investigate this by imagining how a common law lawyer of the 14th century thought. That is a deep conception about the historical articulation and development of the common law of property. It leads to the question that Peggy asks: Why then, is that the point at which the confusion has been resolved and not a later point?

PEGGY: From the passage I read there is no specific point; it's a conflation. You get the 17th century, the 18th century, and the 19th century, all in one paragraph.

FRANK: I just want to say that I thought Richard did somewhat better with the federalism question than Mark's comments suggest. I don't want to concede that he has won, but he did draw a connection worth some reflection between the jurisdictional levels question, which I had argued it was now reduced to, and a political morality issue. He did it by pointing to the exit possibility. We should remember that. He said that a framer who was concerned with the morality question might be content to allow states to do redistribution as long as citizens had the defense.

RICHARD: I said on the straight historical side that incorporation is an enormous wrench. Suppose one were trying to figure out the following political question: If you assume, as I do, that the optimal level on welfare support is not zero, then your risk of going too far is smaller if you run welfare through the state system than if you run it through the federal system.

I think one of the great historical problems is how much the early framers addressed redistribution. I think some of the original understanding is carried over by incorporation. In dealing with that the framers of the fourteenth amendment were thinking about black slavery and a thousand other things. Everything else is stuff at the bottom of the agenda. It's not clear how much of it gets swept up.

* * *

LARRY: Richard is going to be responding to Ellen Paul's paper.¹⁰⁶

RICHARD: I think that there are some interesting and important insights in Ellen's paper. I think she is right in identifying one problem, to which I think I have an answer, but one that's not as clearly expressed in the book as one would hope. Her question is: Is this man riding two horses? There are two senses in which that question has to be answered. First, to what extent do my political theory and my constitutional interpretation happily coexist? The second question is to what extent do my libertarian and my utilitarianism instincts cohabit happily? My position essentially is, why be modest if I want it all? What I've tried to show is, I can ride both horses simul-

106. Paul, *Moral Constraints and Eminent Domain: A Review Essay on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*; 55 GEO. WASH. L. REV. — (1986).

taneously into the sunset and not expose my legs to acute danger as the two horses start to buck and diverge.

First, let us start with the Constitution as such, and indicate what is unique about the Constitution as distinguished from, say, the Lockean formulation, which has most but not all the same words: the Constitution substitutes for the words—"without their consent"—the words—"without just compensation." That seems to me to be more than a semantic detail. Rather it marks a change in substantive conception, because once you start talking about "consent," you are clearly within the pure libertarian framework. You don't have to worry about the mixture of two separate theories of entitlements. It's all straight absolute property rights, which owners can bargain away as they please. When you put in "just compensation," and say that the state may take if it pays, regardless of consent, you are now trying to muddle two worlds together. You first have this conception of property rights, which looks to be absolute on its face, but then you add this utilitarian exception which allows takings upon paying a just compensation in order to achieve some form of public benefit.

There is no question that a responsible judge, trying to interpret the clause, would have to try to coexist with both of these tendencies. Within the framework of the Constitution, the framers started with some natural rights conception of what private property was; they recognized some kind of utilitarian override; and that many of the difficulties in interpretation rise from trying to merge the two parts. I think you can get a fixed and definite meaning of property—I surely don't abandon that point. I think, oddly enough, that working within that framework the argument against transfers simply comes, not from profound social theory of consequentialism, but from the recognition that if you have a net transfer, then there's no just compensation for the loser, and the transfer is not for public use. So you flunk two of the three elements that are in the clause under straight mechanical interpretation. This analysis leads to a result some of us find appropriate and some of us find unpalatable. All of us, to some extent, find it surprising. The only way I think you could break that conclusion is to argue that the progression, as one moves down the line from total to partial takings, is in some sense illegitimate: I don't think it is. That is one side of it.

The other side is the treatment of the desirability of the clause from the perspective of political theory. How, then, do you try to reconcile the whole? My own sense is that the phrase "natural rights" is a place-holder for those things which you hold dearly, which you know to be correct, but which you are unable at that time to defend

adequately. I think there's a kind of Hayekian sense that the tenacity with which the view is held is inversely proportioned to your real ability to give reasons for it. I think it's quite clear why Locke in 1690 and the founders in 1789 were very troubled by this: the modern theory of property rights dates, arguably, from the last generation.¹⁰⁷ Still there were some intuitions about the subject, but in a world where ideas of public and private goods were not clearly established, where marginal cost was unknown, where demand curves had no particular slope, that ignorance made it rather difficult to defend property with a formal structure.

My sense is that political theory is designed to give a rigorous consequential justification for a naive libertarian position. The theme I've been pushing all the way on bargaining games says in essence, "if you are to pick amongst original entitlements of rights, pick those that minimize the bilateral monopolies which tend to destruct the beneficial bargains that otherwise would take place." That leads on balance to a very simple solution: the first cut is that everybody owns himself, and nobody owns any external thing. Locke had trouble with all of this because of his idea of ownership "in common."¹⁰⁸ The importance of that point for historical purposes is to deny that property comes from the state, i.e., King, on down. Locke's view runs in the opposite direction, that rights start with people, not government. It seems to me that a rule of first possession, as a way out of the first "no ownership" position accomplishes that same objective. It also gets rid of some of the conundrums of collective choice that otherwise exist, on who takes what out of the common pool, without the consent of others.¹⁰⁹

The second point that I want to talk about for just a moment has to do with the issues that are raised in discussing natural rights theory: do we start to talk about a theory which allows no forced exchanges? Here I have come to the conclusion that the lifeboat cases are in fact vitally important cases to test the limits and the strengths of a particular theory. To be sure, as a matter of pragmatic convenience, you can take the positions I have often taken: "Look, a lifeboat case is a one in a million phenomenon. Don't allow sound institutions to perish on the basis of these long shots." But today I'm trying for, as it were, a larger brass ring. When you're going for that level of theoretical completeness, you can't accept these kinds of approximate

107. See, e.g., Demsetz, *Toward a Theory of Property Rights*, 7 AM. ECON. REV. 347 (1967).

108. See J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 133-45 (T. Cook ed. 1947) (1690).

109. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

results. You have to be able to explain why the theory accounts for the lifeboat cases.

Let me see if I can explain. The way I understand the lifeboat cases is basically through the law of conditional or qualified privileges, with respect to the taking of anybody else's property.¹¹⁰ The first point is, quite surprisingly, that these forms of qualified privilege are very old within the fabric of the common law. For an example, in my torts casebook¹¹¹ the first case I often end up teaching is the *Case of the Thorns*.¹¹² When you actually look at it closely, it raises the question whether there is a qualified privilege for somebody to enter the land of another in order to recover his thorns which were blown there by an act of God. That is hardly a case which treats property as an absolute and total exclusivity, an imperative that admits no kind of variation.

The concern is, why do you want to abandon absolute rights? What you basically do is to define the necessity situation as one in which the original assumption behind property rights, that is minimized bilateral monopoly problems, turns out to be false in the context of this particular set of contingent social arrangements. The necessity defense recognizes that there is only one guy to whom you can turn for help, and he is someone who, by fluke, can now extract all your money and your wealth, at least if property rights are absolute. The solution that people try to reach is one that approximates what competitive markets would yield, that is, a unique point solution with normal profits for the landowner. As competition is not available we pursue a system of direct regulation. That form of direct regulation is usually called "just compensation" for damages inflicted, with the corresponding right to inflict them, given the necessity. One can give a very extensive account as to why the introduction of compensation as part of the total legal package is an improvement over a new, simple absolute right to enter somebody else's property without having to pay any compensation at all, a rule which in turn is probably an improvement over the absolute right of exclusivity of the pristine common law.

When one recognizes the particular mechanism in those cases, the translation from the individual cases to the state cases takes on a rather different complexion from that which I think Ellen would want

110. See *Vincent v. Lake Erie Transport. Co.*, 109 Minn. 456, 124 N.W. 221 (1910); *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908).

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

112. *The Case of the Thorns*, Y.B. 6 Edw. 4, fo. 7, pl. 18 (1466).

it to have. It is no longer true that as between private individuals you can only lose your property with your consent. We now can identify by our bilateral monopoly theory, ordinary circumstances in which you can lose things without your consent. We also have a unique set of prices for the exchanges, and limited occasions where they take place. When you put the whole package together as part of a general scheme, it turns out to be Pareto superior over the previous distribution of absolute property rights. Politics, in my judgment, is simply an extension of that necessity from the one on one situation to the M on N , or many party situations. Now the necessities come from different circumstances that are harder to bind and harder to control. But nonetheless that's what we have to do.

This gets me to my next point. Here my response has to be not only to Ellen, but also to Tom. I take it that one line of criticism which seems to draw real blood goes as follows: "Epstein, you're subject to the usual 'back-end' objections. That is, you have developed a theory which on the front end, the *prima facie* case, purports to be extremely rigorous on the structure of property rights and the tests for takings, but you give everything away when you try to figure out the appropriate test of compensation which goes with it." Now it seems to me to be a very profound objection. Let me try to put to you how stark the choices are, so that one can see why my solution may not be so bad.

Essentially we can envision three logical types of positions. There are two corner solutions and one intermediate solution. Corner solution number one is Ellen's solution: "You cannot control the just compensation, implicit compensation test that you tried to design. Therefore Epstein, forever hold your peace; you can never get past the consent requirement, as Locke had it." She would in effect have to take back a great deal from the lifeboat cases and hope that the quality of mercy would solve all the problems that necessity cases raise. Empirically, she is probably right most of the time; certainly in maritime communities there is no question that a tradition of voluntary aid runs very deep and very strong, as any sailor knows.

The second solution is the Grey solution which responds to the identical problem from the side: "Epstein—this woman can't be right; you'd get a zero public sector. You can't have courts; you can't have statutes; you can't have bankruptcy; you can't have anything; you can't have society. We can't find any intermediate position, so we have to run off to the other corner and adopt a rule, the Grey rule, which is more restrictive than the traditional rule: you draw the line and end the book at chapter thirteen on explicit compensation. You

don't worry about implicit compensation. You take the position that the government may pump out any comprehensive general social legislation regulating property. It is per se constitutional."

I find both solutions intolerable—Ellen's, because it turns out you can't account for sovereignty in a coherent fashion; Tom's, because you take all the rights of disposition, all the powers of taxation, all the rights of regulation and place them into the public domain. It seems to me that you lose enormous amounts of resources because of the rent seeking phenomena. Unlike Mark, I think you can estimate the costs from the theory of litigation, which says that the amount that people will spend in an effort to gain wealth is directly proportional to the amount at stake.¹¹³ Place massive wealth in the public domain, the consequences for public and private behavior will be substantial.

I see, therefore, that the real gains come from an intermediate position. I think, e.g., when you look at the first amendment law, or when you look at interstate commerce, everybody is looking for that intermediate position on the ground that these two end points are unstable. I think to some extent we can find a sensible intermediate position. Obviously there are direct measurement cases like rent control, where the taking diminishes the value of the asset in ways appraisers can calculate. But, in addition, I think that the common pool argument is sufficiently powerful and sufficiently well accepted that there is a very strong argument which says when you take rights out of a common pool, as opposed to placing them in a common pool, there are systematic net losses. Therefore you have invalidation, as there is nothing to compensate with (ch. 14). The motive test is generally weaker because the more you apply it, the more people will cover their tracks (ch. 14). Looking back at the past legislation passed in an era where folks didn't fear constitutional review, the statutes are a bunch of sitting ducks, like the windfall profit tax (pp. 289-93).

But the most important test is disproportionate impact. Let me now state what the formal theorem is. The formal theorem is that you can construct a test where the social welfare function becomes a simple multiple of the individual welfare function. It therefore follows that you've now created an incentive compatible system, where every individual will be driven to seek the social optimum in order to find his individual optimum. He won't deviate systematically one way

113. Kelman, *Searching for the Libertarian Core of Legalism: Comments on Richard Epstein's Takings* (unpublished manuscript) (published as Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CALIF. L. REV. — (1986)).

or the other. Oddly enough, this test turns on our assumptions about the continuity and differentiability of the social welfare function. The more kinks, the more local maxima and minima that you find, the more irregular your social functions, the less plausible this approach will be. I think these regularity assumptions are quite plausible. Indeed when you check all the nondiscrimination doctrines, as they are developed elsewhere in the Constitution, with equal protection, nondiscrimination with respect to original package imports,¹¹⁴ nondiscrimination with respect to access to public forum in the first amendment,¹¹⁵ and nondiscrimination under the negative commerce clause,¹¹⁶ the Court, without knowing the formal argument, has adopted exactly the same line I have proposed here. What's interesting about it, the idea of redistribution to one side, is that the test works reasonably well. My basic position is that the structure of compensation arguments is sufficiently clear that we can find easy cases on one side or the other, as with *Adair*,¹¹⁷ rightly conferring constitutional protection on yellow dog contracts.¹¹⁸ Notwithstanding Joe's discomfort, the reason I have to be so insistent with statutes of limitation, with recordation statutes, pooling arrangements, creditor's preferences, is that they are all situations where the theory seems to give you pretty powerful results. We get negative results with the labor statutes, the minimum wage, and the progressive tax. We get this funny set of hard cases with the anti-fraud cases, the public health cases, etc., where there is a legitimate "grey" area. Courts in the 1870-1937 era, weren't always very good at handling cases. But to the extent that one wants to talk about Bruce's demand for sympathetic reconstruction (tr. 57), their output is more congruent to my theory than it is to anybody else's theory.

So, the last word I want to say is how should you try to apply this system? Ellen gives us one case, the situation in *Midkiff*,¹¹⁹ where she basically asks the right question. She says: "Look Epstein, what you're trying to do is to replicate the division of the surplus in two, three, and four party games that one finds with public goods in *N* party games, where the key difference is that these games are asymmetrical—landlord v. tenant—whereas in your joint tenant partition case (ch. 12) the parties have symmetrical rules. You can't do it."

114. See, e.g., *Brown v. Maryland*, 25 U.S. 419 (1827).

115. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981).

116. See, e.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

117. *Adair v. United States*, 208 U.S. 161 (1908).

118. See Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

119. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

My answer is you're right, I cannot do it cleanly. But it seems to me that we know enough about bargaining theory and corporative surplus to make a rough and ready functional distinction between a site specific asset which cannot move, i.e., the mill, and the wharf, the coal, or the ore, and *Midkiff's* landlord-tenant arrangement where there is always some bilateral monopoly because the specific leasehold improvement or locational capital is vulnerable to removal. Still, in these long-term situations, there are opportunities to contract *ex ante* to handle the renewal problem. That surplus problem is going to be very small, while the political dangers of forced exchanges will be great. Therefore with *Midkiff* you follow the absolute prohibition against the forced private sale whereas with the Mill Act you take the opposite approach.

Perhaps I placed the separation in the wrong place; still, that's not going to be the test as to whether or not my approach is wrong. The right question to ask is, "is *Midkiff* on one side of the Mill Act cases, or is the theory sufficiently incoherent that we can't figure out the relationship between them?" The problem with Ellen's ahistorical theory is very simply this: you simply can't figure out how to generate a public sector. What she has proposed is that we're not going to invest anything in trying to have procedural rules that restrain both state privileges or individual liberty. Her only evaluation is *ex ante*, where she allows *ex post* exit at the point you think that things are too bad. But I would quote the language of the old self-defense case, *Tuberville v. Stampe*:¹²⁰ "By then it may be too late." When one looks at voluntary contracts by which people commit capital to specific assets, e.g., condominiums, cooperatives, they invest very heavily in front-end legal structure. One eerie thing to do is to compare the articles of a typical condominium association with the American Constitution. They're very similar, for neither contains any element of redistribution at the time of formation. Ellen's analysis places too much weight on the *ex post* remedy of escape, which will be blocked by the prior actions of those who govern and abuse. She does not invest enough in internal legal structures and in public goods. She needs to build forced exchanges into her system, as I do.

ELLEN: Richard, I was a bit surprised that you didn't thank me for putting you in the position of being a wimpy compromiser, and I'm sure that's an unusual position for you. Let me begin where you did and where I did in the paper, on the question of collating natural rights and utilitarianism. You have added an interesting element in your first remark regarding why you were motivated to infuse your

120. 1 LD. Raym. 264, 91 Eng. Rep. 1072 (1697).

natural rights argument with elements of utilitarianism, i.e., the just compensation clause is in the fifth amendment to the Constitution and, therefore, you have to deal with it. That answer was a bit too ready or flippant. But in your book you base your argument on blank slates, and you do want to have "just compensation" in your four-pronged test, so you are keeping that element, even starting from blank slates. So I think that avenue of escape is just too easy. You're taking the easy route here and you really have to address the question of whether these two theories are compatible. After all, if you examine the genesis of utilitarianism historically, it developed as a reaction by Bentham to the earlier natural rights theorists.¹²¹ Consequently, utilitarianism began as an alternative moral theory to natural rights. Bentham was very right; indeed, he did devise an alternative theory to natural rights. Natural rights theory is absolutist and historical in that it looks to individuals and their entitlements, and it brooks no compromises. Utilitarianism, in contrast, is consequentialist and pragmatic. The two theories are antithetical, and this should not be surprising because Bentham devised utilitarianism as an antidote to the perceived abstractness and absolutism of natural rights theorizing.

I see why you want to combine the two, the presumed motivation being to moderate the extreme consequences that natural rights theory generates, consequences that you are just unwilling to accept. So why not import various ad hoc principles that will weaken or nullify aspects of natural rights theory that you find objectionable? I understand the motive, but theoretically the enterprise simply will not fly, for the reasons that I stated in my paper. I really don't see any purpose in belaboring them here, but in general, I think my position is well-taken: That in trying to remedy the deficiency that you saw in Locke's justification for the state¹²²—namely that tacit consent just doesn't work—you conceded too much. Your view is that if consent won't get us to the state because of free-rider, holdout problems, etc.—then compel people. Your statement, as I quoted it in the paper,¹²³ is just as blunt as it can be. If people through voluntary transactions won't be able to agree to a state, well then damn it, compel them. I don't think you really argued for that; it's just a bald assertion, and I know why you want to do it. You don't have an alternative theory to Locke's that you think could generate the state without forced exactions, so your solution is forced exactions. In

121. Locke and the natural law theorists: Grotius, Pufendorf, Bynkershoek, and Vattel.

122. J. LOCKE, *supra* note 108.

123. Paul, *supra* note 106.

your response to Joe Sax you said, "Well give me an alternative theory. You have criticized my theory and no theory is perfect; give me some alternative, for your paper is really a critical effort and not an effort to pose an alternative." Mine really tried to do both.

It is incumbent upon you to show why my theory, my ahistorical theory, which I call the time-frame theory, won't accomplish basically your same purposes, but without the necessity of repairing to forced exactions. [Briefly, this time frame theory says: look at any government at a period in time and determine whether it is rights-protecting. If it is, then it's legitimate, if not, then it's illegitimate. It is an entirely ahistorical theory, but it does allow for a theory of rectification to remedy any past injustices.] I do acknowledge that our conceptions of an ideal state are not wholly compatible. Your state wants to do a lot more in the way of public good, etc. than I would want the state to do. But the state that I have generated doesn't violate people's rights; and when they are violated incidentally, as in a revolution, people would have to be compensated or the state would lose its legitimacy. And I think it solved one problem which I don't take nearly as seriously as you do. In fact, I don't take it seriously at all, that is, the problem of free-riders and holdouts. My theory solved the problem of getting the state started without compelling people. Therefore, it's much more harmonious with natural rights theory.

You're really in deep water when you try to say (and you invoke this continuously throughout the book) that the state can only do what private individuals have a right to do prior to the state, and that the state is a mere fiduciary—people can't transfer to the state more rights than they had prior to the state—and then you have this whole huge exception of forced exchange. Where did this come from? It's nothing more than an assertion. You have to make it. There's another theory, the one I proposed, to accomplish the founding of the state without sacrificing Lockean principles and without affording all of this *ad hoc*ism that comes in once you accept utilitarian principles. That's my first point.

The second point is on the four-pronged test. Again, what bothers me is the utilitarian element. Whenever you're a strict Lockean, I sit back and applaud. But your departures from Lockeanism are disconcerting. Just to take one example (and I went through many in my paper), your definition of public use. First you say, "I'll provisionally define public use as public goods," and then you say that's too restrictive. What you're really saying any reasonable person would have to concede: "The state is permitted to take for such purposes as the construction of roads, and if my definition won't do

that, something must be wrong with it so let's have another ad hoc principle." You import another principle to widen it.

And what about common carriers. You import another ad hoc principle. Again, it's reasonable, you think, that common carriers should be able to take property, therefore, that's in some sense a public use. You also concede that the state can convey ownership from an owner to another private party which is—as I see it—nothing more than a taking of property from private person *A* to give to private person *B*. But you say there is a social surplus created, so its okay. You seem to be relying on some type of conventionalist notion, i.e., that which any reasonable person would concede, is reasonable, therefore, there must be something wrong with natural rights theory if it prevents the taking. So let's have another utilitarian principle come in to rescue that particular class of takings. In this way, you seem to generate one exception after another with its accompanying ad hoc principle.

Another modification is engendered by the Mill Acts (pp. 170-76), and you think that they were justified. But, you have to come up with a new principle to justify that. The principle must be that if you're constrained by external circumstances, then its okay to take as long as the benefits—the social surplus—is distributed to the people. The Mill Acts took property from some to benefit others. That fact should not be evaded, especially by someone who purports to be a Lockean. The more you become a utilitarian, the more I become concerned that courts, when they get these principles, will play deuces wild, and they'll see public goods where you do not.

Respectable philosophers now argue that charity is a public good and, therefore, that welfare should be a legitimate state function. Now, I don't buy the whole public goods argument to begin with, but even by a strict definition of public goods, I find a great deal of difficulty in accepting the case that charity is a public good, but I'm sure many judges would not share this difficulty. The more instrumentalist and utilitarian you become, Richard, the weaker your argument becomes. It is incumbent upon you to analyze my argument, to show where it's defective, where it doesn't solve the problems that you saw in Locke, and where its solutions are inconsistent or undesirable. Some of your other critics were less than genteel in criticizing you, and I think you were a bit high handed in criticizing my position. "This is absurd; she wouldn't have courts; she wouldn't have this; she wouldn't have that." That's ridiculous. I would have courts, I would have nuisance laws and nuisance rules. And they would be courts that people could repair to in order to defend their property rights on

an individual basis. You were just too flippant in dismissing and caricaturing my views. My argument for the genesis of the state that avoids forced exactions needs to be answered; also my argument that eminent domain and taxation are illegitimate; and finally that only a very truncated police power is legitimate.

BRUCE: Ellen's paper inspired me to pick up the following hypothetical: Suppose that Richard's fondest hopes are finally fulfilled. The Congress of the United States agrees with everything in his book except for one thing. It passes a statute that states: "Whereas a first possessor is entitled to property (*see* Richard, *see* Paul) and whereas force or fraud is plainly illegitimate (*see* Paul), we hereby say that all the land goes back to the Indians." The question remains: Is that a taking? Is my statute unconstitutional? Because after all, that's what he suggests until his weak-worded utilitarian paragraph. It is, of course, true that the Indians might, as Richard suggests, have killed each other off. But it is perfectly plain that the Indians have better title because they're the first possessors. The question that I would like Richard at some point to answer is: Is my statute unconstitutional? If he says it's an unconstitutional taking of the white man's property to give it back to the first possessors, then he makes it plain that his theory really is not a theory of first possession; it's a theory of second possession. And as soon as you have a theory of second possession, then I want to know what's wrong with a theory of third possession. If, however, he says it is constitutional to give it all back—excepting his utilitarian mumbo jumbo—and that it's perfectly constitutional for the legislature to announce that it isn't a taking at all, then the next hypothetical goes: What about Black slaves and their descendants? Because after all there is also an obvious problem there.

The third point is that if it's open to the legislature to choose the true theory of initial entitlements, then Richard's theory has a very radical implication which he has peripheralized. If it's open to the legislature to choose a true theory of distributive justice under the Constitution, what happens if the legislature decides in its conscientious judgment that the true theory is not Richard's theory, but my theory? Why can't the legislature say that it isn't only the Indians and Blacks, but every oppressed person, in each generation, who is entitled to a fair share of the nation's property?

ELLEN: I think Richard spoke too loosely—maybe you don't agree with this—when he talked simply about first possession. The Lockean tradition is more than just possessing—it's mixing one's labor with an unowned thing, using it in some sense, creating some

value out of it. The Indians didn't do that simply by walking, marching over new tracts of land. Over some land, yes, they did use it in a Lockean sense. So they deserve reparations for that portion of it, but not for every inch of land that they happened to traverse.

RICHARD: There are large bodies of law called accession and specification¹²⁴ which has to do with the problem: suppose somebody owns something and somebody else takes it and adds value to it. Does the original owner get the whole thing; does the improver get the whole thing? Every system holds that both those extremes are wrong. One party gets the "fig"—i.e., the thing—and the other gets the "leaf" of compensation. There are all sorts of different answers to who gets the fig and who gets the leaf. The answer to your Indian question is painfully clear. First, you did forget the treaty element. Some of the land was purchased by valid treaty. But for that which was taken, my sense of the eminent domain equation is that the thought that the Indians go home empty-handed is absurd; the thought that they'd take it all is absurd; the appropriate response is the payment of substantial sums of money. I'm not troubled by that, but it is hard to go further. If every theory tried to undo the past, with evidence that is imperfect, the enterprise becomes counter-productive; that's why we settle cases. I am not at all troubled by the outcomes, and I doubt the Indians are troubled by it either. One thing that would make the discussion look less definite is to actually go through the records of one of these cases, to examine claims to rights, for example. Given their antiquity, and the clear differences in cultural practices, these could be very hard cases. But the interesting point, Bruce, is every single piece of litigation and every settlement presupposes the validity of the first possession principle.

BRUCE: So I understand your answer to concede that Congress would not have to compensate whites for land it returned to the Indians (as opposed to improvements). As soon as you say this, you can open yourself up to the question, what's so special about the Indians? Of course, under *your* theory of initial entitlements, they're special because they're the first possessors. But you have to explain why Congress is constitutionally obligated to accept your theory of initial entitlements compared to mine or anybody else's.

ERIC: One of the things that one hopes for is to talk to the author of a book and to find what he really thinks about something where you're not clear. But I'm getting less and less clear about this political philosophy, which in some sense is going to run alongside the

124. See Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103 (1922); see also (pp. 325-36).

constitutional theory. What is this moral theory? In the book, you say you can justify various claims about rights. You can go either way. You can give a libertarian justification, which presumably means a sort of anti-consequentialist justification, or you can give a consequentialist justification. In conversation here you seem to pull away much further from wanting to give, from feeling you could give, the anti-consequentialist justification. You said that talk about Lockean rights is really a placeholder and I go to this book especially when I don't know how to give the anti-consequentialist justification citation.

Two questions: one of them actually a series of assertions and then a series of questions. The series of assertions is: If you throw overboard your idea that you have some independent nonconsequentialist argument, you're really throwing an incredible amount overboard that is part of your essential methodology. Two of those things: one, your first ploy is to define your moral baseline in terms of people and their Lockean rights. That's your baseline for evaluating all the subsequent movements and for identifying improvements and instances of mutual benefit. If you don't have that as your baseline, then I don't understand what the baseline is.

RICHARD: Get it out of chapter five.

ERIC: There's one point; another point, with respect to what you lose. I don't see at all how you can have this principle, which I like and which you invoke over and over again, that the state can't have any rights in effect that individuals—Lockean individuals—don't have. Your view is that there aren't any Lockean individuals with rights. So what—this principle is contentless. You lose all that. Now, what is this consequentialism? I really want to know what this consequentialism is. Sometimes you just say "utilitarianism," sometimes you talk Pareto. I can imagine that what you really want to do, what you really would best do, would be to go with some sort of a contractarian argument which gets you results similar to a Paretian standard but would be motivated at least by some idea of separate, self-interested people coming together and forming a contract—hard-nosed people. And you would get, perhaps, to conclusions which you can read as non-redistributive; and you get public goods. But I really want to know what this consequentialism is, that you fall back on.

RICHARD: As I said there are two things. When you're talking about the Constitution, and you want to understand the term private property, then you cannot allow "private property" to be defined at will by a state legislature. And the framers were clearly driven by a natural rights theory. So when you do textual constitutional interpretation that's the theory to adopt.

ERIC: You can avoid having the state define these rights by having some moral theory which is going to generate the rights. Your moral theory won't generate the rights at bedrock; it won't be a Lockean theory. Maybe it's a contract theory. Maybe it's a utilitarian theory of right. But we're going to get those rights, we're going to let you get those rights. Still, just what is that consequentialist spirit which is going to give us a description of people's rights?

RICHARD: The natural rights theory is appropriate if you try to work within the text of the Constitution. In contrast, the political theory that I use normatively runs as follows: start with the system of property rights as the first step in a system that would maximize, in some sense, aggregate utility, when you don't have any distributional knowledge. To maximize aggregate utility is to minimize the role of bilateral monopoly, and therefore create the distinct set of rights of possession, use, and disposition. That bundle has a compactness which no other rights configuration has. That bundle becomes inner pie.

One fundamental difference amongst us lies, I think, in the regularities we see in human behavior. I work, as Tom Grey has noted, in the sociobiological tradition and see a powerful role for scarcity and self-interest in shaping behavior. With those powerful constraints, there are fewer variations of property rights that can function. The possible acceptable legal combinations are far narrower than is normally supposed. A paper I've written before this book, called *The Static Conception of the Common Law*,¹²⁵ makes this point, and also my paper on *The Social Consequences of Common Law Rules*.¹²⁶ The uniformities of human nature across cultures supports a common set of rules, across cultures, for utilitarian reasons. Let me give you one example. Find a legal system in which a contract between *A* and *B* can bind *C*. The problem is easily universalized. The negative utilitarian consequences are so manifest that nobody would ever want to adopt it. It is a different world from one in which you could argue over consideration and the intent to create legal relations in contract law.

ERIC: Someone comes along and says: Put a 15% tax on inheritance for redistributive purposes . . .

RICHARD: No, you can't do that because, in effect, you're making the argument that transfers are costless. With each and every one of these transfers, we know that it is a negative sum game. More

125. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

126. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

precisely, there is no doubt with respect to wealth, unlike utility, that there is clearly a negative sum game. Utility then raises the measurability problem. The whole point of a system which basically says, "minimize the bilateral monopoly problem" is to avoid the direct measurement problem. You have to understand that we're talking about an original position with radical uncertainty. That's an enormous advantage over any alternative system where measurement is key.

SPEAKER: Would the parity of measurements be no good, for instance, if this system were in place? Your political philosophy would say, "remove it," but then you can't compare those gains.

RICHARD: No, my argument on removal of existing systems was completely different (pp. 324-29). Once you break down certain proper structures, then while in *medias res* you cannot pretend as if all those structures had always been in place. You can't tell people who are 72 years old—"well, you should have saved privately," when in fact you coerced those savings through Social Security. I am very emphatic about that. In fact, in the book I defend that old maxim *error communis facit legem*. All cases of rectification raise hard problems of judgment. But now we're talking about basic theory. We're not talking correction.

My second point is that Mark's argument says, "Look Epstein, you have made a theoretical point which is necessarily true and an empirical point which is wholly false." The theoretical point, which is necessarily true, concerns negative sloping demand curves: all welfare systems must confront moral hazard and adverse selection problems. The empirical point, which Mark claims is totally vapid, is that there is no direct empirical measurement of its extent. But how should we handle the measurement question? Somebody has to make that judgment if any judgment is going to be made at all. But how do we go about making a judgment like that within the political process? What do you think the probabilities are that you're going to overshoot the ideal target? The other kind of social judgment is that we're not going to make any kind of empirical judgment at all. We're simply not going to look at the data. We'll have a categorical rule on the theory because we know that once we open the issue up, we're not going to be able to constrain the level of transfers because of the rent seeking dynamic.

SPEAKER: And what about giving the third possibility within the Constitution—20%?

RICHARD: That proposal is surely a preferable solution to the current legal order because it constrains rent seeking to some degree,

but it's not an ideal solution. I'll tell you why. It is hard to know what level of transfers is socially best. In addition you must make costly administrative adjustments to every other element in the system to preserve the transfers. Working out the negative income tax is, for example, a nontrivial problem. And precisely what's the base from which you measure the added 15%? Who are going to be the eligible recipients? What if they're not on the tax rolls? The point is really very simple. Once you abandon the hard flat tax line, even by way of a constitutional rule, all of those particular points, which require direct measurement, can no longer be avoided by the disproportionate impact test. I think the optimal solutions take one of two forms. It either takes the form of imperfect obligation, or the form of charitable deduction for the reasons stated before. My argument is not the raw moral argument that helping the poor is wrong. It is the moral argument made in an institutional setting with major administrative and measurement difficulties. Many of these problems remain even when progressive rates are set by a constitution, although they are surely aggravated by ad hoc machinations in the political process.

JULES: Eric asked exactly the question to ask and I want to follow up on it. As I heard your response, it sounds very much—shockingly to me—like the Calabresi-Melamed piece.¹²⁷ Basically, you might want to put the point this way: What we want to do is to maximize net utility or net welfare or something like that. Under certain sets of conditions, we can do this by giving people entitlements and then allowing them to trade these entitlements at their own discretion. Later, we can permit them injunctive relief against others, but then there are other considerations. You just introduced a whole new set of problems in addition to high transactions costs. There are uncertainties, radical uncertainties—you keep using that phrase—but the world is really a world of radical uncertainty all the time.

RICHARD: In original position?

JULES: Well, that's what we're talking about, remember?

RICHARD: Which original position are we talking about?

JULES: Any one you want to start with. Tell me how there's no radical uncertainty. All I'm saying is that there is a radical uncertainty. This is your argument: This transaction creates radical uncertainty and a measurement problem. There are a number of problems that lead us to choose, for example, a property rules scheme, and then there are certain sets of conditions, like transaction costs, which lead us to use a forced exchange scheme or a liability rule scheme. My

127. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

point is one of clarification and coherence, namely, that that way of thinking about the problem seems so extraordinarily different than the style of argument which is presented in the book as a whole.

RICHARD: Why don't I argue Locke there?

JULES: If I hear anything, what I hear is this. That there might be some basic entitlements which we will secure, or in my terms, spell out the content of, in terms of the property rules, on utilitarian grounds because of the impact of doing so, and . . .

RICHARD: Read chapter five. The point is that Locke got there by intuition. He uses natural rights language.

JULES: You're not trying to trade off in any way on the notion of Lockean natural rights. What are you doing? Lockean natural rights theory, or utilitarianism with a Paretian twist?

RICHARD: Only to explain how the term "private property" has to be construed. Not with respect to my own independent political normative theory. I tried to say that a dozen times.

JULES: I haven't heard a libertarian argument yet.

RICHARD: I think in the end it comes down to that. But I've gotten somewhat more radical, more consequentialist since the book. Now the problem with the Calabresi-Melamed¹²⁸ model is this: Basically, working in a world of virtuous judges and legislators and the usual sort of ordinary people, their approach does not take into account the whole constitutional dimension. Once that is done, what happens to Calabresi-Melamed, most particularly in the recent Calabresi-Klevorik paper,¹²⁹ is that the proliferation of legal categories simply creates a rent seeking nightmare. The solution set becomes smaller and smaller as the constraints become larger and larger.

JULES: I just want to understand. What I want to understand is this. You said the problem now with Calabresi-Melamed is that they really are not as much in touch with what the public choice literature tells us about what to expect out of legislators, given that they are rational utility maximizers just like everybody else; and if they knew that, that wouldn't mean that they would have any fewer categories—that's not what would follow. What would follow is that they would be more likely to choose certain of them rather than other ones, but it would still be on the basis of what do you expect the *consequences* of choosing them are, in a world in which these are the facts that matter. And that would be a very different style of argument, it seems to me, than a libertarian/side constraint argument.

128. *Id.*

129. Calabresi & Klevorik, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

RICHARD: No, the book contains a lot of material on bilateral monopoly. Chapter five on ownership, chapter twelve on public use. I also have another paper in draft which again makes the same radical claim.¹³⁰ Recall the John Prather Brown paper.¹³¹ It proves a very important theorem. I have fought it for years, but its elegance is enormous. Brown examines the two bases for tort liability for harm to property—negligence and strict liability. What he shows is that in his simple case with the single defendant you get the same social optimum—the usual p^* under either rule, given perfect knowledge and enforcement. Under both rules it never pays to take either more or less care, so negligence and strict liability converge on the optimum. I've never seen anybody break his proof.

If this is correct, you have to ask the following question. If tort liability is governed by a general rule, if there is no disproportionate impact, then all of my traditional ethical arguments in favor of strict liability¹³² get washed away by the implicit in-kind compensation point. That's what Dick Posner kept telling me back in the 1970's. In a sense he was right. But in a second sense, he was wrong. With a perfectly general rule, risk neutral parties behind the veil of ignorance cannot prefer one rule to the other.

But we do have to choose. As the incentive argument washes out, every important social choice turns on second order considerations. Every one. That means that the real choice between negligence and strict liability depended on things that I didn't understand. Which rule gives you better observation to reduce the error costs? Negligence has a discontinuity at p^* which strict liability avoids. The great weakness of much of the tort literature is that it never follows the Brown insight to ask what are the appropriate second order adjustments decisive in various types of cases. My paper, *The Temporal Dimension in Tort Law*,¹³³ states the general theorem and then examines a number of particular rules on proximate causation, and on vicarious liability. It tries to show how they respond to the imperfections of the legal system.

I think I have learned a lot from all the arguments I've lost in the past twenty years. My present sense is that the law and economics people did not have the wrong program, but they didn't know how to use it. The weakness of Posner was not his ethical norm—wealth

130. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. — (1986) [hereinafter Epstein, *Temporal Dimension*].

131. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973).

132. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Strict Liability*].

133. Epstein, *Temporal Dimension*, *supra* note 130.

maximization which converges on utility maximization. It was that he systematically misapplied it to the available cases. But once you get it right, it turns out that the norm generates very many powerful results. Why did he do it? It's the selection problem; which cases do you examine? It's the same problem that we have all the time. Posner and I, Fletcher,¹³⁴ all came in cold; we didn't know anything in 1972. Quite literally, we were going into this void, trying to figure out something about liability rules, a second generation, after Coase told us about his theorem. What we are trying to do is to apply this theory to the major choices in the legal system as we see it. But what's the major choice in tort? It's the choice between negligence and strict liability. Everybody is arguing about it in the products cases, in stranger cases, and in trespass cases. And with *res ipsa loquitur* we try to answer those case law issues, but they turn out to be just a tiny tip of an iceberg. The difference between negligence and strict liability is the fifth order consideration compared to everything else.

Over the last fifteen years everybody pushed the inquiry further and further back. I worked that libertarian calculus more diligently than anybody else, especially on causation and physical invasion. But where did the whole system come from? In 1979, I wrote a paper called *Possession as the Root of Title*,¹³⁵ and my whole system blew up. I could reduce everything to that one proposition, but I couldn't deduce that proposal from anything bedrock. The more I thought about it, the more I found plausible utilitarian justifications for that premise. These then fed back through the entire common law system, the transitional stages in Epstein's thinking are the *Possession as the Root of Title* paper, and the nuisance paper, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*,¹³⁶ where I introduce the transactions cost problem explicitly.¹³⁷ But my writing is still geared to this very naive physical invasion view, which in the end I defend for very different reasons. 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: I said, "You know, this man Posner is crazy. What he is telling me in his paper, *Epstein's Tort Theory*,"¹³⁸ is that every single legal rule of tort liability, contract, and property is a function of positive transac-

134. See Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

135. Epstein, *supra* note 109.

136. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) [hereinafter Epstein, *Nuisance Law*].

137. *Id.* at 75.

138. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979).

tions costs. What sort of moronic universe is this? So I kept on trying to figure out rules that weren't a function of positive transaction costs, but every time I looked, I found, by God, transaction cost explanations. The world is never your zero transactions Coase world. Every single legal rule is an effort to respond to that fact. Uncertainty is one of those costs, identification of the parties is one of those costs, information is one of those costs, substitute regulatory systems is one of those costs. And looking at these issues, I concluded that these natural rights theorists had stumbled onto a gold mine, and that they had enough sense not to give their substantive views up, even though they didn't understand all the reasons for them. People like Mark Kelmen then come along, and they say natural rights is nonsense on stilts. In a sense he's right. But he's just wrong when he assumes that, looking at his own sort of intuitive unformed consequentialism, that natural rights can't be rehabilitated in a better way. So in effect, over the years, the need for intellectual purism has moved me in the opposite direction. So Ellen, I never would invoke natural rights in my own theory of the Constitution, but when it gets to the political dimension, I want allegiance. Natural rights is the language that people understand and relate to; that's the language I think that one has to use to some degree. It is not a case of fraud. It is an effort to show people the congruence between their own beliefs and the system of underlying utilitarian structures.

CASS: The utilitarian argument you are offering depends on all sorts of contingent empirical judgments which are sharply contested, and on which you need to do a lot of work to win. And that's the point on which I think Ellen has a good rejoinder to you. Your book depends on utilitarian calculations; maybe the whole system revolves around them.

Now here are some important points that haven't come out yet, and because they are so obvious and so fundamental, I might as well say them. The claim of novelty—with which you started—grates, because 95% of the framework you described can be found in the *Lochner* era. So much of it is straight out of those cases. There was an earlier reference here to Herbert Spencer and *Social Statics*,¹³⁹ which makes the point. Now, why were the *Lochner* cases rejected? There were two reasons, neither of which you've responded to. The first one might be called the problem of base line. When the Court rejected *Lochner* in *West Coast Hotel v. Parish*,¹⁴⁰ the Court said that the community is not bound to provide a subsidy to unconscionable

139. H. SPENCER, *supra* note 28.

140. 300 U.S. 379 (1937).

employers. This reversed the earlier statement in *Adkins*¹⁴¹ that the regulation amounted to a forced subsidy. For the Court in *West Coast Hotel*, the *failure* to regulate amounted to a subsidy. There's an answer in the book to the base line problem in the tale of two pies, but that seems to me just an assertion; it's not historical. So the problem of the base line has not been answered.

The other problem, and here there's shockingly little in the book (and thus far there's been very little conversation on it here), is the institutional problem captured in the notion of "judicial activism." The calculations that you would have the courts engage in are just staggering. Consider the calculus with respect to which sorts of things fall within your conception of public use. These are things that are sharply contested among Chicago economists, let alone among economists generally. Now the institutional concern is especially troublesome in a book that is generally otherwise dedicated to clarity and precision, and that is otherwise sensitive to institutional fears about discretion. So I guess the point is that the basic framework is one that we've seen before in the *Lochner* era (a framework abandoned because of the base lines problem), on the one hand, and the problem of judicial institutions on the other. To neither of those problems is there a persuasive answer in the book.

TOM: Well, Ellen, do you still think it's an intrafamily dispute?

ELLEN: I feel like I've been deceived by one of Plato's necessary lies.¹⁴²

TOM: I'm not surprised at what Richard says, actually. Maybe it's my own utilitarian bias. I would actually like to ask Ellen. Here I do sympathize with Richard. I really find the call for him to deal with your argument difficult. If I were asked—maybe you wouldn't ask me because you know I disagree so much to start with—I would say "what is the argument?" Maybe this is asking too fundamental a question, but if you don't appeal to consequences, as the basis of the right, if you don't appeal to something bad that would happen in the way of human suffering, or something good that would happen in the way of human happiness, but your only claim is that rights were violated or followed, what are you appealing to? That's really the question?

I don't mean there aren't problems with utilitarianism. Nozick has a powerful counterexample with his "experience machine."¹⁴³ But in the real world of political argument, the appeal to conse-

141. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1925).

142. PLATO, *THE REPUBLIC* (B. Jowett trans. 1946).

143. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 42-45 (1974).

quences in terms of human happiness, human suffering, is such a powerful thing. Richard shows this in the course of his own development since his first article in 1973. Once you let the appeal to consequences in, it takes over, and yet what else is there?

FRANK: I want to go back to Bruce's question about Indians. You suggested that perhaps the answer to the puzzle was that the Indians while they may in a sense have been occupants, were not in the requisite sense, occupants, i.e., they were not in the requisite sense possessors, i.e., they had not in the requisite sense mixed their labor with the land.

ELLEN: I was just limiting the problem—the Indians hadn't mixed their labor with the whole continental United States. A very good case could be made that the territories over which they were actually habitually hunting would qualify as theirs because they had sufficiently mixed their labor with them, and therefore, they would require some compensation for the taking of these lands.

It's a very difficult problem to move from Locke, who clearly had a farming example in mind, to the entitlements of nomadic tribes. I made a trivial point and didn't really hit at the heart of what Richard was saying. The fundamental problem is defining what constitutes ownership in the first instance. In my book, that will be out in a couple of months, I do try to answer precisely this very tricky question. What I come up with is an argument for ownership based on creating value. Probably everyone but me will find this argument very implausible; but that's the lot of the political philosopher. Here's how I proceed: in some sense you have to transform a thing—you have to create a value from it—just simply marching over the land isn't really sufficient. That you were the first human to trod on a piece of land does not mean that you are entitled to it, for walking does not constitute transformation—creating a novel value that didn't exist before.

FRANK: I could imagine a theory of this kind that was so culture specific, that I would regard it as essentially monstrous, as not supportable as a theory. From what you said, I don't have any reason to believe that yours is going to be of that sort, but it is a part of the concern that struck me when you spoke. Beyond that, I only want to say I could also imagine that the criterion of first occupancy could begin to operate in a total theory of this kind in the derogatory fashion that you, I think, quite properly say, the doctrines of public use and implicit in-kind compensation operate in Richard's theory. That is, the second thing I would be looking for in your theory is, how have you solved the problem of getting comfortably between the Scylla, on

the one hand, of a theory that gives Tom's word wacky results or, on the other hand, the Charybdis of a theory that invites so much judgment at the moment of application that it is subject to the kind of manipulability that you right now find in Richard's criteria.

ELLEN: You have correctly identified the question—the important question. A wacky theory would be that the first person to set foot on the continent of North America thereby can claim (assume no Indians were there before) the whole damn thing. Whoever sets foot on Mars claims the whole thing for himself. That's a wacky theory. And I try to draw a line in a consistent way. It's awfully tough to do. I concede that. But this notion of transforming, of doing something that creates a value, is defensible even though in some cases it might be subject to dispute. It doesn't have to be an exchange value, either a value in use or an exchange value, it doesn't matter. What if you simply construct a fence around a huge corral of hundreds of thousands of acres; have you thereby transformed it and created a value? It gets very messy, I concede that.

TOM: But what considerations do you consult that are nonconsequentialist? I understand the lines are hard to draw, but what considerations can you sort out, other than what will work, or make people happy?

ELLEN: The basic attraction I see in natural rights theory is that it respects the autonomy, individuality, and liberty of individuals. That's what I find attractive about it. Now, we're all concerned about consequences, and the consequences of a system that respects individual autonomy are much more preferable than any other system I can envision. It leads to human happiness and that's what we're all after. What I find inconvenient and ultimately useless about utilitarianism is that it's extremely subjective. I wrote a book, several years ago, about the evolution of political economy in Britain in the 19th century when natural rights theory was replaced by utilitarianism.¹⁴⁴ The slippage from Betham to Mill and then Mill to Jevons was extreme; and from Jevons to Marshall even more so. Utilitarianism is very interpretable and every observer balances and weighs its elements differently to arrive at different conclusions about what will maximize utility. That sacrifices individual autonomy—utilitarianism in any form does. It allows for redistribution and takings from one individual to give to another if utility in the aggregate would be maximized. That's why I'm a bit shocked to hear Richard say he's an aggregate utilitarian.

RICHARD: There are new forms of utilitarianism, like Russell

144. E. PAUL, *MORAL REVOLUTION AND ECONOMIC SCIENCE* (1979).

Hardin's,¹⁴⁵ which treat the basic point as maximizing utility. But they seek to structure human interaction under certain sets of restraining conditions.

SPEAKER: We should have a conference on utilitarianism now that we know that Richard's into it.

BRUCE: I came in thinking that Richard was going to give the point I just thought Ellen gave, which is that natural rights is the right theory, but thank God you don't sacrifice much utility in having them. Now I think I hear Richard saying: utilitarianism is the right theory, but thank God we don't have to sacrifice many Lockean rights. This is a big change, especially for those of us who doubt that Lockean rights are in general utility maximizing.

FRANK: This is going to be a hard question to express, because I'm going to be referring to things that—it's implicit in the question—I don't fully grasp. Suppose you had a culture that seemed to us highly communalistic in its understanding of self and the relation of self to others, and, in a further dimension didn't make anything like the same kind of clear distinctions that we seem to make between persons and nature or the rest of the world or God; and the culture's relationship with the land was—in ways that aren't intuitive to us—a part of its conception of its identity and its relationship with the rest of the world, so that it wasn't making the land, or at least a large part of the land productive in our usual sense of the term. The land was important to the people for what you might call expressive purposes, for meaning rather than for output. Could that culture lay valid claim to "its" land, in your system?

ELLEN: What's it doing? It must be living on this land, it's not flying in space.

FRANK: In the first place, it's common property within the culture, and not private property. In the second place, its not being used agriculturally, the people are there, but perhaps seasonally or nomadically.

ELLEN: They walk through it?

FRANK: Yes, they know about it; they're aware of it; they care a lot about it; there might be some sense in which they could be said to worship it.

ELLEN: They're not cultivating anything? They're just nibbling off the trees?

SPEAKER: They hunt and gather.

145. R. Hardin, *Collective Action as an Agreeable n-Prisoners' Dilemma* in *RATIONAL MAN AND IRRATIONAL SOCIETY?* 121 (1982).

BRUCE: We just have two parcels of land, right, there's 1% that they cultivate intensively and 99% that they worship. What about the 99%?

ELLEN: If it were a reasonable amount of land . . .

ERIC: Tom really asked Mark's question. It's nice that he just let it slip away, but I wouldn't want to let nothing be said about the grounding of nonconsequentialist rights. The argument would begin this way: My view (and I think other people would hold a view something like this) is that in some sense the theory of value is more fundamental than the theory of right, but that the theory of value is a highly individualistic theory. So that what's valuable is agent-relative. You have this value picture of a universe of different lives and the satisfaction or fulfillment to different lives, but each of these values has agent-relative value; with nothing like the commensurability among these values that anything like utilitarianism asserts. Then you have to say either something like, "Implicit in this pluralistic picture is some notion of people having a type of jurisdiction over their lives as are separately valuable." Or you have to ask, "Well what sort of mutual social principle is conceivable among these people for arbitrating disputes," given this value picture? And you say some sort of principle of minimum intervention. Or you go to a more contractarian line, and say, "Among these people, for whom it is obviously mutually advantageous that there be some principles of arbitration, what would they do in the way of a type of contract to generate these principles?"

Now that last approach may or may not be strictly within the natural rights tradition; it's clearly not at all a utilitarian thing. The virtue of such arguments, besides the fact that something can be said, is that they do begin with a type of value theory. But they don't begin with what I consider the most crazy value theory of all, namely, these aggregative theories, which somehow suggest that any person at random should care as much about other people's lives as his own, or should care about other people's children as his own. Now, some people think that this is a principle of rationality, but to me it seems utterly insane. That's what really should worry Richard. You fall away from natural rights theory, which seems to be based on this much more plausible individualistic conception of value. You have to accept this: That for every person, every bit of whatever is conceived to be valuable, pleasure, happiness, or preference satisfaction, is as morally compelling as every other bit. That's something that nobody has ever given any decent argument for.

RICHARD: No, I know—that's a major confusion. This is the

difference between a lawyer and a philosopher. The difference between us is that you are trying to talk about the way individuals ought to behave. I'm trying to figure out when force can be justifiably used against them. I think one of the things that religion always has been designed to do is to find ways short of compulsion to mold conduct. That's why I take the theory of imperfect obligation so seriously. I believe, however, that trying to convert religious norms into a system of force turns out to have disastrous consequences.

But many cases are easy: We can reach the first cut decision, to let a contract between *A* and *B* bind *C*, without choosing among Paretian utilitarianism, wealth maximization, or utility maximization. Their differences lose significance because they all cut the same way on this fundamental question. The reason I picked the Paretian norm thereafter, is that it works best in constraining both legislative and private abuse. I want the just compensation clause included simply because of institutional control. I remember years ago I said to Posner, "Dick, you're crazy, if you think that compensation is just a detail." He basically bought my argument. The problem is, "detail" may be the wrong word, but once you examine implicit compensation, and see the relationship between tax systems and liability systems on the whole, then desirable incentive structures that simple compensation rules can create for all parties, tend to organize an enormous amount in the legal and moral universe. I think the studies of law and economics in the last fifteen years have tended to show that the standard, anti-utilitarian argument—the indeterminacy of the system—is exactly wrong, once you make all of the hard assumptions about subjectivity, and interpersonal comparisons, utilities, etc. It is the point that I made in response to Joe. The greater the complexity of the universe, the greater the power of the simple rules: physical invasion, that's the strength of eminent domain law; and truth for the first amendment, which has an identical internal structure.

BERNARD: I want to ask Ellen a question because I don't understand it from reading her paper. At what point do you suspend natural rights? Is there a way we can judge that? You are willing, obviously, to suspend natural rights at certain elements of condemnation. Are there any other circumstances? I thought there were.

ELLEN: What might have misled you was the conclusion where I said, "This is my theory and this is what it says." But we do have this Constitution that has an eminent domain clause. How do you live with it? In my book, where I go through this fully and have a chapter on it,¹⁴⁶ it will be clear that what I'm saying is, that we should

146. E. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987).

fuse the theory that we have into the eminent domain clause and constrict this as narrowly as possible. To me, this means resuscitating the public use requirement, which restricts taking as narrowly as possible.

RICHARD: The act of taking by the government, not the definition?

ELLEN: In my pure theory, yes, that's what I say. In the real world what I am saying is that we have this eminent domain clause that we're stuck with. Let's try to restrict takings as narrowly as possible. The way I would do that is to resuscitate the public use requirement and define a public use as narrowly as possible to ensure that people are fully compensated when their land is taken for necessary public government purposes like building post offices. But in my ideal world, the government wouldn't even be building post offices.

SPEAKER: Is this a constitutional principle you're talking about? Does the Constitution say natural rights are fully implemented through constitutional rights?

ELLEN: I'm not imputing my theory to the founders.

SPEAKER: How do we go about doing that now? What's your theory—we have a Constitution. You have a theory. How do we inject that theory into the constitution. They're not connected at all.

ELLEN: If I were a Supreme Court Justice, which obviously I never will be, this is how, given my natural rights theory, I would interpret the eminent domain clause as narrowly as possible.

SPEAKER: How do you fit that in with the founders, the framers?

ELLEN: I think the framers were very strong believers in natural rights, so I'm not importing some theory that's totally alien to them. Obviously, I take property rights even more seriously than they. I take them in the same sense as people like Grotius¹⁴⁷ and Pufendorf¹⁴⁸ and Locke, who just presume without any argument that eminent domain was an inherent feature of government and that government was inconceivable without it, but more consistently. I argue that government was perfectly conceivable without eminent domain, but we're stuck with it. So let's try to limit it so that we're creating as few rights problems as possible.

BRUCE: You say that government is conceivable without an eminent domain clause. I suppose you're right, in some very weak sense—it's conceivable in some never-never world. But is it a possible form of government in our world?

147. H. GROTIUS, *OF THE LAW OF WAR AND PEACE* (F.W. Kelsey trans. 1925) (1646).

148. S. PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* (C. & W. Oldfather trans. 1934) (1688).

ELLEN: What you're saying is, has there ever been any government that satisfies my conditions?

BRUCE: I think it's a very simple point. Who is going to pay the salaries of these people?

RICHARD: The judges.

BRUCE: That's the question.

RICHARD: Is that compulsory?

ELLEN: You don't have to use the courts, you can use private arbitrators.

BRUCE: If there is no tax, then in order for it to exist, there have to be voluntary contributions. That's your critical assumption.

ELLEN: It doesn't have to be.

BRUCE: But then we wouldn't have anything like a coercive state. We would have a Nozickian world in which there are a large number of protective associations.

SPEAKER: You identify with Nozick's world?

BRUCE: For a state to exist, each and every citizen must have access to protective services. Unless people contribute voluntarily for this purpose, this will not happen in a Nozickian world of protective associations.

SPEAKER: I'm not quite getting Bruce. Why not have this entity called the state running a court system that was totally self-liquidated in terms of support?

RICHARD: It's true that not every citizen would have access to it.

BRUCE: That's my point. I agree with Richard.

RICHARD: There's no way to get compulsory process in your universe.

STEVE: I know this may be something that you prefer to discuss on another occasion, but I'm curious about the way Ellen's theory treats acquiring ownership. The point you mentioned had something to do with transforming things in the world in such a way that some value was new or added. Does this end up being a kind of desert version of the labor theory—such as Lawrence Becker's,¹⁴⁹ for example—or is this something different from that?

ELLEN: I can't recall Lawrence Becker's theory.

STEVE: The basic idea in his desert version of the labor argument is that, if someone adds value to the lives of others, then he deserves a fitting recompense for the benefit he has provided. In his

149. See L. BECKER, *PROPERTY RIGHTS* 48-56 (1977).

case it definitely involves adding value to the lives of others. In your case, it seems not to, but nevertheless to involve desert in some sense or another.

ELLEN: The way I would describe it is that you own your body. If you labored on something and transformed it, you're entitled to it. It's a question of entitlements.

STEVE: That's what I want. I wanted to press here because it seems to me that it is important to distinguish between desert versions of the labor theory and entitlement versions. One way to sharpen the contrast is to imagine people who expend their labor producing something that is extraordinarily silly—a bunch of totems, or something that has no value to themselves or anyone else. You might say they're entitled to have them, but it would be odd to describe someone as deserving them if there was no sense in which the products had value or were useful. That's why there seemed a bit of tension in your earlier remarks that there has got to be some value that's added. Even if value is increased only for the person who makes the totems that would suggest a desert version of the labor theory, whereas your last remark suggests an entitlement version. But in the end, as it now turns out, for you it's the latter.

* * *

RICHARD: I read Cass's paper, and I find it a novel document. It certainly is a paper that I think we can say with complete confidence, I could have never written. It tries to develop the argument against the book and against the general tradition in which I operate. It starts at the opposite end. Instead of trying to figure out the way in which various legal concepts interact with one another, and the implications once you accept principles of rational behavior and rational choice, it says to some extent that some of the assumptions about behavioral regularities and about individual incentives and preference structures are themselves wrong. Once these assumptions are isolated and corrected, then the scope for government action is going to be plausibly broader than it would have been under some alternative view of the world.

Cass's challenge can be put in one of two particular ways. First, you can fight, as I would like to do, some of his alternative assumptions on their merits and argue that the case for them is not fully established. To put it more bluntly, Cass is probably wrong with respect to the vast realm of behavior, and where he is correct, existing institutions already take the problems into account. Second, one can say even if the phenomenon is as pervasive and as important as Cass thinks it is, there is still the problem of figuring out how to harness a

set of social institutions as useful ends, when all individuals have the same problems with their own preference functions and behaviors. What kind of regulation is appropriate on his view of human nature?

The first problem, basically, as Cass puts it, is one of psychology or, in my case, of social biology. The second question is that of totalitarianism: how far are collective institutions permitted to identify and to treat some individual preferences as though they are in some sense unacceptable distortions, which we as a collectivity, whoever "we" may be, are entitled to correct?

Starting with the first point, one sentence in the paper which captures a lot about what Cass believes, and a lot of what I don't believe, is the sentence which talks about preferences as being "social constructs." What that sentence means is that when you take the set of individuals and try to find out what they like and don't like, what their tastes are and so forth, you could never identify the pristine individual. Instead every one of these preferences is mediated through the interactions that people have with other individuals. In some sense people are a product of these interactions, not a product of their own shaping and forming.

My own sense is that Cass is probably wrong at least to a large degree. One difference between Cass and myself which may explain our differences in attitude is that I have three children and he has none. I've noticed when you sit with young parents, when you go to nursery schools and so forth, one preconception that always seems to take an incredible beating is the idea that parents can somehow or other shape the preferences of those little tykes and children whom they call, in some sense, their own. You have to understand, of course, that this is a highly totalitarian environment. The children are very dependent upon the parents. The parents are in some sense very heavily invested in the children. We don't have a set of democratic institutions which allow the state to mitigate their interactions and so forth. Yet what you discover with your own children (and I think every parent has recognized this) is their personalities seem to have been formed in a very large degree between one and two seconds after birth. You watch them at a very early age and there's something that is characteristic about that child which you can then see in him as he gets to be two, and four, and six, and eight, and ten. Most of your effort as a parent is an effort to socialize your children. It is basically to handle the usual libertarian imperatives to make sure that these little tykes don't simply run roughshod over everybody else. It is to try to teach them the rudimentary elements of sociability. To try, as it were, to make a child who doesn't like to play with trains, to

play with trains, doesn't work very well. It is met with massive resistance, and creates all sorts of incredible complications.

All this suggests that the social construct theory is to some extent overstated. The reason it is overstated is that it tends to draw its empirical evidence from all sorts of disciplines that do not capture the necessarily dominant elements of behavior. Cass could talk about cognitive psychology, sociology, and anthropology. But one subject conspicuously missing from this list is plain old ordinary biology—the obvious observation that human beings are part of the animal species; that they have certain native bodily functions that they must discharge in order to survive; and that to some extent their preferences are formed as necessary to maintain the species, or better, each of its individual members in operating condition.

There was, for example, in the biological literature at one time an acceptance of the naive dogma, that basically everything is learned through experience. But modern theory suggests that there's a mixture of instinct and intelligence. Many things come to you by way of preplanned programs, by the instincts that you must have when you enter into this world, for otherwise you will be unable to negotiate it. Other things are going to be learned cognitively, but there are in fact highly specific areas in the brain charged with highly specific tasks. The dominant biological model of human behavior is far from Cass's model of amorphous individuals waiting to be formed. It's a model of specificity in which different parts of the body, different kinds of chemicals, different sorts of functions, are all located on highly specific places, with highly specific functions.

When you have that kind of a backdrop, your sense about the relationship between men and women, young and old, strength and behavior, tends to be rather different from that which you develop if you assume that all individuals are given roughly the same kinds of endowments, so that it's just a matter of the way in which parents, friends, and everybody else shapes them. I think the social ability to shape an individual's tastes and preferences is far more limited by virtue of the biological element of personality and behavior, which turns out to exert a very heavy anchor.

We have seen enormous numbers of studies on animal behavior and have checked the question of whether or not preferences are constant across disappointment. One thing that's very clear is that neither Sunstein nor Elster¹⁵⁰ did empirical work when they were trying to put together the hypothetical example of sour grapes. When

150. J. ELSTER, *SOUR GRAPES* (1983).

you check disappointment in animal behavior, you don't see any real evidence that basic preferences change. People still need food to live and survive; mating is still necessary if propagation of the species is going to continue. Indeed, it's very difficult to work the assumptions the opposite way.

That conclusion, I might add, is also reinforced by the general principles of socio-biological theory and evolution. Most of us understand the two driving mechanisms that dominate the entire theory are the principle of natural selection and the principle of inclusive fitness. Natural selection says that you may have a random generator that throws up a certain distribution for a given trait, but when the balls come back down to earth the same distribution won't survive. Some fraction of the population will be more adapted to their environment than others. Those traits will tend to survive as against others, and over time repetitions of the same process yield systematic deviations and movements in favor of some individual traits.

Inclusive fitness says that the utility functions that dominate natural selection are not individually based. Instead they're extremely complicated, and take into account the entire line of gene succession,¹⁵¹ including the interaction between parents and children, so that there are essentially interdependent utility functions. These are not given as Gary Becker¹⁵² might do it, because it's an interesting equation to put on the blackboard. They are given because they're implicitly true.

One thought experiment that you can try is to ask yourself what would happen if we threw up a random array of individuals into the world. Some of them had preferences which were very constant over time, and others had the variable preferences and behavioral characteristics attributed to the foxes in the sour grapes illustration. How would natural selection work on this array? Well the key determinant is that the person with the constant preferences has, in terms of long-term survival, an enormous advantage over somebody else whose preferences are in fact variable.

One way to stress that point is to note that the biological theory of preferences has a very long time horizon. When you measure the inclusive fitness of a trait, you always measure it over the entire reproductive cycle. So you either take it from egg to egg or from parenthood to parenthood. One of the key corollaries to this cycle theory of biological behavior, therefore, is that you are constantly

151. Hamilton, *The Genetical Evolution of Social Behavior*, 7 J. THEORETICAL BIOLOGY 1 (1964).

152. Becker, *A Theory of Social Interaction*, 82 J. POL. ECON. 1063 (1975).

talking about present investments that will yield future payoffs. If you are dealing with persons who don't know today what it is they will want tomorrow, it's almost impossible to figure out what sort of investments they're going to make, because you don't even know what kinds of payoffs that they're going to want. So what typically happens is that the person which has very constant preferences—or at least preferences which evolve in predictable ways over the life cycle, so that when young he knows he's like this, therefore when he's old he'll be like that—that kind of individual will have a systematic advantage in virtually any and all imaginable external environments over somebody else who is trying to handle a set of random, variable preferences.

From that kind of thought experiment, you could argue quite forcefully that there is a very powerful survival instinct or a survival pressure which moves you away from the social construct, variable preferences model, which a large part of Cass's paper rests upon.

Nonetheless, I think there is something to this preference changing phenomenon. I don't want to say it's a zero phenomenon. Certainly any time people make contracts after taking mind altering drugs, preferences are being changed. It seems perfectly plausible to take that into account as a possible limitation on freedom of contract. I think this was one of the things at stake in the old "morals" head of the police power, which I think is rather more coherent and more limited than some traditional accounts have suggested.

Still, for the huge range of ordinary economic behavior, like the kinds of direct economic regulation that I talk about in the eminent domain cases, it strikes me that this phenomenon turns out to be fairly peripheral.

The second point that I want to talk about is, what do we do if Cass turns out to be correct? Here I think Cass makes the same wrong assumption that Joe makes. It's one thing to talk about a bunch of folks out there who constitute a virtuous legislature trying to control the behavior of fractious populations; it's another thing if you assume that the folks who enter the legislature are drawn, not randomly but certainly by some preselected norm, from this large population. What's going to happen if both the regulated and the regulating population live in a world where these preferences are essentially freely floating and subject to distortions? What confidence could we have when we talk about the public? Can we believe that somehow or other the good guys are going to take over control of the bad guys?

The sense I have is that Cass basically envisions a political equi-

librium in which he and his cohorts will be in power for the foreseeable future. But let me give you another scenario which is every bit as plausible, and which may be a lot more ominous. It might cause him and the rest of us to retreat from confident talk about shaping preferences—about shaping public preferences independent of any budget constraint.

Suppose Jerry Falwell says that everybody knows that there are enormous social pressures which lead to a distortion of the sexual roles between male and female. God has so intended that women stay home and raise children, and that men go out and earn the money. As far as we're concerned that's the right way. Now, of course, any man and any woman in the current society will behave as they do today because they can't get other people to go along with them. But all of these people have deep down inside them preferences about preferences, so we're now going to impose a legal order which reinstitutes the principles of sexual discrimination and bans women from certain kinds of employment. We do so on the grounds that that will now produce the just society that we all so crave.

Well the difficulty is why is that argument wrong and Cass's argument right? Once you allow arguments from false consciousness to come in, you have to be able to find, not outside the political system but within the political system, somebody who's going to be able to tell you who's definitively right and who's wrong. I don't know who that somebody is. And the reference to the Platonic guardian of Learned Hand¹⁵³ raises exactly that point. He's saying that he's not quite sure how you can get around the problem, "who governs the governors?" But you certainly don't get around that problem if you endow the governors with powers to reject the expressed and revealed preferences of individuals because of these latent distortions.

Now this point seems to carry over to a number of illustrations. I just want to talk about two of the legal points before I leave. One is the question, what does a system of property rights do, at least as my book would do it? That system is clearly designed to constrain the kinds of collective choices that you have to make. Now all public decisions have to be made in accordance with some fixed metric set in advance. The naive assumption is that we're going to take preferences

153. For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

L. HAND, *THE BILL OF RIGHTS* 73 (1958).

more or less as stated, and not go behind them on the theory that here, like with welfare, we can't control the process.

It seems to me that *West Coast Hotel v. Parrish*,¹⁵⁴ for example, was wrong when it said that there wasn't a natural base line of property rights. I don't know of an economist in the world who would say that there's a subsidy in an ordinary competitive market. Still *West Coast Hotel* didn't establish any new base line; it didn't come in and say that in the non-Lockean world the base line is forty cents per hour. What it said in effect is that the choice of base line is an open question. It therefore rules out any limits on the public discussion of what baseline should be chosen.

Second, with the discrimination case, Cass has got it wrong, at least if we assume—as I want to assume for these purposes—that we have well functioning public institutions and not those which enforce systematic biases for racial segregation. The only way Cass's argument will work—that is, that individuals who do not want to discriminate are afraid to do so because of the competition—is to assume an absolute uniformity in the demands of the consuming public. The moment you can find some small fraction of the public which in fact prefers integrated to segregated facilities, then somebody is going to try to break from the dominant practice. So that unless you're prepared to assume highly coordinated behavior on the part of all suppliers of goods and services, the segregated equilibrium will not be stable. Once it starts to erode, then the question will be, will those people who still have the taste for discrimination be able to maintain it? At that time the cartel theory, at least as I understand it, predicts that the original effort to keep the discrimination across the board will break down because of cheating behavior by individual firms. If you can put aside the question of defective public institutions—which in a practical sense you cannot—then Cass's argument will not go. The reason this is a fair criticism of Cass's position is because he does not justify antidiscrimination as a correction of past unjust practices, brought on by institutional corruption. His is an argument of correcting preferences. It seems to me that those perspectives raise very different issues.

CASS: Richard's system speaks for a certain part of the liberal tradition in accordance with which people have property and preferences. They have them in a kind of natural way; both of them are just "there." And it's important to realize that that's a fairly narrow aspect of the liberal tradition. One can associate it with Bentham, maybe Hobbes—though I think probably not Hobbes—but certainly

154. 300 U.S. 379 (1937).

not Kant and other important liberals at the time, and after the founding, of the Constitution. Now the tradition I am speaking of in this paper might be called republican. Frank referred to that yesterday (tr. 60). This is also a part of the American constitutional tradition which says that the role of government is not just to implement what we want, but also to decide what we should want. It takes a critical and self-conscious look towards preferences and also towards property.

Now under that competing tradition one can talk either about property or about preferences. Richard's book talks about both. What he does on both the property and the preferences score is the same thing—formalism, resolving the problem through definition. And there are three points in the book in which he says representative government *necessarily* means the agency theory of government in accordance with which government has no rights different from those of private individuals. If that's an effort to describe the American constitutional tradition, it's just not right. Madison's theory of representation was that the role of government was to deliberate about private preferences and not just to implement them. If Richard's is a theory of what representative government necessarily is, it's surely wrong as the Pitkin book demonstrated a long time ago, the Pitkin book quoted at length early on in Richard's book.¹⁵⁵

One can talk about property or preferences from the standpoint of this competing tradition. There are two things on which one can draw which are both firmly established. The first is the tradition of "revealed preferences" which seems not so much a theory as a tautology. The second is the notion of "false consciousness," which seems to me not to be terribly helpful. But there is an alternative approach to the revealed preference and false consciousness traditions. One way to conceive of this alternative approach is as a category of things which one might consider to be functional equivalents of market failures, though they aren't market failures economically defined. There's some sort of cognitive or motivational distortion in the individual actor which certainly forms a powerful case about which to worry. It's a strong *prima facie* case for concern and, I'd say also, forms a powerful case for collective action. The market failure analogy is the right one, because just as with the market failure, you don't necessarily conclude that government action is appropriate. But you do conclude that there's a problem. The case against government action has to be a contingent one.

The next question is, what does one appeal to in deciding

155. H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); (pp. 20-24).

whether the government should act? There are two traditions we've spoken of. The first is the welfare tradition, and the second is the autonomy tradition. Now in the categories I'm describing there are significant welfare gains from government intervention. For example, there are significant welfare gains from prohibiting heroin consumption, as with seat belt or other safety legislation.

With respect to autonomy, the tradition for which Richard is speaking is one in which autonomy cannot be understood as a system in which there's any kind of deliberation about ends, rather than implementation of ends. But that's hardly self-evidently correct. Consider the adaptive preference where a woman decides that because it's a sexist world she will try from the beginning to be a housewife. It seems to me not implausible to say that there are autonomy gains from having social deliberation about that world and changing that world. There may be some tension between the welfare and autonomy goals. It may be that the creation of cognitive dissonance—which you get from disrupting an adaptive preference—will have short-term welfare losses. Nonetheless, it seems to me that in the long term one is likely to have both welfare and autonomy gains from intervention. The basic point is that one can identify a category of cases in which one can say that both welfare gains and autonomy gains, or at least one of the two, will be likely from collective intervention. This competing theory falls within the liberal tradition broadly defined. So much for the connection with Richard's book.

Now with respect to some of the points Richard made—I have four written down. The first has to do with children, and I think that cuts the other way. Let us talk about Richard's children with respect to this point. One of Richard's favorite activities has to do with music and his daughter, and it seems to me that there's a difference between consumption and self-realization. A parent is going to help his or her child realize herself through music lessons, and this is what parents do with children all the time. They help form their children's preferences through paternalism or maternalism; that's what those words mean. The idea is to improve autonomy and welfare and it's an omnipresent phenomenon.

Point two has to do with the biological element of personality. There's undoubtedly something to it—though I think very little—and I think that whatever there is to "the biological element of personality" is irrelevant to just about everything I'm talking about. I wrote down a list of the things that I'm talking about: seat belts, addictions, workers and self-government, sexism and racism, and the environment. Now it seems with respect to these five categories of things the

notion that any of them is biologically determined seems to me very odd, and even if there's some minimal biological component in any of them there are certainly things that can be changed—they're hardly static. And one can prove that things are not static with respect to what Gary Becker¹⁵⁶ calls a taste for discrimination; certainly with respect to attitudes towards the environment; certainly with respect to addictions and also to seat belts, where I can speak autobiographically if you like. The more general point, though, with respect to the biological element of personality, is that preferences are not constant across cultures, they're not constant across eras, and they're not even constant across life times. So that point seems to me not relevant to my basic claim.

The third of Richard's points has to do with Stalin and totalitarianism—I was sure that was going to come up. I have two responses here; one has to do with *Ulysses and the Sirens*,¹⁵⁷ and the second has to do with the public/private distinction and the dangers both ways. The *Ulysses and the Sirens* point is that the government is subject to electoral control. Often when government acts, one can tell a plausible story—whether it's right I'm not absolutely certain—that people are implementing their own preferences about preferences. People may want seat belt laws even though they don't buckle up. That seems to me not a totalitarian story at all; indeed, to prohibit them from doing that seems to me the totalitarian story. If people want to express through government a preference about preferences and one is banning them from doing so, one can say that that falls within the category of totalitarianism. So electoral control seems to me something of a safeguard, though an imperfect one to be sure, against the danger of totalitarianism.

The second point in response to Richard's third point is that the absolute prohibition of preference shaping through law seems to be based on a fear that once you open the door all bets are off and we're down the road to Stalin. Now surely that's not true with respect to America in 1986. In America, in 1945, there was a lot of preference shaping; indeed, it is probably the case that preference shaping by government occurs no matter what government does. There are dangers both ways.

How does one define dangers? One can define them as I did originally in terms of welfare losses and autonomy losses. In all the stories I've described, governmental "inaction" produces significant losses in terms of both welfare and autonomy and one can get gains in

156. Becker, *supra* note 152.

157. J. ELSTER, *ULYSSES AND THE SIRENS* (2d ed. 1984).

terms of both from government action. Richard is absolutely correct that there are risks in allowing what he considers preference shaping as distinguished from something which he considers not preference shaping. There are risks in buying into that framework. Nonetheless, it seems to me that the risks of what he calls "not doing anything" are very substantial as well.

The last point I want to make has to do with discrimination being cured by competition. Here there's the empirical point that racist and sexist preferences persisted for a very long time, indeed they still persist, even in areas in which there are competitive markets. The other point is that where the taste for discrimination is pervasive, the market won't correct these tastes for discrimination, but will instead be a guarantor that tastes for discrimination will persist. For the empirical point you can refer to the North for support, where the argument that legal rules were in fact responsible for a taste for discrimination seems implausible. Discrimination persists over time in the face of competitive pressures. With respect to gender, one can refer to many places to support the proposition that the taste for discrimination persists, Richard would say in spite of, I would say because of, competition.

FRANK: I want to sharpen a point that Cass has made. In a way this is friendly criticism within the family, and it will stay that way. Richard takes Cass's first premise to be an empirical one about the sociology of knowledge, about the socially constructed nature of preference. And that is not at all an unfair reading of Cass's paper as written, but for reasons that Cass has begun to discuss, it doesn't do full credit to the strength of Cass's position. If you take his first premise as empirical, then it's subject to attack on empirical grounds. Beyond that, it can be made to seem uncertain and elusive as an empirical proposition. Its elusiveness then becomes the basis of a second line of attack which, in essence, is that the danger of totalitarianism which lies down that road can't be justified by a set of empirical propositions which is as elusive, uncertain, and hard to nail down as is this set.

There's a standpoint, however, from which both the first premise of an approach like Cass's, and the issue between Richard and Cass, is the moral issue of freedom—what you mean by it, and how you understand it. Cass is implicitly—and I wish he was explicitly—invoking that strain in our tradition that people sometimes speak about somewhat disparagingly: a positive libertarian strain, as opposed to a negative one. Kant seems to have learned the positive strain from Rousseau. The positive strain draws a crucial distinction

between preference as an appetite that enslaves—that is the opposite of freedom—and judgment of a different qualitative order that can be equated with autonomy. The idea can be gotten in part just by looking at the word autonomy, which means self-rule or giving the law to oneself.

The idea is that before a preference can qualify as an expression of freedom in this moral sense, rather than as an alienated extraneous ruler of one's self in the form of unexamined appetite, it has to undergo a kind of dialogic or dialectical examination and criticism in which the holder of the preference is a participant, but—unless that person is truly morally heroic—not the only participant. It is this way of understanding moral freedom that ties into the republican strain in the political tradition, in so much as political engagement becomes the medium of the critical examination of preference. Consequently, that preference can supposedly be translated into free choice of how to live. My proposition is that Kant's position on this question—that raw appetite is the opposite of freedom—has a lot of appeal. It's necessary in arguing Cass's position to present negative libertarians with the problem in its moral dimension, and not just as a problem of false consciousness, or preference not fully understood, or in some other way empirically impaired. It is necessary to present it as a genuine issue of how it is that one can live a free life which is more complicated than the negative libertarian tradition would allow.

JULES: Though not a libertarian myself, it's one thing to argue that a minimally necessary condition of positive freedom, self-rule, or self-control, is engagement with others in a critical appraisal of one's preferences, and an opportunity to change or alter them in the light of a deeper understanding of what one really wants from one's life. It hardly follows from that, however, that the appropriate means for doing this is in the form of government regulation, government control, or the political process. There are other ways, short of coercive measures of enforcement, to accomplish this.

ELLEN: I have about fifteen different points. Before I begin, however, just a side comment on Cass's views about how children develop; his preference theory is just a perfect explanation for why I am today an accordionist, a ballet dancer, an ice-skater, an actress, and about a dozen other things that my mother tried to make me into, none of which I have had anything to do with since I got beyond her control—oh, and a libertarian, too, which is about as obnoxious as I could have been in my family setting.

Instead of raising my fifteen objections let me ask a question. The position you're arguing against, Frank, is one based on "prefer-

ences as appetite," but also on the view that the purpose of the state is as a mechanism to aggregate private preferences. Now Cass, what would you say to a view that started with revealed preferences but didn't see the state as any kind of mechanism for aggregating private preferences—merely, in a minimalist view, as an entity to prevent people from beating each other over the heads?

CASS: Wrong, for similar reasons. I'm trying to argue against both positions, the libertarian tradition and the aggregation tradition. I'd say they are both wrong because they take what is a social construct—preferences on the one hand and distribution of rights on the other—as if they were natural.

ELLEN: Well, Cass you really have to answer Richard's Jerry Falwell example (tr. 141) because it's devastating. I don't see why you wish to resort to the "real will" tradition, as Frank claimed, that is the tradition of Rousseau, Hegel, and Bossanquet. That tradition presumes that there are some people who know what other people should really want, and I'd like to know, to put it crudely, why you think that you know what other people should want, or that the majority knows what other people should want, and that Richard does not if he happens to be in the majority.

CASS: I think the Falwell position is wrong and horrible. But I don't think it's wrong and horrible because the proper line is that no one should tell anyone else what they should want. Where I would draw the line is not in putting off limits to government any effort to shape preferences, but in putting off limits to government something like what Falwell is suggesting. What is Falwell saying—women can't work, is that the idea?

ELLEN: Homosexuals can't.

CASS: The question is how and where one draws the line against things like what Falwell wants. That depends, I guess, on an appeal to welfare and autonomy.

ELLEN: Well, doesn't it depend on something more, which is that Falwell claims that there are welfare benefits to leading the good life, the main one being that you get into heaven rather than hell? Don't you have to presume something, like platonic ideas, which you know and the rest of us just don't know?

CASS: I would say that sometimes we do know, and we're right. For example, we know we're right with respect to banning heroin or other drugs, with respect to seat belt regulations, with respect to regulation of racial discrimination and discrimination on the basis of gender in private markets.

ELLEN: What about regulation of the intake of salt? How do

you avert the totalitarian trap if you are regulating people's intake of salt because it's bad for them?

CASS: It may be that it is a very good idea to regulate people's intake of salt. And it is conceivable to me that the failure to regulate the intake of salt is horrible, certainly on welfare grounds, conceivably on autonomy grounds.

SPEAKER: What do you mean by autonomy?

CASS: Lack of information. It's like Mill's example of someone walking off a bridge and not knowing that he's about to do so.

ELLEN: Well, then all of us are nursery school children who can't make our own choices. Most people who smoke know that smoking is dangerous, yet they do it anyway. It's a choice. You can regulate cholesterol, salt, and everything else that's deleterious to our health and then we're all going to live in this perfect paradise!

CASS: What I would say is that there are dangers both ways, there are dangers from private coercion and there are dangers from public coercion; and the word coercion is itself controversial. The notion that the government should *never* do anything because of the prospect of Stalin seems to me a nonsequitur. Is it a consequential argument? Is it a natural rights argument? Richard's formulation is both. To the extent that it's a natural rights argument it's captured in this tale of two pies which seems to me an assertion and not an argument. To the extent that it's an utilitarian argument, I think it's just wrong. There's no reason to think that you are going to maximize utility by keeping all so-called moral regulation off limits to government. And there's electoral control of government after all.

SPEAKER: Cass, I just want to ask you whether in your constitution you would have a religion clause, an unestablished one of course?

CASS: Yes. You might have a category of "rights constraints" on what government can do. It's very difficult to describe exactly why one has particular rights constraints. The religion clauses, incidentally, were justified on two very different grounds. They were not justified only on autonomy grounds; in fact, they weren't primarily justified on autonomy grounds by Madison. Often the clauses were spoken of as a mechanism for permitting democratic processes to work. If you didn't have rights constraints on interference with religion, what would happen is the polity would disintegrate into factional warfare. And you couldn't have the kind of collective determination that I'm talking about. I admit that I don't have a well worked out theory of rights.

SPEAKER: What about a theory of collective determination?

CASS: Madison believed in it. Richard doesn't.

SPEAKER: Suppose everyone believed in it. There still exists the problem of what the voting rule would be, what the paradoxes of voting are, whether or not the preferences, even the preferences that people have about other people's preferences, get reflected accurately in terms of voting rules and things like that. You're putting a lot of weight on the legislative capacity to do something, and there's a whole lot of literature out there on this point, and most of it, it seems to me, goes the other way.

CASS: I don't think that's true. Now, there are two questions. The first is, is there a problem that we ought to worry about? I gather Ellen's question and Richard's question are pointing in the direction of "no." Then there's a second order question: If there's a problem to worry about, is collective action a good solution or ought it to be always off limits? It seems to me that the claim that collective action ought always to be off limits is no more defensible than is the claim that when you have a market failure, collective action ought always to be off limits because of the cycling problems and aggregating preferences problems. If you don't have majority rule, then what's the surrogate? Now majority rule—for all its problems—and they are many—I can't think of a better mechanism than that of the majority rule for the kind of Ulysses and the Sirens phenomenon that I've described (tr. 145-46). It seems to me that the solution the libertarian is pointing towards suffers from lack of foundations. It has a kind of jerry-built, intuitionistic quality. If I could surmount my belief that it is without foundation, or that the fear of Stalin is intuitionistic and jerry-built, then I would understand the position better. What's wrong with Falwell is that his political program is objectionable. Why is it objectionable? Well, one can make some arguments having to do with ideology.

JOE: [Professor Sax declined to publish his remarks.]

RICHARD: I don't think I was wrong with respect to *Just*¹⁵⁸ (p. 156). I think the distinction between pollution on the one hand and taking somebody else's land for a wildlife preserve on another is important. If one doesn't recognize the difference between something which is done to you and something that you do, then the entire tradition of individual responsibility is lost. That's an enormous price to pay.

I think that the point about courts is clearly correct. One has to worry about the excesses of the judiciary. One of the interesting

158. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

things, however, about the eminent domain situation is that the clause imposes basically a negative function on the judiciary to complement its rather large powers. The most that a court ends up doing is ordering compensation, at which point the state has the opportunity to desist by simply repealing its legislation. Ellen's point and I think Jules's point is that collective decisions . . .

SPEAKER: Jules didn't say anything, he just raised his eyebrows.

RICHARD: Anyhow, on collective decisions the theory of contract calls for unanimity; the theory of elections and legislation allows majority rule. Generally speaking, if you could organize a society in which you have a greater proportion of issues decided by unanimous consent, you have fewer problems than a society which bears the huge error costs of collective determination.

The line I would draw between the two types of decisions is the public good line. It's not perfect but I think it's the most stable intermediate position. Where you have nonexclusive collective goods, then you have to have collective decisions, with maintenance of social order and so forth. But on the provision of ordinary goods and services, where the issue is whether or not I want to hire a woman or a man, my presumption runs strongly in the opposite direction. I think that the way to handle the Falwell situation is to say that he is awful, that his proposal is awful. It is surely not that moral criticism is off limits. But beware of the move from morals to law. The sad history of the United States is often attributable to the perverse outcomes of legislative behavior. Segregation in the South was not a function of markets. It was a function of systematic Jim Crow legislation which pervaded every area and aspect of our social existence. The great tragedy of American constitutional law is that those Justices, at the same time they were deciding *Lochner*, couldn't figure out a way to intervene with respect to those massive infringements upon liberty.

TOM: Cass said much of what I want to say. Richard says that the base line is Lockean, or it's up for grabs. This ignores history, culture, and practices, which provide the actual base line people operate from. But the law of property and the constitutional right of property are based on these factors. It goes back to the socio-biology argument—the hard-wired versus culturally-variable preferences argument.

Look at Richard's own arguments, his argument about social security, his argument about prescription. It's clear from his discussion of social security and welfare—the argument that the reliance interest requires that the judiciary not throw it out immediately—that

he's aware that judges can ascertain a culturally and historically established base line. It is not *natural*, because this is one which isn't right according to his theory. Similarly with prescription, if you acquiesce at some point in the past wrongs, past violations of natural rights, it's because you can identify the set of stable expectations that have been reached over time by people adjusting to them. No one can deal in legal argument or political argument without presupposing and constantly using an historical, cultural, and practical base line; and libertarians simply do it tacitly or implicitly. The rest of us more enlightened folks do it explicitly.

RICHARD: What would you have done in *Brown v. Board of Education*?¹⁵⁹

TOM: But there *were* reliance interests there too; they were outweighed by competing considerations.

RICHARD: But there had to be a theory. You had a natural rights theory, that's what drove that case. What is it that drove the argument against slavery? Wasn't it the Lockean conception?

TOM: Why did Lincoln propose a thirteenth amendment in which the slave owners would be compensated?¹⁶⁰

RICHARD: You understand exactly why—for political convenience—not for moral theory.

TOM: We're always talking political convenience.

RICHARD: No, we're not always talking . . .

TOM: You're a utilitarian too, you conceded that yesterday.

RICHARD: But there are two different kinds of arguments that we could always make. One is, given past errors in the system, what are the principles of rectification? This is where I think everybody has a strong pragmatic position. But Cass is not making that kind of argument; he is making an argument for first principles where, it seems to me, all of these convenience arguments simply disappear.

TOM: I don't think there's a distinction between first principles and convenience, or pragmatism. That's the mistake, that's the fundamental mistake.

ERIC: I'm sitting here trying to decide whether Cass's position gives me the "willies" even more than do the people who talk about being members of the "movement," or who say that we're going to have to collectively make all sorts of decisions. Cass's position probably scares me even more. The real error that's being made here is

159. 347 U.S. 483 (1954).

160. See 3 F. THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 21-24 (1901).

simply a failure to recognize that we may talk about freedom as a matter of political philosophy, as a concept within moral psychology, or even a matter of metaphysics or psychology. This is just a great error that has occurred in the course of history; a disastrous error that's occurred. The error is not recognizing that the description of the notion of autonomy Frank elaborated on is a notion within, as I call it, moral psychology. It is certainly true that it's an attractive notion within that area, and once laid out, people want their lives to be autonomous in this sort of way. But it's not at all true that one has to be autonomous in this way in order to be politically free. Political freedom is not a matter of this type of autonomy.

Of course people have conflated them, and some people have thought they've had some sort of argument for conflating them. You're conflating them, Cass, without any argument whatsoever, and you're just assuming these notions are the same notions. Kant has been invoked as an eloquent spokesman for this notion of autonomy, and I also think he is perhaps the best spokesman. One of the reasons he is the best spokesman, is that he didn't make this mistake of conflating the notions. He's strongly anti-paternalistic while invoking this notion of autonomy because he recognizes that this is a matter, in Kant's sense, of metaphysical freedom and not political freedom. Political freedom has to be defined in some totally different way.

Another thing your position trades is to say, in effect, "This is our choice, and we can either give credence to these very unlovely preferences that are completely non-reflective, or we can give credence and weight in our decisions to these wonderfully reflective and autonomous preferences." And then you say, "If that's our political choice let's go with the second." But it's not somehow just preferences—whatever they happen to be—that the classical liberal position took to be the base line for political freedom. Instead, it relied upon a certain theory of rights. That's the political conception of freedom that the classical liberal has, or even, in many respects, the political conception of freedom that all sorts of liberals have. That's not at all "unlovely" as a political position.

The final point I want to make is in effect what Jules was saying: If you have anything like this Kantian notion of autonomy, and you think its very, very valuable that people live along autonomy lines, then it's very natural to refuse to turn to politics to facilitate this notion because the political imposition of the higher preference is going to undercut the very autonomy that you're supposedly seeking. So it really should be a strongly anti-political position.

CASS: There are strong words used here like "crazed" and "wil-

lies.” You say that to connect the political psychology and the political philosophy is a mistake. True, there’s no logical compulsion to the connection. Nonetheless, they are highly congenial. They both reflect a conception of freedom the point of which is to deliberate about ends rather than to implement ends. Now if you believe in deliberation about ends, the idea of people acting singly or with their friends and not through the collectivity, through the government, is hardly necessary. Indeed there is a tradition—I’ve written down some names, T.H. Green,¹⁶¹ Thomas Jefferson, James Madison, Lyndon Johnson.

ERIC: That settles it.

CASS: What it settles is your claim that it’s a logical mistake to conflate the Kantian and republican views—if the word “mistake” is meant to be a claim of logic. You have to ground the view that there’s a mistake.

ERIC: The “mistake” is thinking that you can go from it being appealing to talk about people living autonomous lives, to thinking that you’re giving a theorem of political philosophy.

CASS: I didn’t say it was a theorem. The Kantian and republican views are congenial. I don’t say the first one logically compels the second. And indeed I think the Kantian conception is more congenial to the Green-Mill-Jefferson framework than to a preference implementation framework of government.

Now the other point you made had to do with rights, and how that scheme is not “unlovely,” unlike the Benthamite scheme and maybe the Epstein scheme, though the latter has become more ambiguous. I think the scheme you’re describing is unlovely—it’s part of that conception of political philosophy which is Hobbesian, or pop-Hobbesian. The idea is that people can discriminate against one another, they can fail to hire each other on the basis of their gender or skin color. There’s no interference with private preferences with respect to addictions or habits; one doesn’t distinguish between consumption choices and self-realization. At least there is a plausible conception which captures fairly shared intuitions in which that is indeed an unlovely system.

BRUCE: I am a liberal republican—a republican in Pocock’s sense, not Reagan’s. I very much agree with Jules, that the Plato who’s important is the Plato who emphasizes the death of Socrates. Plato believes that an individual can’t find himself alone, but nonethe-

161. See, e.g., T.H. GREEN, WORKS OF THOMAS HILL GREEN (1906).

less he also emphasizes the difficulty of a simplistic immersion into political life.

There are probably too many things going on in this conversation, but all of them organize around the same rhetorical technique of false dichotomy. Political conversation is a fundamental part of our effort to understand ourselves, but it doesn't follow from this that political conversation should be unconstrained and permitted to trump all other kinds of conversation through which we explore more private aspects of our being. To the contrary, a liberal state is precisely a place in which we categorically refuse to allow politicians to justify coercion by telling us what the good life is.

But I don't believe that the problems Cass talks about can be eliminated even in a liberal state in which conversation is constrained by an appropriate conception of "neutrality." A good example which links up to the book has to do with bankruptcy. I read the book with some care but I'm pretty sure it isn't discussed.

RICHARD: I did in the other article.¹⁶²

BRUCE: Well, let me tell you what I think the book suggests: a discharge in bankruptcy is an unconstitutional taking. After all, you had no trouble with the sixteenth amendment.¹⁶³ According to you, just because the amendment gives power to tax income, it doesn't allow Congress to infringe on the property rights guaranteed by the takings clause. Why isn't the same true in bankruptcy? After all, "common law" bankruptcy didn't involve discharge. Why doesn't discharge violate the takings clause?

RICHARD: I didn't say that.

BRUCE: But you should have. The argument goes simply like this: It's the rent control argument with an emergency provision. Let's say that I am renting an apartment and then there's an emergency. The people then say, "Let's stabilize the rent," and pass a rent control bill. According to you, that's simply a taking from *A* to *B*. It's one thing, of course, for bankruptcy law to say, "Bruce, you shouldn't pay the first guy who asks you because the second guy who asks you won't get any money." That kind of bankruptcy law Richard has no problem with. But the thing that he should have a problem with, unless he is going to bring in cash subsidy autonomy utility talk, is why in the world I should be able to get away with welching on my debts over time? According to Richard, this should be a taking of property. The state says, "Bruce, because you've been a bad boy and borrowed more than you could possibly pay back, you don't have

162. See Epstein, *Contracts Clause*, *supra* note 63.

163. U.S. CONST. amend. XVI.

to pay back the money you borrowed.” That’s simply taking money out of the creditor’s pockets, isn’t it?

RICHARD: The answer is that that’s an exceedingly close case because the disproportionate impact test is a very powerful kind of limitation. The original statutes were amongst merchants and the question you have to ask is whether this statute had any systematic wealth effects before any loans were made. As all loans were made with complete knowledge of the law, that test would tend to point to allowing the statute. It’s hard to find the major moral hazard or adverse selection problems precisely because there are alternative bonding devices available to the creditor.

BRUCE: What’s the public use?

RICHARD: Any legal rule which is simply available to all people on equal terms satisfies the public use requirement as stated in the book. It was argued for expressly (ch. 12). What’s the public use requirement where you start to talk about this shift from strict liability to negligence? The change satisfies the public use test if that’s a rule that generally applies to all cases prospectively. Still, I’m very uneasy about the discharge provisions, largely because I’m more willing to press an examination of the substantive merits of the case.

BRUCE: You haven’t said anything about the bankruptcy provision we have. You only said something about what we don’t have.

RICHARD: Let’s place the general discharge statute into context. The obvious case is the retroactive application of the discharge provision. I think everybody understands that. Similarly, any provision in the bankruptcy laws which starts to make differential rules for consumers as opposed to traders, leaves me progressively more uneasy as well. But I was very clear at least in the contracts clause paper.¹⁶⁴ I regret it if it didn’t come through in the book. I regard that case as right on the cusp.

I think historically it’s exceedingly important to understand what the consequences had to be. When *Ogden v. Saunders*¹⁶⁵ was decided, the issue was whether or not a prospective discharge statute was an impairment of the obligation of contract. If you don’t allow any “just compensation” exception into the contracts clause, then you can’t get even a statute of frauds to pass muster. Therefore, you’re forced to one of the two extreme positions that we talked about last time: which is either you have no prospective regulation, or you simply say any regulation goes. On a four-three vote, the Court basically said anything goes. I think that Tom is right that there’s a certain degree

164. Epstein, *Contracts Clause*, *supra* note 63.

165. 25 U.S. (12 Wheat) 213 (1827).

of muddiness and vagueness on the middle line with this prospective discharge statute. Still the standard preference cases turn out to be easily permitted, while the retroactive discharge cases come out easy the other way. So if a court wants to say that the bankruptcy discharge provisions are constitutional, by a five-to-three vote or a five-to-four vote, they could do it responsibly. I might also add, Bruce, that when the case was litigated, the arguments in favor of the discharge provisions were wrong, even though the result was correct.

BRUCE: I feel subjected to a "word bath," to be honest. I just don't understand why this is a hard case. According to you, a discharge in bankruptcy is an easy case of a taking because the impact is so obvious; it helps debtors, hurts creditors.

RICHARD: No, because disproportionate impact is not the sole test. In some cases it turns out you could have formal equality, while there may be radical distributions that take place within the formal equality. You could never simply say that since you satisfy that formal test alone you're necessarily home. To illustrate, suppose we had a rule that abolished all actions of trespass to land for all people under all circumstances with respect to land. That rule meets a test of formal generality. Still, with factions and the common pool problem, it should be struck down.

BRUCE: The fundamental distributional issue that animated the framers of the contract clause was the class battles between the creditors and debtors.

RICHARD: They certainly did. But the particular problem was the discharge provisions on a retroactive basis, or the changing of the legal tender. The obvious point is that prospective discharge is a much harder case. Put yourself in the following position of a creditor.

BRUCE: Paper money.

RICHARD: No, would you in effect be opposed to a limited liability assumed on a voluntary basis? Well in some sense we know the answer is no, because of all sorts of nonrecourse type financing that are widely available.

BRUCE: Different case.

RICHARD: But it's not a different case, because the transactions cost argument starts to have a certain degree of plausibility. You know that the pattern that you see in the bankruptcy laws is not wildly disparate from others you observe. And you don't see in the bankruptcy and the discharge provisions strong redistributive elements. To be sure, I see it in some special consumer legislation which I would want to strike down, but not in the general pattern. One way to ask the transactions cost question is this: are you confident enough

that the work out provisions between individual debtors and their creditors' can handle the discharge problem? If you are sure, then the discharge statute is clearly unconstitutional. If you have some doubts on that, then the answer's not so clear.

BRUCE: Well I must say that your claims to having an approach with clear rules and formal realizability has, in my mind, taken a body blow. If this is, after all, class legislation, the reason why it was recognized to be class legislation is because it says creditors, debtors.

RICHARD: That's not class.

BRUCE: Hold it please. You and I are both agreed that we're not talking about roles here or . . .

RICHARD: I agree.

BRUCE: The people understand now, as they did at the time of its passage, that the point of this statute was to take property from *A*, and to give it to *B*. Contrast this with zoning. I can always say there are certain advantages and disadvantages of zoning. But it's awfully hard to know whether I'm going to be a beneficiary or a nonbeneficiary of zoning, as opposed to the bankruptcy laws. This is because, as Eric Mack was pointing out, in bankruptcy there is much that can be done with contract—so that if it's in my interest to discharge you from bankruptcy, I can simply write it into the contract one way or another.

RICHARD: Aren't there tort creditors?

BRUCE: Of course there are problems. But these problems, typically—and this is the formal realizability issue which I don't pay much attention to—don't present much difficulty. So I believe that what is going on is that you are being political.

RICHARD: I'm not!

BRUCE: You are being prudent—if you'd like to call it that—in picking your targets in a way which isn't too offensive; that won't offend too many people simultaneously. You don't choose bankruptcy and you don't choose civil rights for close analysis because you're afraid that calling them unconstitutional would undermine your political credibility.

RICHARD: No, . . . the bankruptcy . . .

STEVE: I won't take long because maybe this point has been pursued as far as it can be here. My concern is connected with some remarks by Jules and Eric and Frank. I am getting progressively less clear, Cass, on what you mean by "autonomy." Your response to Jules sounded as if you merely wanted a condition on preferences that they be informed. But your later remarks suggest that it was some-

thing stronger than that. So as not to waste a bunch of words, could you perhaps just say a bit more on this issue?

CASS: On the subject of autonomy, it's much easier to describe what's not autonomy than what is autonomy. To describe a truly autonomous preference is a very hard task. Jules was talking about a special case where someone doesn't know something.

Now ordinarily to give the person information in circumstances in which the person doesn't know something is not thought to be an infringement on autonomy, correct? I would say that either giving information or making a person do something if the provision of information turns out to be too costly or ineffectual—to make the person do what the person would do were the person informed—seems uncontroversially not an interference with autonomy. But I also do mean autonomy in the stronger sense. I mean autonomy not limited to the class of information failures, but to include also cognitive, or motivational defects that occur behind the back of the person involved. And here the best example I can give is gender. Think of a woman who adapts her preferences to the opportunities available by concluding that women aren't workers so she will reduce cognitive dissonance by not even thinking about being a worker. That's not a case of character planning on the part of the woman involved, but of preferences being conditioned by the lack of available opportunities.

If the legal rule were that a woman couldn't be *X*, then one would say there is obviously an infringement on autonomy. If there are social pressures or existing legal regimes that impose pressure on the person to prefer not to do *X*, then I'm also quite comfortable with saying there's an infringement on autonomy. The sour grapes story is the best example here. The fox genuinely believes it doesn't want those grapes even if they were in fact available. It seems to me the fox is not behaving autonomously. Now that's not a logically compelled definition of autonomy, but it fits with very widely shared intuitions.

STEVE: I *think* I understand it.

ELLEN: You fail to recognize, however, that all preferences are conditioned by the available opportunities. We never choose in a vacuum. We have tastes, and we also make choices that foreclose other choices. Your solution for that is to say, "Well let's impose choices and preferences on everyone, because I know what those choices and preferences should be and this will promote autonomy." Even in your narrow definition of adaptive preferences, if some preferences are adaptive and not really internally motivated, then you make virtually all of them enforced by government as if that's somehow going to solve the problem. It just makes it much, much worse.

MARK: I'm going to try to raise the level of concreteness here, as did Bruce in the discharge case, but this time I'm going to focus on Cass's preference issue. The first point is that the notion of what it means to respect a preference is extremely complex. I usually use a simple case to illustrate this in class. Somebody tells you in the morning, "I'm going on a diet. I'm going to beg for a piece of chocolate cake later, but don't give it to me." Then, at four o'clock in the afternoon he says, "Who was that vain, imbecilic moron this morning? Give me a piece of cake or I'm going to break down the refrigerator."

In the first instance, there's an ambiguity if you're a friend of this person. The first thing, separate from the political theory that Cass was trying to explain, is that there's a great deal of ambiguity about what it means to respect preferences; what it means in utilitarian terms to maximize his utility; what it means in autonomy-respecting terms to respect his will. The first point, then, is about the ambiguity of preferences. Eric's system is supposed to be based on the idea that government should simply let you manifest your taste. But common-sensical statements about autonomy, respect, or utility maximization inevitably refer to a subject at a particular point in time and deal poorly with the question of intertemporal variation. The second point is that the only way of dealing with this problem is to face it directly. I don't get to the higher level of republican theory that Cass, Bruce, and Frank get to. As many often say, I am incredibly antitheoretical. I'm not sure I understand what this republican virtue stuff is about. I prefer dealing with a couple of particular choices. The example I'll give may be a little confusing, because it is often confused with the welfare rights argument—the recipient's side—but I want to talk about welfare for a moment just from the donor's side; from the rich people's side. This is not about the rights of the poor now, but instead, the privilege to dispose.

Now the problem is that the "taste" for disposition raises these ambivalence problems. We may believe—and I can give you a lot of evidence for this—that as a social contextual matter, one's tastes for giving money one possesses to charity are distinct from one's taste for having charity get the money one never possesses. I'll give you a simple nongovernmental example but it's going to come back to the government. I talked with Cass and Tom about this yesterday. Entertainers are giving up staggering offers to play in Sun City, South Africa. John McEnroe gave up an offer of \$1,000,000 to play a match in Sun City. He is a man who may never have given away even \$10,000 to charity. In effect, he has donated \$1,000,000 to a political principle when he almost surely would not donate \$1,000,000 of his

possessed funds to the same principle. There are some wealth effects to that, but they don't explain the disparity between what he has never given away and what he has failed to take in. He probably has a net worth of millions, so wealth effects can't explain the staggering disparity.

Redistributive taxation—having the state take forty percent of my income—means that I never possess the money that is redistributed. I don't take it in and then decide whether to give it away. I have different preferences about money I've never received. The libertarian's freedom/unfreedom distinction simply collapses; you just can't have it both ways. It's not that you're more free to manifest your true taste for charity if the money stays in your hand and you later decide to give it away. The absence of a redistributive tax simply takes away the option, the freedom, to manifest a different, equally tame preference not to end up with personal control over the money. It's not that one regime is free, and the other is unfree; they just nourish different preferences. They just nourish different aspects of yourself. The only way you can manifest this sort of preference for redistribution is collectively. Many of Cass's examples are just like this one—the seat belt example is one—but I think we should try to move away from his level of talking about republican virtue. There are obviously going to be costs in Eric's terms to the collective system. Some of the people that you tax are going to share neither that preference never to have taken the money in, *nor* a preference to give the money away themselves.

PEGGY: Going back to the Falwell example, and I think it's important to go back to that for a minute (tr. 141). The Falwell argument is a red herring for everybody here. It's a good argument only for those in the mainstream tradition of liberal meta-ethics—value subjectivity. We are having a debate about meta-ethics. If you think that values are subjective and only represent your preferences, then there's no right or wrong, there's only what I have a taste for. Then you can argue that the Falwell example is just like the discrimination example. But if you argue that there are natural property rights, which is a code word for rights against the majority, then maybe those rights trump majority preferences whenever the majority thinks wrongly about property; rent seekers who want to preserve the environment and wetlands, or who want to have zoning or rent control. But, then, as a matter of ethical theory, you cannot at the same time coherently argue that the government can do nothing against the Falwell example.

In other words, I am perfectly open for Cass to argue that the

government has a duty to act against majority preferences in the Falwell example, because in my view persons have rights, and women have a right not to be treated like non-persons, and Falwell might want to treat women as non-persons. Mark wants to argue that the value subjectivity meta-ethical tradition is the only one that's really coherent with classical liberalism. I'm sympathetic to that position at some level, but I don't think anybody else here agrees. The false consciousness debate, and the moral freedom debate—in the Kantian republican sense—require a moral theory or a meta-ethic. This is so especially with regard to the latter—if republicanism as we're talking about it requires a government obligation to provide, or at least not obstruct, the conditions for achieving this moral freedom. So if a lot of people have tastes for being Falwellites you can say that's morally wrong. This is what Cass wants to say but he needs to have a meta-ethic. It's fine to say things are morally wrong if you're not in the majority, unless you're in the liberal subjectivist tradition. This is really a problem for libertarians. They want to say this: "I am right about property rights; it's not just my taste that property rights should be the way I want; people who don't agree with me are wrong even if they're in the majority; they're not entitled to impose their view on me even if they're in the majority; and they can't run the government their way even if they think there is a right to preserve wetlands." Given that libertarians take this absolutist position, they're not entitled to say other moral traditions can't do the same. You can't say to Cass Sunstein, "You're foreclosed from arguing that there's such a thing as false consciousness or the majority being wrong." As a matter of argument, you could be a moral realist, even if the libertarian wants to say you have chosen the wrong thing to be morally committed to.

The question I want to ask you is would it be morally wrong—supposing that you get political power even though you're in the minority—to run the government your way if you're in the minority, and most people would like the government to preserve wetlands and to have zoning and to do some of the things that Cass wants it to do?

RICHARD: If you're right, you're right.

PEGGY: Well then, the Falwell example is a red herring. That's really the main point I want to make.

SPEAKER: That's what Falwell would say too.

RICHARD: Falwell said that it's a red herring: I'm right morally and so therefore I can't do it.

PEGGY: You can't say to people, "Don't argue that there's

such a thing as false consciousness, that there's such a thing as morally right, because you're imposing your views on other people."

TOM: Libertarians think they know everything about the right and nothing about the good.

RICHARD: Much depends on the methodology. Look at the way, at least yesterday, that I tried to get to the consequentialist element, wholly apart from the Constitution. The theory about individual property rights recognized the radical uncertainty as to tastes, subjectivities, and preferences. In effect it was a theory which was only designed to minimize transactions costs, so that you could derive that theory without any particular conviction of what people believe, why they believe it, and how they wish to have it. What we are trying to do is to create autonomous zones of control in which people who have different preferences can live together without having to make and resolve arguments over right and wrong. The asymmetry arises when the Falwell fellow wants to cross the line. The libertarian thinks Falwell may be wrong, but he, the libertarian, knows that there's a barrier between me and thee.

PEGGY: And you think that this is not a moral argument based on some non-subjective . . .

RICHARD: It's a moral argument which basically assumes pure paretianism and subjectivity.

SPEAKER: Is your position on battery that it is a tort because it would minimize transactions cost?

RICHARD: It is the argument that you must have a system of natural rights precisely for that reason, in the sense that you cannot run a society unless you can keep the boundaries between persons, precisely because the transactions cost between them turn out to be very high. As I said yesterday, I think every single set of substantive rules we have is in response to that problem.

SPEAKER: Yes, yes, I just wanted to make sure I had the distinct general analysis.

RICHARD: I don't think it is that distinct. What the first pie tries to make is the first approximation of what is going to minimize bilateral monopoly problems and their transactions cost. In the book, as I tried to answer Ellen yesterday, I was working within the constitutional framework. It already has the first pie. Private property is in the Constitution, so it's the natural rights' pie. In the political theory, the first pie is not so easily established.

ELLEN: Will you say yes or no to the proposition that your view of property is a moral argument that is right, which you will defend against the majority.

RICHARD: Of course I do. It is a moral argument that is right, which I will defend against the majority. I have to do that.

FRANK: What I want to say about Eric's remarks has already been said by others in different ways. He said that you should be careful to note that the minimal state, negative libertarian vision isn't just a vision of just people wandering around acting out their adaptive preferences. Instead, he said, it's based on an appealing notion of rights; that is, it's constrained in some way. That's certainly a correct description. I merely want to observe that that way of characterizing the vision won't help in terms of what concerns Cass and me, except in so far as the vision can be justified and its attractive properties exhibited in terms other than the suggestion that it allows for the optimal realization of private preference regardless of its autonomous character.

ERIC: I want to come back to the autonomy point just to emphasize, in a different way, how illusive this notion of autonomy is. I will do this by talking, Cass, about your housewife example. One way of picturing the person you presented us with is that she considers all of the dissonance that she'll be subject to if she goes against fairly well embedded stereotypes. And so she decides to give up certain ambitions and to re-contour her character in certain ways so as to minimize that dissonance and to get certain traditional sorts of satisfactions. Now I've tried to put that quite neutrally. You could make a very strong argument that this is an autonomous choice. Your tendency in giving this as an example of non-autonomy seems to me very likely not to reflect any theory you have about autonomy, but a view that I may share with you that, in some sense, it is better for this woman to have made a different choice.

CASS: No, that's not right. Surely one can tell happy stories about any particular form of conduct. That's the story you've told about the housewife. I've told an unhappy story. I don't know if you're talking about character planning or something else but you've told a story in which one can say that what the housewife has done seems autonomous. I've told one in which one might possibly be able to reach the opposite conclusion, and I would say that what I've described happens every day with respect to many women. Now the question is, what does one do about that? I gather that under both Eric's approach and Richard's approach the answer is nothing. And that's the problem: I don't see a foundation for that conclusion either on welfare grounds or on autonomy grounds.

You're absolutely correct that it is hard to come up with a positive description of autonomy. Nonetheless, people are working on it.

We've made a lot of progress on this in the last twenty years. The revealed preference stuff is really on the run now because, in political theory and social psychology, people know something about how preferences are formed and about the Ulysses and the Sirens problem (tr. 145-46). Even in economics, revealed preference theory is starting to be on the run. So what I would suggest is that this is a question on which we are very much at a beginning stage—what is an autonomous preference?

Nonetheless, what Richard would do, and what I gather Eric would do, is to say the inquiry is itself off-limits because of the dangers of political intervention. The inquiry itself is off-limits either because of the Stalin problem or because of the rent seeking problem. Now it's that step whose justification is missing to me. I've seen two arguments. The first is a natural rights argument—a tale of two pies—which is now defended as only consequential. To the extent that it's consequential, I can't buy it. Its consequential character makes it contingent. And here I think it's all wrong. The second argument, the welfare argument against disrupting so-called voluntary transactions as a flat rule seems to be unjustifiable. In some circumstances the disruption of the voluntary transaction will be welfare promoting. Think about gambling, for example. That may be a case that'll appeal to you.

* * *

RICHARD: My reaction to Mark's paper,¹⁶⁶ more than to Mark, is that it reminds me of Dr. Jeckyl and Mr. Hyde. At the conference, he is very high toned, and lands some very strong blows against the positions that I advocate. Then I read this paper and it is like a man going mad on the word processor. I don't understand again why the sort of snide remarks made in the paper seem to be part of academic discourse.¹⁶⁷ I should say that I do take it, to some extent, personally. I think it's not only a sign of disrespect to me but a sign of disrespect to everybody else. It doesn't seem to add anything to the argument. I don't want to belabor that.

It also seems clear to me that his is not a good paper, independent of tone. It doesn't seem to say very much, and what it says, by and large, is rambling, unsystematic, and disrespectful of traditions with which he disagrees, and with which perhaps I disagree, but which nonetheless have had sufficient weightiness and permanence in our own legal culture and tradition that they should not be dismissed

166. See Kelman, *supra* note 113, at 3.

167. *Id.* ("this silly and peculiar book").

in such preemptory fashion. I don't think I can spend fifteen minutes talking about it, but maybe I'll prove myself wrong. Let me at least try and clarify some of the issues.

First is the issue of natural rights, which is a point which has obviously come up before. It seems quite clear, again, that there are two ways to approach them. One way is through the Constitution, and the second is by way of a general political theory, if the issue is how we were to form government, not how to interpret a particular document. To begin with, I find it almost incomprehensible to think that one could approach the Constitution as a document and think of it as something other than a natural law or natural rights document. It may well be that the framers were wrong in some deep and fundamental sense about the logical status of natural rights, but I also think that there was a fairly heavy influence of the tradition at that time which made it an integral part of their thinking. That's the Lockean influence. In an odd sense I would almost cite Tom Grey's paper¹⁶⁸ which talks about a number of these issues in exactly those terms, as a counter-weight to Mark's paper, which seems to ignore all of these elements in dealing with constitutional interpretation. If you've got a document which contains words like "liberty" and "private property" and "contract" and "freedom of speech," it becomes utterly inconceivable to the idea of a constitution that the content of each and every one of these terms could be determined by the legislature that the Constitution is trying to regulate. The natural rights tradition, far from being a theory that the rights are out there in nature, is only a theory that these terms have meaning independent of legislative behavior and political discussion. The natural law tradition is one that you have to bring to constitutional interpretation. In this sense it is also one that any sound theory of governance would have to bring to constitutional interpretation. The people who take very strong positions on matters like freedom of speech are implicitly appealing to a notion of freedom which the legislature is not free to change at whim.

Now as to why it is that we need a theory of natural rights, let me see if I can try to explain again the great power of the theory and its great weakness. Generally speaking, when we're trying to work in political theory or in ordinary discourse with one to another, we always have to move two ways from our premises. First, we have to have a major theory as to what the law is about in order to figure out what particular rules, dictates, and directions are going to be given to

168. Grey, *supra* p. 21.

other people, so that they will be able to decide whether or not they've transgressed, whether they've done right or wrong.

In large part the ability to govern large aggregations of individuals is going to be dependent upon the ability to transmit information to them about the appropriate limits of conduct. Lots of useful devices have been developed over time to do that. There are of course the kind of simpleminded tests like boundaries, the "no trespass" type rules. There are also rules of custom, which I think have a very high degree of regularity, and are not contingent and not erratic. There are also general canons about the importance of the distinction between truth and falsity. There's a general rule which says that you don't lie and, a general rule which says that you keep your promises.

What the natural rights theory does is it says that all of these things are part and parcel of our law; they just are. The theory may not have very clear foundational justifications, but in terms of social preservation, it does provide a set of canons, which if not perfect, at least gives you first approximations as to what's right and wrong conduct. And these rules do allow human interaction to take place in some kind of a coherent way. That tradition has a very high degree of reliability relative to the pure utilitarian tradition in generating specific norms of conduct which individuals can follow and obey. One great advantage of that clarity is it prevents the bloodshed and conflict and terrible situations that might otherwise take place.

The great weakness of the natural rights theory has always been its implicit appeal either to mysticism, religion, or intuition, to set the foundations of the rights in question. Somebody always asks me, "Well, where do we get these natural rights? Why don't we get some other natural rights?" Natural rights theorists, myself included from time to time, are very hard pressed to give answers which sound something less than mystical. In any rationalist discussion, the natural rights champion argues that you ought to keep your promises, but the critics keep asking why? You therefore get a very strong consequentialist challenge to the natural rights theory.

But consequentialism, of course, is not a free good. Once you start to take the consequentialist line, you're faced with the following dilemma. You now must construct the social welfare function which allows you to take into account either the wealth or the utility of all individuals over all times, for society to have a stable set of institutions. People like Ellen—and I think she's right here—basically would say, "Look, the great weakness of your theory is that, while it may have an absolutely impeccable bedrock foundation of trying to maximize human satisfactions, you essentially now have a world in

which deuces are wild.” Anything that anyone wants to do can be justified in the name of some kind of a collective good, if we jazz up our utility functions, allow preferences about preferences, or take into account problems of forestalled preferences, inconsistent preferences over time, and preferences shaped by environment. The good welfare utilitarian type theory leads to unknowable outcomes. So what the natural rights theorist says is, “You’ve got wonderful foundational grounding—that is, you could go back to what is most deep about human beings and their ends and their desires—but you can’t get the set of rules necessary to achieve your own stated objectives.”

It seems to me that the trick is to find the theory, which by and large combines the strength of your utilitarian foundations with the set of consequences that natural rights theorists call for. As I said yesterday, for the longest time I was an anti-Coasean in one sense and a Coasean in another sense. I always understood the power of the Coase theorem for zero transactions cost and thought that he was woefully misguided about causation. Now what seems clear to me is that the zero transactions cost world, when you actually flesh it out, is so incredibly bizarre that nobody could quite figure out what the world would look like if in fact it turned out to be true. The way in which Mark, Tom, Frank, and myself tried to put the thing together over dinner is that the world of zero transactions cost is in effect a world with just one person. Thus, just as you know when the pain to your foot offsets the benefit to your elbow, so you can instantly equilibrate gains and losses through biological mechanisms faster and more efficiently than any human being that evolution has yet been able to design. No matter how great the number of parties, no matter how difficult the problems, you can enter into voluntary transactions instantaneously and come up with an optimal solution. But that’s not our world, so the separateness of persons, which some people talk about as an anti-utilitarian theory, is just another way of saying that positive transactions costs between people necessarily limit and shape the way in which their interactions take place.

Once you recognize that, the whole task of political theory, as it stems out of ordinary discourse, is to find a way in which these folks who have separate preference structures can interact notwithstanding the very high barriers between them. That means that you’re trying to set suitable foundations for appropriate bargains, and to gain some confidence that these bargains are in fact expressions of true inner intentions. What’s the best way to do that? Given the huge number of people who have to interact, some very simple rules are going to necessarily be dominant.

Take the physical invasion rule: Joe says it's a simpleminded rule; Mark treats it as "morally vacuous." But that rule basically says, "Look we generally know in this world that the global empiricism that we all use makes sense." By and large, if we have that simple rule, resources are going to be better allocated than if we have a rule in which everything's going to be held in common, and every decision is going to be contested.

Once you recognize that you can't have common property, then you must have boundaries. If you're not going to use vertical or straight lines for boundaries, you better tell me which way you're going to tilt them, and how much, and why. That's a first approximation; in fact it's a naive line, but it's a very durable line. We have other durable lines like that, for example, take the law of freedom of speech. We have a line called truth and a line called falsity. You look in the constitutional literature, and by God if somebody's engaged in truthful speech about somebody else, then he gets absolute protection. Does everybody say, "how naive, how morally vacuous."

To be sure, the line that you start with is not the line that you can always end with. Then the question is, how do you make corrections in a responsible fashion?

What Mark in effect does is to fall into the Coasean trap. He and I are on the opposite sides of the theorem. He's always been a "rejectionist" in denying that the world of zero transactions cost yields optimal assignments of rights, absent any previous entitlements. I've accepted Coase here. However, he's always been a Coasean on causation and I've always rejected that. What's really at stake, I now believe, on the causation question is the acceptance of general rules. Do you believe that it is possible to make essentially the wholesale dispositions of large numbers of cases, without individual inquiries into cost and benefits? If in fact you reject the physical invasion test, then every time you get harmful interactions across the boundary line, you can't say that the guy who crossed the line is in the wrong. You're going to have to examine anew the preference functions of each individual to decide who is sacrificing more and who is sacrificing less, in order to get a responsible social outcome. The decision pressures on that procedure are of course enormous. Indeed the reasons we don't use that method in an omnibus fashion are the ones that Mark identified. If you don't have any market, how can you talk about mimicking markets by legal rules?

Now his dilemma is absolutely complete. First, he says that the standard act/invasion line is morally vacuous, so he rejects that. Then he says that case-by-case adjudication doesn't work because we

can't mimic markets. He has created for himself a situation in which he can't give you any coherent theory to explain the separateness of persons. He can't specify the way in which they're going to come together. By standing outside of the system, by never giving us an alternative, by announcing that people are primitive or silly, he's managed to foreclose the entire feasible set of decision strategies that might answer the question, how do we keep persons separate one from another? My strategy, as I outlined in the first session, is to use a legal algorithm. If we start with the boundary lines, we recognize that there's something wrong with them. Now there are lots of ways to solve them by intelligent exceptions. One of the traditional exceptions, always existing in common law, was that you could always enter your neighbor's land to pick up your crops; and he could do the same to retrieve his crops. It was a reciprocal custom that worked to mutual advantage of both landowners. And it fits very powerfully into my version of "live and let live" (ch. 15) as a strong, traditional illustration of proportionate impact and mutually advantageous trade.

But there are obviously asymmetrical situations, and these of course are much more prey to abuse. The point of the compensation rule is to identify a situation where the passive, recipient party is the better cost avoider; if you feel confident enough about it, then you might want to switch the entitlements around. And what the compensation formula says is, do not trust adjudication, fine tuning, or collective thinking about this to get the right answer. We want to make sure that those who are doing the switching are going to have to pay, so as to discipline this public function. Once you look at the problem this way, you are going to move sharply away from his kind of skepticism.

This leads me to the conclusion that Mark's scholarly work is very profound and yet deeply troublesome. His great strength is his ability to take apart any given conception, to develop troublesome counter-examples, like the one he gave yesterday morning about why withholding taxes and giving the proceeds to charity gives you certain kinds of benefits that flat taxation systems can't provide (tr. 160-61). His case about the forbearance and cake also shows the problem. But the issue is whether you can give counter-examples which deal with individual cases. The question is, can you develop a systematic set of rules to answer either of the two questions that we're going to face here? One is the question of constitutional interpretation, where his own views are kept as deeply hidden as any that you might care to imagine. Putting all that aside, if you're dealing in the separate domain of pure normative political theory, exactly what are you going

to do with the set of difficult insights on scarcity and self-interest, which make life harder for everybody? Unless you are going to be wholly skeptical about the enterprise of law, you must sooner or later abandon the strategy of attacking anyone who tries to come up with a substantive position, be it mine, be it the Coasean one, be it any other one that you care to mention. Instead you might come up with some alternative program of your own, so that we'll know where you stand.

At that point, we could then play the following game: We all know that there are fatal objections against everybody else's position—that is, unanswerable hypotheticals. But as Michael Levine said to me long ago, "Richard, you've got the wrong standard if you think fatal objections are fatal in politics. The key question is how many direct hits can you take below the water line, and still keep your ship of state afloat." Well, the answer is not zero. You know politics is basically a second-best game, which means that anybody who wins the overall political argument is still going to lose some particular parts of it. You can't fight this kind of struggle without having any alternative conception of government. How do you go from the subjectivity and unknowability of individual preferences to the demands of collective rule? I do it by stages. What I don't see in Mark's work is any effort to examine the problem with the kind of rigor he demands of others. He should turn his own standards upon himself.

MARK: Although none of the specific arguments in my paper were addressed, I want to comment on a couple of points. First, the snideness issue is actually worth mentioning, because I think there's a real dispute about what constitutes politeness and impoliteness. I find your book staggeringly impolite. It may not be directed to me personally, but it frequently says that we would all know what to do if we were to act in a principled way. Because you know that people like me wouldn't act the way you act, you're saying that we're unprincipled. You do that for four hundred pages. Many people would agree that your tone is smug and insulting, at least as insulting as my own. But because it's spread out over a longer text it's not nearly so obvious.

My second point addresses constitutional versus political theory. I'm not doing constitutional theory. Listening to you yesterday, I didn't really think you were dominantly doing that either. It seemed to me that the book is about constitutional theory largely for cosmetic purposes.

On more substantive points, you're getting two arguments continuously confused in this material. But you're wrong on both of them; so even if you kept them separate I'm not sure what good it

would do you. You talk continuously about the transmission of information function and the fact that rules must be constant over time and noncontingent. The transmission of information function seems to have something to do with the formal realizability of rules. If that is your requirement, all sorts of rules that you disapprove of are, nonetheless, perfectly formally realizable. The tax system is reasonably rule-like, more so perhaps than the common law's negligence rule in torts. Levels of welfare benefits can be set in a rule-like fashion. The rule against development of wetlands obviously can be defined with a fair degree of particularity so that its reach is easily known. Therefore, if what you're talking about is transmission of information—which you said three of the six times you made this point—then your criticism of the rules you think are suspect is totally off point.

My third comment addresses universality or noncontingency. On this issue I have two different points; a normative point and a descriptive point. The descriptive point is that you dramatically overstate the degree to which these norms you call universal are universal, except at the most vague level. This comes back to the argument we had the other night; let us assume that there is an almost universal norm against something called rape. But the definition of what constitutes nonconsensual sex, what constitutes force, or the illegitimate appearance of the possibility of force, varies widely. Let's say that the question of whether husbands can or cannot do this "universally" disapproved of thing, varies a good deal. To say that there's a universal norm on rape or even a universal norm against homicide doesn't account for wild variations in actual schemes. You overstate descriptively the universality of the simple rules that you think are at the base.

Second, I'm not sure what makes universality a virtue—let alone an exclusive virtue. You might get a minimal number of rules supported by the fact that you have a strong social consensus on them, but the absence of universality doesn't preclude the establishment of other rules that are going to be more contingent in specific situations.

Turning to the material on the invasion rule, I'm really not sure what your argument was but I think it falls into the trap that Tom was talking about yesterday. You say that it's a rule in the first part of your algorithm, but where it creates transaction cost problems, you'll admit that you'll tear it to shreds.

RICHARD: I didn't say that.

MARK: Wait, let me give two kinds of hypotheticals. One is that the states decide to replace traditional nuisance law with a set of

air pollution regulations about how many particulates may be sent into the environment. But until the polluter reaches that level, even if there's an invasion of particulates crossing into your neighbor's yard, it is no longer a nuisance. Above that level, however, it's regulated directly. Now if we switch back to traditional nuisance law, we have staggering transaction cost problems. If we use a system where any kind of invasion by the particulates is not only an enjoined nuisance, but also a nuisance that can be met through a series of small damage rewards, it may pose insuperable transaction cost problems of the kind that you worry about. So the simpler transaction cost minimizing rule—and the one greater in terms of clarity and the transmission of information—might be a direct regulation of the amount of particulates, not a nuisance rule. Again, you fail to address that kind of case directly.

My other point on the invasion material is that you're still not really dealing with what is morally significant about invasion as compared to harming. You've been doing this for thirteen years, and it's either time to say you've lost the argument or to establish an argument as to what is wrong with the Coasean perspective which focuses not on invasions but on added social cost which results from the interaction of the two distinct desires.

One thing before my final point. It is powerfully important that you address the material I have at the end of my paper on how you are confused by the distinction between the imperfect obligation in the individual context, and the rather perfected obligation in the social context. That is also an answer to your last point about my rigor or lack thereof.

Finally, you also asked whether I have counter-examples and counter-proposals. Among the things I favor is redistributive income taxation, and I don't think it's in any way defeated by the analogy back to the fact that in the private case, there is imperfect duty. All of the arguments for the imperfection of duty in the one-on-one case are irrelevant, and represent your moral confusion. One of my positive programs is to root out this silly confusion which draws all of us into an irrelevant argument. That will make the case for something that is good—more secure rights to certain kinds of support for children, along with the right not to be molested. You did not address that at all, Richard. It's the biggest point in my paper and it is odd that you didn't address either that point or the point I made this morning in talking with Ellen. You're not addressing the two concrete arguments for the particular political program I want in place. You've had fif-

teen minutes, and you can start again, but those points were the main substantive ones in the paper.

ELLEN: The two examples; did you really wish to concede that they were so damaging?

RICHARD: Of course not. I'm not conceding anything.

ELLEN: Good, it sounded like you were, and I thought it was needless to concede them. On the cake example, I can see that it's difficult to determine what are that person's real preferences. But your solution or Cass's solution, since he has expressed one, is to pass a law that says nobody can eat cake, or fat people can't eat cake, or nobody in general can eat cake because it's bad for one's heart and raises one's cholesterol. This is just wild overkill, wild and senseless overkill.

MARK: Ellen, you're doing just the sort of thing I accused Richard of doing in the section on negative rights, of falling into the complete legalist trap. You're saying either you have the privilege—in which case I have the duty not to interfere with your privilege—or I now take over the privilege . . .

ELLEN: What about his salt example; he also mentions cholesterol. These are dangers that you're saying people don't have the correct information on; you give them the correct information, and if they still ingest these substances then ban them.

CASS: We're talking about Ulysses and the Sirens here. Ulysses and the Sirens is an example where a majority of the collectivity, possibly an overwhelming majority, thinks that the only way to do *X* or the best way to do *X* is through a law. This is why Mark and I both responded to your cake example with the statement "No, that's not our solution." Sometimes people can do it through voluntary interaction with others, sometimes they can do it in their own heads. •

MARK: Sometimes collective conduct can be distinct from either prohibition or acquiescence. For instance, when we deal with people with eating disorders, the options are not that the bulimic or anorexic either gets to continue to make his or her own choices, or that a state dietitian takes over. There are other options. Given the defects that we believe exist in her realization of herself, we could fund therapy programs for her.

ELLEN: And you force her to go.

CASS: No, we force the taxpayer . . .

MARK: No, we force the taxpayer to fund the program. We may even have periods of compulsory treatment.

ELLEN: Can I respond to the McEnroe example in South Africa?

CASS: Well he did, by the way, give \$10,000 to New York's neediest.

MARK: Right, as far as I know that's his largest donation ever. I chose the \$10,000 figure deliberately.

ELLEN: And he also contributes time to various groups. Anyway, other people would make different choices. Frank Sinatra has received a lot of money from performing in South Africa, but he also gives a lot of time and money to other causes. What you're saying is that I feel like there's something defective in me. If I receive my whole salary, I won't give 40% of it away to charity, and because there's something defective in me I'm not suitably charitable. Therefore, the state should come in and compel "charity" by imposing this requirement that 40% of everyone's income goes to the state to be redistributed.

MARK: You've defined the alternative. You have started from a supposition of wholly private conduct and assumed that the norm is charity, which is what you give out of realized income. I'm saying there's another social construction that you can't just make go away, in your case, for having money redistributed that you never have control over. It is a different case and it simply isn't realized in your scheme, which relies purely on voluntary charity. Therefore, you are depriving people of the autonomous expression of the taste for expressing my charitable impulses that they don't have once they controlled the money they may or may not give away. You're simply making an assumption that the desire to give out of realized income is the true private desire.

ELLEN: No, I'm saying anyone who wants to make the choice that John McEnroe has made—to forego income because he thinks apartheid is objectionable—should be perfectly free to make his choice. Others who feel differently, who want to exercise charity, or none, in any way they choose, should be able to do that too. You're saying that everyone should make the choice that you would make.

MARK: No, I'm not saying that. I'm saying that given the empirical fact that people differ along the dimension of what they do with foregone income and realized income, there must be an option for a collective decision to deal with those distinct tastes. Those are distinct manifestations that occur in different social settings and this leaves no option but to enable a collectivity to permit that other kind of autonomous choice. The McEnroe example is not about what he's permitted or not permitted to do. It's an empirical point, to get at the fact that voters may have different tastes about what they'll give up versus what they'll simply . . .

ELLEN: So change your tastes if you think you have different tastes. Change your tastes.

MARK: No. They're manifest in different social settings. That's the whole point of the example.

ELLEN: What you're saying is that people have different tastes when they're spending money that comes from other people's pockets.

CASS: The key to the Ulysses and the Sirens point is that it's self-binding through politics. The question is why is it off-limits?

ELLEN: Because you are binding others.

MARK: Your rule that you can't use a redistribution system that is equally binding upon those people who want to set up that level of compulsory charity out of unpossessed holdings.

LARRY: All right, I'd like to focus on the Epstein-Kelman debate. When I first started reading Richard's stuff on strict liability a long, long time ago, I thought I was reading Richard the natural rights theorist. There were natural rights not only over one's person, but natural rights in resources out there in the world, and what I was seeing was the unpacking of what those natural rights were, including the invasion rule and all of that. I didn't think any of that would ever work for the basic Coasean reasons and because of the problem of getting from any kind of description of what you do with the resources to any kind of rights over them. In this book I still thought I was dealing with Richard in natural rights over things out there, but there were all these funny kinds of consequential arguments in the book, and I was trying to figure out how they actually fit in, whether they were makeweights, or what they had to do with the argument. We can mark this Conference as the point at which it becomes clear, that all of this, not only the natural rights stuff, has been thrown out at least as foundational. If I heard you correctly yesterday, what we have is some sort of consequentialist, and I think aggregative utilitarian, theory of the foundations for the rights. And not just with respect to rights over things out there in the world, which I think you have to have some sort of consequentialist theory about, but as I understood your dialogue with Mark in the previous session, about rights over the person as well, so that essentially there's a consequentialist foundation. The natural rights as the libertarian side of you, the past libertarian side of you, those natural rights are now strategic in the consequentialist argument, instrumental. The point Mark was making was that the things that make these rights instrumental for your collective goals are their formal side, the fact that they're expressed in a very formal structure—but as Mark points out there are lots of alternative formally realizable rules one might have—the

collective choice theory side; only a certain set of formal rules will prevent rent seeking and so forth. Let me just ask the question this way. Suppose that someone were to propose a constitutional amendment, having bought your view of the takings clause and having admitted that under the present Constitution we cannot have taxation for redistribution to the poor. Someone says, given that you're an aggregated utilitarian and that you believe in the declining marginal utility of money, etc., it would be good if we could find a bright-line rule that would not lend itself to all sorts of strategic rent seeking behavior in the legislative halls. Why shouldn't we have—why don't we constitutionalize this—some sort of bright-line rule like everybody at the bottom level should be within a certain percentage of the average per capita GNP or whatever. That would be a bright-line rule that would not lend itself to legislative manipulation and you would support it, I take it.

RICHARD: Or oppose it, because I don't believe it is. When you start to take rules like that, it seems to me that the effects on production, consumption, etc. are going to be very large, and the strategic elements are going to be highly pronounced. The theory of good taxation tries to make the system work by limiting taxation to observable income,¹⁶⁹ and the moment you start to ignore it, this shift to imputed from realized income would be more dramatic than it is today. I would prefer a constitutional rule that fixed progressivity to a rule which keeps things more contestable. But the key question is, when do you measure the definiteness of rule? Many people make Mark's mistake repeatedly. Of course, after the legislature generates a rule, you can look at it, and find it definite. In some cases it is quite specific. But now the entire law that you develop on property rights, given the way he understands government, is indefinite before passage of the act. Everything at that point is politically contestable. A minimum wage rate at zero is just fine; a minimum wage rate of \$1,000 per hour is just fine; and anything between we can battle over. The fact that you may come out with a clear new rule afterwards does not answer the point that the system of property is designed to prevent the process from starting where it now does.

Mark says I don't answer his charges, but he never once referred to the entire rent seeking question or the governmental role. The rule I would want is a flat tax, which by and large limits perverse incentives and strategic behavior better than any other. Now some strategic behaviors will exist under the flat tax, even if you constrain the expenditure side, but it will be less than under the alternative rule.

169. See Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y 49 (1986).

Therefore I would oppose any legislative choice over rates, although I would obviously find Eric's rule of 15%—which I oppose—less offensive than the current situation, where in effect 40% to 50% of the gross national product is up for grabs. Today the political process has produced this mess which goes under the name of tax reform in 1984-86.¹⁷⁰

Mark's other "simple" proposals aren't so simple, because of the administrative apparatus needed to sustain his substantive comment. Take welfare, he's wrong in that he can't constrain the numbers; he can't constrain the class of recipients; he can't restrain the types of payment. Once you get away from physical invasion rules, and keep your promise rules, you always have to develop a back-stop set of regulatory rules to insure that private individuals will not defeat the regulatory scheme. So you want to have a minimum wage rule of \$3.35 an hour. You have to have goon squads to make sure that people don't do work in private homes; you have to inspect the books to make sure they don't switch on the hours; and you have to do a 100 other kinds of things that you don't have to do with a rule which basically enforces contracts as written. We can't ignore the institutional support structure needed to keep this simple legislation in place. Why is that point not understood? The size of the *Federal Register* today is larger than the compendium of common law rules. One can think of intelligent rules, but beware of Bruce Ackerman's book¹⁷¹ as a perfect illustration of the effect interest groups would have on the whole.

TOM: Richard is requiring that our political, legal, and thought systems engage in either wishful thinking or deception. He's just trying to eliminate the dilemma of modernity by pretending it doesn't exist.

RICHARD: I recognize the transitional problem.

TOM: The "naturalness" of Adam Smith's system of natural liberty is gone now. The "naturalness" is only like the naturalness that emerged in Tom Schelling's famous experiment where he asked people to meet in New York City on a given day. In this experiment, about 80 out of 100 of them met in Grand Central Station under the clock at noon. This naturalness is a culturally established contingency that simply identifies those things which are important for solv-

170. Since the Conference, Congress has passed a tax reform bill which is better than one dared to hope, but did not go far enough. Its virtues are the simplification of brackets and removal of special preferences. These are precisely the ends that my constitutional analysis achieves, with greater simplicity and clarity, greater durability, and far lower costs. Tax Reform Act of 1986, Pub. L. 99-514 (CCH) (to be codified in scattered sections of 26 U.S.C.).

171. B. ACKERMAN, *CLEAN COAL/DIRTY AIR* (1981).

ing coordination problems. But the naturalness people see in rules that prevent people from grabbing their neighbor's goods and smashing people up, is because they think the rules are right, not because they think they're well recognized. I understand your point that people recognize these rules better than the rules of statute books, the welfare system, or the tax code. That's a very important point, but these rules are totally culturally contingent, and continuing to use the pie metaphor is totally deceptive at that point. It's totally deceptive because it assumes that there is some rightful distribution at the beginning which the pro rata rule then allows to be maintained. This gives folks a platonic lie.

BRUCE: What I took to be the central point, or at least a central point, of Mark's paper hasn't been mentioned. Richard thinks that it is very important—although in utilitarian terms I don't know why he thinks it's so important—that people shouldn't have a legal obligation to be good samaritans. I agree, but for a reason he wouldn't approve of.

Let's imagine I'm walking along the street and I see someone faint. The reason why I don't have an obligation to stop what I'm doing and to run over and assist is because I know that in fifteen seconds an ambulance will arrive. But if someone told me that there may not be an ambulance coming because the state is no longer in the ambulance provision business, then I do think that I have an obligation to help this poor guy out. Given that there may or may not be an ambulance coming, it is awfully arbitrary for the tax bearer to be the guy who happens to be walking down the street. Maybe I'm going to be taxed very often because I'm in New York City and maybe you folks here in California will be hit less often because you never walk at all. It would be fairer for us to discharge our obligation by chipping in, by being forced to pay our tax share for the ambulance, but given that that isn't the case, I must provide assistance. I suspect that you state of nature folk only think it's obvious that you don't have to be a good samaritan only because you live in a world where the government provides ambulances, and so there is no obligation to provide assistance. Similarly, I agree that I don't have an obligation to stop a thief who is about to charge through this window. But I could very well think differently if there were no police force now being paid from public funds. It's the same sort of thing; you partisans of the state of nature begin with intuitions that are shaped by the existence of a state handling public services in a fairer way than the ad hoc imposition of good samaritanship. But then you turn these intuitions on their head using them as the foundation of a state of nature myth.

RICHARD: That would be a bad argument.

BRUCE: That is a bad argument. Well, maybe I've misunderstood why it isn't yours?

MARK: The argument that I interpret to represent the arguments for not having an individual duty to that person—even if valid in some hypothetical state of nature—tend to be inapplicable for the question of whether there is this taxation duty to feed the kid. What happens is a false conflict. A couple of things happen—it's a reification of two cases of informative duty, and therefore arguments applicable to one are deemed applicable to the other. For instance, the difficulty of drawing the rules as to how many strangers you have to help, how much aid it would have to be, applicable to the individual case, is not applicable to what your tax paying duties are. That's the reification argument. The other problem is the dyadic legal tradition which tries to mellow all cultural relations as if they were law suits, i.e., to say, if there's a hungry kid you ought to have a defendant—he ought to be the plaintiff in order to be defended—also seems to me simply a legalist error.

BRUCE: Well, I suppose that I don't quite stand corrected. That is to say, I'm proud of the assertion I made. I've given an example of an argument, familiar in this literature, which Richard still clings to though I agree it suits awkwardly with his new found belief in utilitarianism.

ERIC: The psychological picture you present might be true of somebody; I don't know. If I question myself, and I make these arguments, I don't believe that my initial intuition depends upon general expectations about ambulances. You may think that I'm lying—I don't know—but I'm telling you this. Secondly, only speaking for myself or other people I have questioned closely about their motives and arguments, the intuition about the particular case does not play a dominant role in forming the conclusion. It may be worse from your point of view, but a general theory of rights and a theory about differences between acts and omissions, and this causal theory, all play a role that may be confused. But there is a whole theoretical background here which might . . .

BRUCE: You're talking about the trolley problem as if you could gain a purchase . . .

ERIC: You're sure gaining a purchase and using it as your . . .

BRUCE: Elaborate "theory." I could certainly understand and admire people who develop strong and elaborate theories about action, responsibility, and all of this kind of stuff. But that's not the spirit of the trolley problem. The spirit of the trolley problem is this

kind of mistake in which we begin with these intuitions about particular cases in which the state isn't involved. Then, without asking whether these very intuitions have been shaped by our life in a state-organized society, we use them to do the work of political philosophy. I quite agree that if we are not going to make anything stand on these intuitions, then let's just forget problems like the trolley problem. This seems just what you're doing.

ERIC: You misperceive the whole enterprise. It's precisely because one is puzzled about the cases. One may have intuitions, and one's not sure whether they are appropriate. One has certain other intuitions about certain other sorts of cases, and wants to know whether this can be fit into a reasonable theoretical structure which has some sort of independent plausibility. We can all talk about reflective equilibrium. But what you are suggesting—that what we really should do is to talk about people's psychological processes when they're building these arguments and dispense with considering whether the conclusions are correct or not—is a really dangerous thing.

BRUCE: You and I are in complete agreement. I don't know whether Richard is also in agreement, because I do believe that until recently he has been building on the intuition about the good samaritan.

ERIC: Well something can be built on that intuition if then you have other reasons for thinking that the intuition can be fortified by theory and all this sort of thing. I thought Mark's point even more simply denies the methodological individualism.

PEGGY: In clarifying what you said yesterday, you said today that there are natural rights because it's a simple solution that has undying instrumental value. What you also said in response to Mark was that he was mistaken to say that there could be simple or formally realizable legislative rules, because what you're talking about are prepolitical rules, and this is a political rule. In a way then, it's confusing that you sometimes assume that the common law is prepolitical. You ought to say, "I'm talking about prepolitical rules." The position that you've arrived at is this: you're justifying, asserting, creating, or choosing prepolitical rules, one, because of their simplicity, and two, because of their instrumental value given human nature in the circumstances of justice.

Now, look where you are. Forget about Locke. Forget him. You have reinvented Hume;¹⁷² perfectly. Given that you've

172. D. HUME, *A TREATISE OF HUMAN NATURE* pt. II, §§ 1-3 (Selby-Bigge 1978) (1740).

reinvented Hume, I want to make another plea for theory. It seems to me that's been my role here. I've made a plea for language, theory, and jurisprudence, and then I made a plea for meta-ethics. Now I want to make a plea for the theory of human nature. If you're going to be Hume—assuming in a nonmystical but instrumentally frozen way that given the circumstances of justice and human nature you will have certain prepolitical rules—you have to have the liberal individualist, private prepolitical person. This is what everybody is saying. You can't be an Aristotelian; you can't be some other kind of person, even a Hobbesian. So I think that you should talk about this, but not now; in your next book.

JULES: I'm just asking for clarification. If the basic foundation is a form of utilitarianism, I want to go back to the early article on strict liability.¹⁷³ In the case against the good samaritan, I thought the argument in the first article was that if you don't take any action, then you can't be held liable, even if you're the cheapest cost avoider, or the wealth maximizer, or whatever the fashionable phrases are. That is, even if the utility maximizing rule would be the rule which imposes liability. Is it then an empirical claim that as a matter of fact the good samaritan rule is not a utility maximizing rule? That's basically the question. The second part of the question then becomes, is the theory of responsibility that you develop based on this notion of invasion and causation—also a theory which is to be justified on its utility maximizing characteristics? I ask this because that would be a much more difficult case to make. You have the natural rights underpinning, the bright lines and the simplicity going for it. The argument you can make for it seems a little clearer and easier, whether or not I agree with it. You always contrasted that with the utility maximizing argument, where whatever the utility maximizing virtues might be, they don't go through because of the natural rights story, the invasion principle and the theory of responsibility. But if they are all now to be derived from the principle of utility at some level, I want a general argument here to the effect that you can have it both ways.

RICHARD: Let me explain the genesis of this problem, how it is I think the early article¹⁷⁴ to some extent unravelled, and what can be done to resurrect it. I said yesterday that in some sense I looked at that article chronologically, as a stage of development rather than as a final resting place. When I wrote the nuisance paper,¹⁷⁵ I wanted to show those Coaseans that they don't understand how transactions

173. Epstein, *Strict Liability*, *supra* note 132.

174. *See id.*

175. Epstein, *Nuisance Law*, *supra* note 136.

costs really influence the common law. So I took a set of rules in which transactions costs played a dominant role which they never understood. Then a lot of odd rules, like the locality rule, live and let live rule, etc., seemed to fit into a pattern best explained by the need to soften the hard edge trespassory invasion rules—that is, to handle cases where return classes of invasions were mutually beneficial. Accordingly, I developed a four part test to relax the invasion rule.¹⁷⁶ I thought about it for a while, and I said, “What if I apply this approach to the good samaritan issue?” I wrote a long section on it in that paper. Dick Posner looked at that section and said: “Why in heaven’s name are you putting this in?” This is my friend, the editor. He crossed the whole thing out, and stated that the paper was about nuisance laws, not about general political theory. So the section went out. The more I thought about it, the more I became convinced that my earlier argument in some fundamental sense was wrong about the good samaritan. Stated otherwise, the only way that conclusion could be right would be if somehow or other I could give a general utilitarian justification under the four-part test for the categorical rule, for the natural rights position. Where you take low cost to one party, high benefits to the other party, why don’t you do something about it? So the guidelines of the world are thereby diminished.

Over the years I’ve thought about affirmative duties and I’ve arrived at different interpretations (I’ve yet to write about them but they’re coming). There are a number of cases in the literature where the imposition of affirmative duties seems to be enormously stable and highly uncontroversial, e.g., to start with something which I didn’t get quite right in the nuisance paper¹⁷⁷—suppose someone has a tree on his land, and it falls over and knocks somebody else down. The question is whether or not this fellow is going to be responsible. My first instinct, and that of many people, is going to be to try to squeeze this case back into the act requirement. Did he plant the tree? Did he trim it so it was out of balance? Did he cut out ground under the root? The first answer is, if he did any of those things, then it’s an easy case for liability.

The problem with this approach arises when none of these things were done. With an on-and-off invasion test, there’s no liability. But you look at the cases and there’s a universal liability of owners whose trees just fall down and damage someone else’s property.¹⁷⁸ There are affirmative duties of care.

176. *Id.* at 75-76.

177. *Id.* at 54-55.

178. At least for urban owners, where the risks are greater.

Then I say to myself, "Now look, Epstein, you're worried about political chaos: is this the place where the universe is broken down?" It's a bit like the discharge case in bankruptcy. The answer is no, so you have to find an explanation. My explanation is a straight transactions cost argument. The affirmative duty makes sense if there's a single person whom you know the duty is imposed upon. There is an answer to what I call the "matching" problem. The owner of the tree is subject to the duty, and you don't face the problems that arise with the good samaritan case of rescuing the stranger. Who is going to make the rescue when many people are conceivable candidates, some near, some far, each with his own distinct costs? With the tree case, you can make a categorical judgment—this is the place for the owner's affirmative duty—without having to litigate on a case-by-case basis whether or not we fall into the class of easy rescue and without having to worry seriously about any perverse effects of the rule. A similar analysis applies to the rule which says if you leave your keys in the car, and somebody else drives it away you're going to be held responsible for subsequent damage.¹⁷⁹ All of those rules seem to have a kind of real solidity about them, because the affirmative duty is focused on an easily identified defendant.

JULES: Would you answer that you now think that the good samaritan rules are *not* wealth maximizing?

RICHARD: It's not—I mean that the generalized duty of rescue, it seems to me, is not. But oddly enough, as Ellen talked about Bruce's illustration, one of the things that I have to contend with, again being pushed from the right by Posner, is this: You're taking a strong autonomy-based stand against the alternative position which doesn't apply a good samaritan rescue rule, but adopts a rule under which anybody who rescues somebody else in need recovers *X* amount of dollars: a restitution theory. A strong libertarian would have to treat both cases the same, for restitution involves a forced exchange and is therefore as much an offense to the idea of individual autonomy as the duty to rescue. Yet as Bruce says, to some extent it's crazy.

Why is it crazy? Just think of two parts. One of the problems with the good samaritan rule is that you don't know who will be bound in a particular case. Unlike the invasion test, you don't have a natural limitation which targets the rule. It's a very serious problem if you're actually trying to implement the duty. With the restitution rule you do have the natural boundary line—it's the guy who con-

179. See various cases and circumstances in R. EPSTEIN, C. GREGORY & H. KALVEN, JR., *supra* note 111, at 215-21.

ferred the benefit who gets the reward. In addition, you have a low cost, small damage solution with the cash running in the opposite direction. People become absolutely nonplussed by the prospect of being made a good samaritan. You see somebody on the street; you don't know if it's a set-up; you're nervous; you don't know anything; you don't rescue. Later somebody is going to say it's a duty of easy rescue case, the damage verdict is \$1,000,000. That's exactly what the damages would have been if you had run the plaintiff down with a truck. When I speak to trial lawyers, they say that they don't want to touch a rescue case like that. So the rejection of a duty of rescue, but the recognition of rights to restitution, looks like a wealth maximization rule, but one which works on broad categories.

JULES: What about the general theory of responsibility?

RICHARD: It all comes down to the same simple premise. I think the whole ball of wax is such that you can explain it and, in answer to Bruce's point, the collectivization . . .

JULES: There isn't a general theory of responsibility. There are rules governing what you would be liable for on the basis of some views about what would be utility maximizing under certain sets of circumstances, but those rules themselves are not supported by an appeal to a principle of moral responsibility which is then imbedded in the law. This is very different from the way it used to go.

RICHARD: That's right. And I think it's better in one sense. Once you get the basic rules in place, the theory of moral responsibility says that those people who wish to deviate from the rules are substance wrongdoers: therefore we can morally go against them. In this sense Guido Calabresi¹⁸⁰ had a lot of influence on me. His explanation for what makes deliberate harms special ran like this. If someone wants to set himself up against the normative order, and try to bring it down, then that is the one thing no one is allowed to do, and which calls for a firm collective response.

JULES: This is good for me because I'm now getting closer and closer to being the only person who thinks about torts in terms of the theory of justice.

CASS: I have some comments which are related, and I also want to shift to Mark on something that I'm not clear on. The problems with a preference aggregating utilitarian approach to takings are fourfold. The first is that a system of preference aggregation needs independent justification, none of which is furnished in the book. It needs an independent justification since its foundations have

180. See Calabresi & Melamed, *supra* note 127; Calabresi & Klevorik, *supra* note 129.

been riddled, by among other things, objections based on the phenomenon of adaptive preferences. You can't without circularity justify legal rules by reference to preferences which derive from legal rules.

The second problem is that preference aggregating utilitarianism hardly compels the series of results in this book. Richard's argument that they do is very complicated, and his argument is hardly logically compelled. The third problem, which should be a very familiar one, is the problem of the initial setting of entitlements. Preference aggregating utilitarianism can't get you to the initial distribution of rights, which seems to be the foundation for the system.

The fourth problem is that the book continually reverts, and Richard has frequently reverted today, to the language and baggage of rights in the defense of the system. And that's why the book has a lot of appeal for the libertarians. All of that has generated the emotional power of the arguments. Now, when Richard refers to notions of responsibility in causation, the listener isn't thinking about preference aggregating utilitarianism, but of theories of rights. So those are four really very powerful problems, and that's just by way of summary.

Now, what I found most striking about Mark's paper,¹⁸¹ which hasn't come up, was the suggestion that there is a little Epstein in all of us. That's absolutely true in the following sense. When one gives to charity, one usually feels good about oneself, and one feels entitled to feel good about oneself, in a way that's very different from how one feels when one doesn't punch. There's a real difference in those two attitudes. What I want to ask you is whether you think there's nothing to that instinct, what a system that abandoned that instinct would look like, etc. The core instinct, the Lockean instinct, is very deeply imbedded in probably everyone in this room; even in you. The question is what follows from that?

MARK: I take that to be a complicated affect, for I am not the socio-biologist Richard is, and I don't think that that is hard line. My claim at the end of the paper is that the distinction he draws is partly a result of legalism. That is to say, it is one of the perverse results of five hundred years of natural rights theory sustained in part by legalist misconceptions. Although there always will be a separate domain for something like charity, the incredible division we imagine between what I'd call the rights violator who doesn't participate in the redistributive scheme, and those who do more traditional harm, essentially supports the place of the relatively well off and their essential moral smugness. I have no long term transformational theory about what

181. See Kelman, *supra* note 113.

the residual role of charity will be if the omission/commission line disintegrates in the face of the growing awareness that is sustained through dyadic confusion and reification.

BRUCE: I am mystified by this last discussion about good samaritans and its impact on the larger argument in the book. I thought that the larger argument is that the state can't assume an obligation which private individuals can't assert against one another. Now, if it is the case that individuals can call on others to be good samaritans, that means that it's also all right for the state to do that under Richard's principles. Moreover, Richard recognizes transactions cost reduction as an entirely legitimate function for the government. So let's use that principle in the context of emergency aid. So far as people and ambulances are concerned, it's obvious that it would be inefficient just to require the guy who happens to be right next to the starving person to provide assistance. That'll just create, in a very bad way, what Richard has emphasized throughout this meeting—incentives on people not to get close to potentially starving people. That's very inefficient, so what we should do is impose a tax on them so they can get close to everybody when it's efficient to do so. As soon as the good samaritan foundation fails, then the bright line against redistribution also fails.

RICHARD: I did state in the book that I thought that the duty of easy rescue is the kind of tort modification to which there is no serious constitutional objection (p. 242). The reason I did so is that I don't see in that limited duty any rent seeking problem or any substantial distributive effect. But Mark is basically raising the same problem with respect to aggregation as Steve Munzer raised yesterday in connection with the welfare situation with its whole set of free-rider problems and coercion problems and matching problems that we can get rid of through state intervention. You're trading those difficulties in now for the perils of public enforcement. I thought I avoided that trap by indicating my mild sympathy with the proposition that charitable deductions—which allow you, as it were, to spend the money of other individuals, so long as you're prepared to pay a huge chunk on your own—were acceptable. What bothers me most about Mark's argument is that he seems to think that the aggregation move offers more powerful justifications in unknown contexts than in dealing with the common poor problem, which you can implicitly find in the charitable situation. If you are serious about removing all constraints from the state power which are based upon that first cut of property rights, which my utilitarianism generates, then you don't have any bulwark against people who will do all sorts of crazy and perverse and evil

things in the name of the state. By moving away from the common pool freeloader problems, which I admit to be a serious issue in the charity question, you can open the door to all sorts of terrible confiscation in the name of wealth redistribution. That is the terrible problem one must face in trying to abandon the Lockean starting point.

I think this all ties in with a mistake that Cass made this morning about the nature of governments and official deliberation. His argument was that deliberation is a motive transcendent, and he emphasized the defects of the agency theory of government—that is, by getting everybody together, people can now interact, and do things to one another, which they cannot derive from the previous rights process. But this misunderstands what deliberation is about. Let's take the private analogy in the law of principal and agent. I say to Frank, "Go down to the corner and buy me a pack of cigarettes, and use your dime, and come back." Frank does it because I don't want him to exercise any discretion on my behalf. On the other hand, we could form a group of shareholders to organize a corporation, to set up a board of directors. We want them to run a business with our investment capital. One weakness of Mark's paper is that he thinks that people just give the money to others in the group without any kind of formal constraints. Yet there has never been a corporation in the history of mankind formed that way. One of the restraints that you would place upon that board is the duty to deliberate. The agency theory says, "I want you guys to have charge of my money, but I'm not going to watch you, all the time. Still I want to make sure that you talk these things out beforehand, and if you don't do it you're in breach."

There is nothing about the agency theory of government which insists that there's only one current model of agency relationship. The Madisonian conception seems to say that we want our government to be a board of directors. But there's a hitch: the board of directors by this conception is going to handle the capital which has been invested in the firm. I don't want these directors to go around saying that now that I am a shareholder in the firm, they are going to regulate each and every aspect of my own private life. The deliberative function of this board of directors does not extend to their telling me whether or not I, its shareholder, should be allowed to marry, whether or not I should be allowed to discriminate in private affairs unrelated to the corporation.

The theory of the state that I put forward is one which says that there are certain intractable public goods problems, for which we have to find answers with collective expenditures. We place the

money there; we know the rent seeking problem exists; we know that the takings clause is not going to be able to solve it in any complete formal way. We now switch to deliberation, but we want the deliberation within the sphere of activities which is previously denominated as collective. We don't want the theory of deliberation to be so strong and attractive that we don't have to worry about that jurisdictional delineation to begin with. The standard theory of nonexcludable goods is the theory which one wants to use to determine the domain of collective deliberation. Mark is trying to make an argument that, given the free-rider problem, charity may come within that domain. On that question there may be better solutions and strong counter arguments, but at least you don't want the theory of deliberation to become so powerful and persuasive that it let's you talk about using government to shape preferences. What you want it to do is to handle only these narrow points. Why is that? Because we are enormously afraid of what will happen when the other side gains control, and we have a sense that private people know their own preferences well enough most the time, that it is extraordinarily dangerous to allow anybody to override them. Our vision of government—my vision of government—is this: I'm the limited partner, and I put money in that real estate. I want somebody else to manage it—I don't want to be bothered. Cass always puts himself in the position of the general partner. And that sense is the one which I think makes us so radically different from one another. And if you are general partner I may go along, but . . .

CASS: What is a contingent fact?

RICHARD: The contingent arguments, as far as I'm concerned, simply mean it's not a necessary truth. It doesn't mean, however, that it's a question on which there's a lot of doubt or uncertainty. There are many so-called contingent events which are governed by very strong laws and which have a great deal of regularity about them.

CASS: Does any law that fits within the categories I've described maximize welfare?

RICHARD: I would be extraordinarily skeptical with respect to the whole lot of them. The only ones that come close to being terribly troublesome are diseases which impair cognitive powers; the whole civil commitment question for deranged people or the treatment of anorexic people are borderline cases. Drugs and hallucinogens also raise these issues.

The factual questions are just not as close as you want to believe they are. What you have done, in effect, is to look only at one element. You've looked at preferences upon preferences, after you've

put yourself in charge. You've ignored the entire history of regulatory failure, which points the opposite way, because you think you could have done it better. The Gary Becker model on competition,¹⁸² is one which says that it's going to be very hard to maintain racial discrimination because you have to pay the price of those preferences yourself. That is not to say there will be zero discrimination in that kind of a world. But it's strong enough to say that creating a monopoly on taste with respect to markets is the kind of collective behavior by which you ought to be enormously, enormously troubled. I am—Bruce noted my view on the discrimination laws—very hostile to them. I think I've stated that publicly elsewhere. The only reason I have sympathy for them is because people screwed discrimination up so badly in the public sector.

CASS: But the laws in question wouldn't be a taking if they maximized utility?

RICHARD: Because there would be some net benefit which would go in the opposite direction—that is, to those so restricted.

CASS: It's an odd way to put that.

RICHARD: No it's not; it's the right way to put it because it happens that you want to constantly make sure that the government is swimming upstream. The theory of limited government says that anytime state officials do something, the burden of justification is placed on them. Your problem is that you have government going full speed downstream. You just won't be able to constrain the size of the state.

BRUCE: I don't think that I heard Richard answer my question. I take the fundamental principle in the beginning of his book to be that the state can do anything which a private individual has a right to demand of another private individual. Now that we understand that private individuals do have a right to demand—under suitable transactional assumptions—good samaritan acts from other individuals, it then follows from your fundamental principle that the state may also act for redistributive purposes. Now what is wrong with that?

RICHARD: The case of easy rescue is something that does come out of the first approximation of libertarian right. But it is not redistributive, and it should not destabilize any system of rights. Put otherwise, if you're going to justify easy rescue, you're going to have to justify it on Paretian grounds. But Mark is trying—he may be right, he may be wrong—to justify it on aggregate grounds. As an

182. G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

abstract matter, I start life as an aggregate utilitarian, but then move to Paretian grounds because I think the compensation limitation is the best single barrier which one could have to control state misconduct. Most of the cases of government action that frighten me are those where the definiteness element is lost, even though the rule turns out to be clear. But a statute of limitations, on my world of taking rules, is not unconstitutional. If you ask me, whether I'd rather have the principle of laches or a three year period for contracts, and a one year for tort, I'd like the latter. I think that the clear limitation rule creates mutual benefits. When I talked about the *ad coleum* rule (pp. 63-64), I would never hold that a statute which limits the area of invasive actionable trespasses at 1500 feet, while leaving the upper airspace free, is unconstitutional. That rule gives a bright line which squares with a strong intuition, and what you gain by way of clarity more than offsets the loss of basic property rights in upper airspace.

BRUCE: So what I hear you saying then is, "Yes it does follow logically that if it's appropriate to impose certain easy rescue cases on the individual level, then the state is empowered to act." It is only that your view of the facts would not lead you to justify state samaritanship very often.

RICHARD: But it's a constitutional view of the facts that counts in this case. The mechanisms which I am working with are the kinds of facts that I think everyone behind the veil of ignorance knows. They are scarcity, egoism, and the idea that contestable rights within the political arena will yield negative sum games. Those are the only facts that I need in order to organize my state. If you don't think they're facts, which of them do you think is wrong and why? Do you deny scarcity? Do you deny self-interest? Do you deny . . .

BRUCE: It's the selection, Richard.

RICHARD: Because those are the basics.

SPEAKER: Rich, I want to ask just one question for clarification. Something slipped by. I didn't go back and read the book after you announced that you were a utilitarian after all. And I didn't go back and look at the agency argument for why the state has no more rights than individuals (pp. 12-13). That argument went through, I assume, a sort of natural rights background. In thirty seconds please, how does it go from the standpoint of a utilitarian?

RICHARD: Great question, for which there's a good answer. Let me give you in the following way the Rawlsian theory,¹⁸³ which

183. J. RAWLS, A THEORY OF JUSTICE (1973).

takes redistribution as a "chain connectedness" principle. Redistribution becomes an ultimate moral good, so long as you keep everybody in their relative wealth position as you push them closer together.

My argument is basically as follows: If you allow the state to take this ordinary distribution and to reverse it in any particular way, that necessarily creates a zone of indefiniteness in the outside ring. Therefore it introduces the rent seeking problem over that particular ring. You must have a strict rule which divides the surplus in some determinate fashion, and which preserves the rank order hierarchy. In light of the administrative arguments that I made earlier in answer to Jules, it turns out that the pro rata division is the only rule which controls rent seeking at an acceptable cost. Once you get rid of the agency theory, you can't stop the game playing, therefore what is treated as an independent moral norm, traditionally speaking, becomes also a derivable conclusion from the basic utilitarian theory.

Let me make it clear, I may be wrong—some people have said I'm crazy—but the objective of the enterprise is to prove the following: It is to take facts which are so general and so elemental that they can't be denied—scarcity, self-interest, and the rent seeking problem—to use those and only those, first to derive the entire set of human social relations, and then to say that we happened to walk into that answer when we drafted the Constitution. It's a very audacious enterprise, but thus far I feel quite comfortable with it because everything fits into this theory better than with any alternatives.

JULES: I just want to comment on your statement about facts so elemental they cannot be denied; so obvious that they must be enshrined as constitutional limits on what the society is permitted to believe, short of amending the Constitution. I want to use the setting of facts upon which your book rests, not the facts you just described. Let me just cite two of them. One is that transfer payments are rarely a suitable means to counteract violence. This is on page 316. Transfer payments are best justified by showing a clear and present danger of social unrest. I don't accept that as a fact so elemental it cannot be denied. I don't accept that it's a fact that cannot be repudiated. Much of American government in the last half century has rested upon an assumption about facts, and they are political facts. That is how you deal with dissatisfaction.

A second "fact" is your minimum wage and freedom of contract argument (pp. 279-80). I might well share with you a view that the minimum wage is a bad idea. I don't know. But to say these are facts so elemental they cannot be denied, and that the society must organize itself so as to be disabled constitutionally from rejecting these

facts, just seems to me—I'm sorry—to be nonsense. I just don't know how you can assert this as if these were not the most controversial issues. I tried to say in my paper that these are the very things around which the political process in America revolves. They are the most controversial things, they are the very things we fight about, and you, Richard Epstein, are going to somehow make them facts so elemental they can't be denied. That's why I said on paper that you repudiate the political process, and I just don't understand that.

RICHARD: It does not in effect say I repudiate the political process. I mean that's the zero government position. It may be best, but not every deviation from it is fatal.

JULES: I just want to talk about two related points. One point is the "elemental facts"; scarcity, self-interest, and the rent seeking problem. Even if they were self-evident, there would be an enormous dispute about their importance, significance, and degree. Suppose we recognize that rent seeking is a problem. It's a fact of life that people will be rent seekers. Does it follow that as soon as we have institutions which permit a sphere of rent seeking, that everything unravels? It's not only that you believe that rent seeking is a fact, and that you believe a consequence of that fact is the unravelling of society; you also believe that's self-evident, not controversial. That's number one. Number two is self-interest, a very complicated notion. Self-interest is a very broad notion that isn't reducible merely to interest one might have about oneself. It's not incompatible, for example, with people being interdependent, having interdependent utility functions, and so on. To say that it's a brute fact that is undeniable doesn't give us a lot of content just yet, until we fill it in with a little more detail. The extent of scarcity is also a relevant consideration.

That's just one set of things I want to say. The second thing is that you want to introduce Paretianism as a constraint on utilitarianism on the one hand, while on the other hand, a lot of what motivates the particular choice of rules are transactions cost problems. If you're going to take transactions cost problems seriously, then why not use hypothetical or potential-Paretianism, and then you will be working from the sphere of, roughly, Kaldor-Hicks¹⁸⁴ and still be constrained in some way. You're being constrained on the one hand, and sensitive to what you take to be so important; that is, the transactions cost problem.

RICHARD: Well, the first point is how to answer the question of what's at stake here. I would not want to make the claim—I think

184. See N. KALDOR, *THE SCOURGE OF MONETARISM* 17-38 (1982).

it would be absurd to make the claim—that the only way in which you could operate a society without having the whole thing disintegrate is to adopt the kinds of principles I support. Anyone who says that is wrong. The issue we're debating, of course, is *optimal* government. If the question is simply trying to find out what kinds of societies can survive, I will give you a clear answer. I think most forms of social democratic societies are going to be relatively stable over the long haul. I think, however, that they will create many more tensions, such as we now have over our own fiscal constitution, than those which operate on my eminent domain principles. So my argument is for optimality; my argument is not for survivability. It would be crazy for me to come into this room with our general level of prosperity and say, "Ah-hah, the reason we're at war with one another is that my interpretation of the eminent domain clause is being rejected throughout the land."

On the other hand, when one thinks about racial segregation and the deference to political process, we as a nation have done things which were in total violation of every principle I have ever believed in. Deference led to the kinds of misbehavior I fear most, which led to a national crisis, and which did come very close to the line between war and peace. There is error, I think, with Joe's position, that all contested political facts have to be resolved within the political framework. I think the courts were right to intervene emphatically in the segregation cases for more powerful reasons than those cases ever stated.

Second, self-interest. You're right, Jules, it's an extremely complicated account, and the reason is inclusive fitness in which interdependent utility functions work through the genes and heavily influence the way people behave. But the interesting question is that the interdependency would be no problem if it turned out that your utility yielded equal value to me, or my utility to you, no matter who you were or where you stood. What the interdependence—that is, what the more complex self-interest function says, is that somebody in the political sphere may want to benefit *A*, *B*, *C* and *D*; yet *C* and *D* may receive lower proportions than *A* and *B*. Those very complex original arrays of shared benefits suggest that any political coalition is going to be extremely complicated. But that problem is not going to make their life easy; it's going to make coalitions more difficult. The more realistic assumptions about self-interest that you build into rent seeking models, the more difficult the rent seeking problem turns out to become, precisely because we're going to have all these subcoalitions which then work in the larger arena.

Let me mention the standard bilateral monopoly problem with indefinite rights. It's known as litigation. By the standard analysis, you try to figure out the minimum demanded and the maximum offered, and then see the amount of money that's going to be spent in securing or resisting transfer. That is basically a two party version of the situation which develops when legislation makes rights indefinite. The only upper bound that you can get on transfer expenditures—and it's a contingent one at that—is the total amount of the stakes. That is, when you take the standard litigation model with noncooperative game theory, the parties will spend up to the total stakes but not beyond. Still the moment you introduce the possibility of strategic behavior, even that upper bound constraint is not fully secure.

Well I don't see how, where the game gets more complicated, you think that the amount of wealth dissipated through the transfer system is low. The litigation model gives rise to no optimism in the straight political transfers. My theory doesn't depend on what Mark Kelman wants, or what Eric Mack wants, or what Cass Sunstein wants. All it does is postulate differences in belief and then reach the generative result.

Now why don't we use Kaldor-Hicks? Well, in effect Kaldor-Hicks is a formula which, I think, may be destructive of the welfare system. It's an extraordinarily conservative system.

JULES: You mean the welfare system like welfare, or like aggregate welfare?

RICHARD: No, like welfare, transfer payments. I don't like Kaldor-Hicks. I want to explain why. It involves hypothetical compensation, and thus harkens to the reasons I don't like the negligence rule. The negligence rule is a hypothetical compensation rule by which you're trying, after the fact, to reconstruct whether or not certain precautions are cost-justified. A simple compensation rule, in effect, dominates that rule because of the way it influences the process.

CASS: Unless there's a transaction cost.

RICHARD: And that's the point of implicit in-kind compensation.

CASS: No, but your original strict liability was a rights piece.

RICHARD: Cass, I understand that there's a contribution in that article. It's the way in which it organized the consequences starting from the autonomy premise. It did explain proximate causation in plausible ways even if you don't have a deep theory of rights. It's not a bad thing to have done.

CASS: But you say that negligence, as opposed to strict liability, is constitutional, and that there isn't a taking clause problem with

negligence. Regarding Kaldor-Hicks, if your objections are only those you have to negligence, why isn't a negligence standard constitutional as a taking?

RICHARD: I guess it's because at this point I fear the over-reaching problem. Oddly enough, once I changed the basic framework, my preferences for strict liability have become stronger. The reason I don't think they're of constitutional dimension—it may sound odd that I could be so deferential here—is that there are just too many arguments on the other side, made by too many people, for whom the redistributive element has not been dominant. I don't see any point to fight that tradition. On balance, if the negligence system is constrained by the physical invasion requirement, then it involves one of the reasonable choice models that Tom talks about.

JULES: I really don't understand, and I feel a filibuster coming and I definitely want to cut it off now because I think I have you. Your view can't be that Kaldor-Hicks throws out the welfare system, and in deference, that Tom is a very bright and nice guy. It can't be that.

RICHARD: No I didn't say that.

JULES: I'm talking Paretianism versus Kaldor-Hicks. I'm not talking "be nice" to Tom versus "not be nice" to Tom. What I'm saying is that you thought that the original virtue of Paretianism, as opposed to unrestricted utilitarianism, is that it provided a constraint on the extent to which one could just go in and redistribute for the purposes of increasing net welfare; requiring *actual* compensation would do that. Also, however, requiring that people make actual compensation would have the additional disadvantage of raising the transaction cost problem. So let's forget the problem of being nice to Tom and let's answer this question.

RICHARD: What is the question?

JULES: If the goal of Paretianism is to restrict utilitarianism in a way that makes institutions sensitive, it constrains them in a certain way—that is, they just can't redistribute wealth when there's a net gain in welfare. They have to be able to compensate losers. Now Kaldor-Hicks, whatever its internal logical problems may be, is also a constraint on utility maximization. The constraint gets spelled out in terms of being *able* to compensate. The difference between it as a theory and Paretianism as a theory is that Kaldor-Hicks is justified because it is transaction cost-saving, or in light of transaction costs, it is impossible to go ahead and compensate everybody. It seems to me that you take the transaction cost argument extremely seriously.

RICHARD: You're damn right I do.

JULES: Now if I can both function to constrain utilitarianism and to take the transaction cost problem seriously, wouldn't that dominate in the game-theoretic sense that we talk about loosely here? That is my question—not negligence versus strict liability. I want to go right into abstraction.

RICHARD: The reason that one gets extraordinarily worried about the Kaldor-Hicks formula is that it avoids the need for the actual payment of compensation when the government takes property rights. That's an argument which, within the framework of the book, addresses the explicit compensation requirement. Explicit compensation cannot be something which you're going to provide every time you pass general legislation of one sort or another. Whenever you pass a statute of limitations or impose a tax, you cannot make validity contingent upon an explicit compensation system. Money will run round in an indefinite circle.

The theory of implicit in-kind compensation says there are lots of occasions where we know from the form of the regulation itself that the compensation will be necessarily provided, to the extent that human institutions are possible. It turns out you can turn the Kaldor-Hicks formula on its head. The Pareto formula turns out to be cost-minimizing, on the transactions cost ground that was originally used to justify Kaldor-Hicks. The whole point about looking at these general regulations in systematic fashion is to avoid one of the usual mistakes in the eminent domain literature. The standard view looked only at general legislation from one side of the transaction. It took the perspective of the guy whose land happened to be taken, while ignoring the benefit side. My sense about it is that once you look at both sides of the transaction simultaneously, then you get more accurate matching of costs and benefits under the strict Paretian norms, that is by doing nothing, rather than by doing something for the taxpayers at large. To turn your phrase around, the Pareto norm provides the needed compensation in all cases to constrain the political process, and eliminates as well the need to incur high transaction costs. Because Pareto is better on both counts, then strictly in game theoretical terms, it dominates Kaldor-Hicks.

In chapter ten, where I talked about taking land for a road, the issue is whose land you take when all plots are perfectly homogeneous. My basic argument is that if you have perfect political processes, you would never have to worry about the question of compensation no matter what the location of that road. But it's those political risks that drive the whole system: it's risk aversion and political corruption. So I'm going back to my original point. If my position is cor-

rect, then its stupendous arrogance is that the two most elemental factors now organize the world from two party transactions to N party transactions, where the only difficulty in generalization turns out to be the measurement problems with N person takings. I admit it's a very audacious claim.

TOM: My point was partly taken care of by Richard's concession in the last talk that he wasn't really saying that the Hobbesian war of all against all would ensue; that he didn't mean it when he said there wasn't a stable equilibrium; and that everything hasn't unraveled because of welfare (tr. 193-94). The point I was trying to get at earlier was that the problem with libertarianism for the rest of us is the notion that all coercive power is exercised by states. There are other centers of power that hurt people—that have to be controlled—particularly, large economic units that arise naturally out of free contract and traditional acquisition rules. The response is that maybe that's true to some degree—though some people would deny it altogether—but the 20th century teaches us through Hitler and Stalin, for example, that the most, the real horrendous human misery is caused by states, not by corporations or private centers of economic power. That's why you have to draw a sharp public-private line.

Nevertheless, the point I want to make is that in the stable social democratic states, decent human relations are maintained and human misery is not widespread. I realize that rights violations go on from the libertarian point of view in those states, but that's almost my point. It isn't that bad. There can be an awful lot of such rights violations, and it just isn't that bad. In any case, there isn't instability in the empirical sense of the term.

MARK: I want to take a real, concrete case that most people would view as very hard for me—a case on competitive markets—and I want you to explain a phenomenon. Your model of a competitive market is not what a lot of more sophisticated economists call a competitive market, but people frequently confuse it with a competitive market—that is, a many-seller market—in situations where there are no legal barriers to competition. Is the standard assumption in your model that there will be some tendency for the long run equilibrium price to fall to long-term production cost? Let's take the example I first raised in dealing with Dr. Siegan's paper¹⁸⁵ a few years ago, still set in Palo Alto, an easy empirical case. There is a price differential between full-serve and self-serve gasoline. Prices remain different, and the amount that you pay for full service remains different for all three grades of gasoline, making it extremely unlikely that it matches

185. B. SIEGAN, *supra* note 58.

cost. Prices are enormously distinct from station to station, even among stations in extremely close physical proximity. There are posted prices, and limited problems with the acquisition of information.

I can give you a number of other terms consistent with that. Now it is perfectly consistent to many economists—not very many libertarian economists—that in the presence of shopping costs there is a tension for a seller between trying to attract more buyers and charging my non-shoppers more. All people in any particular space are partial monopolists, partially able to price discriminate. If we assume that it is an empirical controversy, then a lot of claims about things like price control become extremely complicated. On a lot of different issues about price control, you and I may end up with the same opinions; it's not worth it, or it's not administratively feasible. But the claim that there is anything *a priori* about the necessity of the utilitarian consequentialist conclusion that prices fall to production cost is simply not true. It's controversial, and it's a tough question.

RICHARD: The issue to me is, what is the strength and the durability of markets? It is best answered by the following proposition. If you had the world of perfect information, I would be relatively indifferent to the form by which goods were distributed. Thus if regulators knew demand functions, and the preference functions, etc., and they could be trusted to behave in a good fashion, then the choice between markets and regulation would be far less controversial than it otherwise is. My sense is that the argument for markets is very powerful—and here I am very much of the Chicago tradition. Maybe I rest on the point that you actually do close in on that kind of ideal competitive equilibrium. I am prepared to believe there are permanent barriers that prevent you from reaching it. Nonetheless, over time markets will reach a rough balance. The question is: do we want to invite administrative problems of control in order to correct these relatively small failures? The regulators are capable of bad behavior, and they labor under a serious lack of information when they try to tell people how to act, as opposed to markets, which allow people to decide that for themselves. Still I wouldn't call for a *per se* constitutional rule that invalidates any such correction. Here I get back to the ultimate tension in my theory. It's a kind of nice tension, intellectually. I try to frame the disproportionate impact test to generate a perfect incentive compatible game, in which the only way you could benefit yourself is to make sure that everybody else benefits equally.

MARK: If price control won't do that, it will benefit some gas consumers.

RICHARD: That's so if you get comprehensive price controls with respect to the commodities.

MARK: Now let's take the case you described in the book (pp. 274-82). I know that you said in the book that specific price controls are unconstitutional. I'm saying that if Palo Alto adopts an ordinance with price controls for the term of full-serve gas that it is not a clear case of utilitarian imbalance and that you're simply saying it must be.

RICHARD: I'm not trying simply to assess whether or not the private market will calibrate price to marginal cost. I'm simultaneously trying to control the function, behavior, and the ability of legislators and local governments. At that point, I'm prepared to say categorically, given the risks of government, that the moment you start to make price regulations selective, the rent seeking dynamic becomes too pronounced.

MARK: That's a necessary truth about that process. That's something like a constitutional fact, I mean it's really obviously a much easier constitutional fact if you believe that the market has strong tendencies.

RICHARD: Of course it is. To me, the central theorem of price control and regulation is precisely the same as that in the litigation game. If that analogy is correct, then the amount of dissipation in the social surplus will be extraordinarily large. If you add to that any further complexity about, for example, the ability of regulators to estimate the true demand of price levels, then the point is even clearer.

MARK: They only have to estimate the cost, something that is not staggeringly difficult. Measuring labor, time, and . . .

RICHARD: The regulated industries literature recognizes that costs are very difficult to estimate.

MARK: I'm trying to take a particular problem, and you are always moving the level of generality back up . . .

RICHARD: I'm saying that estimating costs under the regulatory system is a huge problem. Cost, for example, includes the amortizable portion of equipment, networking capital, and taking into account shadow prices elsewhere. Why do it in your case?

Even with natural monopoly, which is not found much at Chicago, we grudgingly recognize the difficulties: I think Dick Posner's 1969 article¹⁸⁶—perhaps it's his best article in some sense—shows the lurking political dimension. Posner rightly observed that you could

186. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

regulate this particular market in order to get some convergence between price and marginal cost, but the dynamic element means that you do so at the cost of preventing the entry of any rival technology. Those long-term political losses far exceed the particular cost savings. What's so nice about his argument is that it doesn't depend upon the particular technology at this date and time. All it depends upon is a veil of ignorance-type assumptions, and that robust technologies will tend to erode whatever national monopolies exist. Okay, I will stop there. So I'd strike it down.

BRUCE: I want just to express puzzlement, because I am, in fact, very puzzled. This book, after all, just came out. My puzzlement is that you have moved so far, so fast, from what you said in the book to what you're now saying. In my mind, this is a radical disjunction. Let me just elaborate. The Epstein I heard last year, and what I read in the book—I think I read it carefully; I read it once carefully, not five times, and I could be wrong—claimed that redistribution was an illegitimate governmental objective. You have said in the last two days, however, that it was legitimate, so far as the Indians were concerned. You said that it was constitutional for Congress to pass a statute on behalf of the Indians, without giving the present owners of land just compensation. But you said it is not constitutional on behalf of the blacks, even though they were enslaved. This morning you also told us about good samaritans, and I pointed out to you that I didn't hear a good enough answer in response to how the good samaritan concession permitted an argument favoring redistribution. So far as redistribution is concerned, what you said, as I heard it, is different from what the book says.

As for alienability, your endorsement of Frank Michelman's position is a concession that, so far as the common law is concerned, the status of alienability was deeply contested. Third, you gave up the idea that alienability is at the core of property; alienability which obviously plays a very important role in your critique of environmental statutes and so forth. So far as redistribution, you've given that up. So far as Locke, you have given that up. Hobbes and Locke should have been replaced by praise of Bentham and Hume. So then the master philosophers are different in these two days of conversation and in the book. The book's rigor, which is something that you rightly prided yourself in, is gone. Time and time again, you've told us about utilitarian theorems linking utility to Lockean rights. But there's not a single theorem in this book. No effort, mathematically, to ground any of your rules and principles in utility appears in the book, and yet you said, time and again, that there are theorems; con-

vergence theorems, uniqueness theorems. Nothing like that appears in this book.

In your talk, though, your fundamental claim is that you have provided us with a unique set of formally realizable rules that will optimally constrain rent seeking. But, of course, you do not, nor could you in conversation, prove this point. Because it's obvious that there are lots of formally realizable rules with very different properties. You have to show why your formally realizable rules have better properties than other plausible formally realizable rules. But that's only the first problem in your talk about formal realizability, because, of course, the takings clause appears in the fifth amendment,¹⁸⁷ and your target includes the fourteenth amendment.¹⁸⁸ So we have to know how your four-part test relates to the fourteenth amendment in order to get anywhere in terms of formal realizability. Then there's the third problem with formal realizability: are your rules as formally realizable as you think?

Your answer to my question about discharge in bankruptcy seemed critical here. Bankruptcy discharge involves a classic question of class legislation, one that James Madison would have had no trouble identifying as an effort to take property from *A* (the creditor) and giving it to *B* (the debtor). Nonetheless, you managed to say it managed to pass your rigorous and formally realizable test. If creditor relief can pass, what can't? Of course, your willingness to bend rules in this case may well attest to your constitutional common sense, but it doesn't speak well for formal realizability.

And then there is a final disparity between your talk and your book. While your book does mention rent seeking the idea is nowhere near so central as it has been in your conversation. If I were trying to reconstruct the chapters of the book that would come out of your talk, I would imagine that there would be a chapter called "Models of Legislatures." You would have to talk about Madison's efforts to deal with the problem of rent seeking, and explain how your own effort is related to the ones envisioned in the *Federalist Papers*. A second chapter would distinguish between rent seeking, which is bad, I take it, and public participation, because, of course, public participation is good. These chapters are needed because you've really moved away from the book a tremendous amount, in your talk about redistribution, alienability, your master philosophers, and most importantly—something which I've really respected in you for twenty years—in the rigor of your analysis. If you're going to be utilitarian, then the whole

187. U.S. CONST. amend. V, cl. 4.

188. U.S. CONST. amend. XIV.

book is going to look different, not just in one or another detail. So this is my bewilderment.

RICHARD: I think that you are announcing some concessions which I didn't make on positions that I did not quite take. Start with the Indian situation. I took the position there that the first possession rules, which I've certainly endorsed throughout the book, apply to people I don't "like" as well as to people I do "like." There is no redistribution. Where we differ is on the question of the bona fide purchaser. Your attitude is that if somebody knows that there is a prior inconsistent claim, he is now *malafides* so that the traditional rule that you get nothing from subsequent improvement would apply. My rule, and I think it's the general rule, is if somebody thinks he's taking under the strength of legitimate claim and makes an improvement, some allocation of gains is going to be appropriate under the usual rules of *accessio*, *confusio*, and *specificatio*. My position ultimately is that the compensation paid to people for rights violation is perfectly consistent and appropriate given what had happened. I don't see any way short of using general revenues to pay it.

On the question of black reparations, the blunt truth is that I never discussed the issue in any depth. I am certainly not unsympathetic to your position. I have the same problem with Indians, but the question here, of course, is even more complicated. You're not dealing with land, you're dealing with services. You're dealing with all sorts of offsets and so forth. Whatever one wants to say against my view of the Constitution, the South can never rise again as it did under Jim Crow. One of the fears that continues to drive me is the theory of degenerative political equilibrium, which made the South into an armed camp. My views may give you some unpleasant things if imperfect obligations to the poor, the needy, and the hungry are not discharged. But the question of black reparations is, again, not a redistributive one.

Do I believe in natural rights? Again, my sense is that if you're doing constitutional interpretation, then natural rights theory simply means that the meaning of key terms found in the Constitution cannot be defined by the legislatures that are bound by them. I continue to remain a natural rights philosopher in that particular sense. And I continue to remain a natural rights philosopher in the sense that I started in the first chapter; the definition of what counts as property, like the definition of what counts as murder, like the definition of what counts as freedom, is something which has to be settled prior to, and independent of, the state.

The point that I am saddest about—remember the book was fin-

ished over a year ago—was not to make the utilitarian argument of the inner pie as elegantly and as strongly as I could. In chapter five, I asked what's in the bundle of rights? I went through the methodology which said, "Can you envision private property with this stick in and that one out?" In the end, I showed that the traditional bundle of possession, use, and ownership was exclusive. It offers completeness, definiteness, and simplicity. What I never did was to tie my account up to the bilateral monopoly theory, which I did in that little paper on restraint and alienation.¹⁸⁹ As fate would have it, the book was in pages, and the paper was being written, but I never saw the connection between them. What can I say?

But once one sees it and puts it all together, at that point the formal theoretical structure emerges. The ultimate issue was the one that we discussed at dinner. That's when I finally saw it; when Kelman, myself, Grey, and Michelman were sitting and talking, we decided that a zero transaction cost world was tantamount to saying that there was only one person. That answers the question of why it is that liability rules of battery must be a function of transaction costs; now there are two people. That's where that all came from.

The other question is whether or not the theorems are in the book. The math theorem which is there relates to the disproportionate impact test and chapter 14 is an effort to explain it. I put the formal mathematical proof (p. 208 n.24) in the footnote proving that the pro rata rule gives incentive compatible effects. When I started to think about it afterwards, I realized it was such a profound theorem that if it was right, it handles the major problems. Therefore, you are wrong when you say that I didn't try to meet the problem of measureability head on. That was the point of the discussion.

I also tried in chapter nine to deal with the squishiness of the intermediate scrutiny with respect to police power means. My answer was like a formal test in trying to minimize the use of two types of errors, where both over- and under-inclusion are weighted equally. I don't think you'd see anything special about private property in either direction that requires any dispensation. I think that the rent seeking points, which were spelled out in the contracts clause piece,¹⁹⁰ rate as a formal proof. If rent seeking is a negative-sum game, then given the just compensation clause, then all wealth reducing legislation is infirm.

Discharge provisions are a close case—Madison was wrong about the severity and importance of prescriptive rule. They are in

189. Epstein, *Alienation*, *supra* note 13.

190. Epstein, *Contracts Clause*, *supra* note 63.

sharp contrast to the zoning situation, which takes land and subjects it to the indefinite control of the state. The discharge provision, on the other hand, takes things from one definite state and makes them into another definite state. Given that you're dealing largely with consensual arrangements when security arrangements are available, we don't have the titanic struggles over zoning. With discharge the stakes *ex ante* are sufficiently small that you might be prepared to let that statute ride through on the disproportionate impact. I regard that case as a cusp case. I don't think it destroys the theory because I can place it in the array of easy to hard cases. I do regret that I hadn't gotten all criticisms earlier because I would have strengthened the book. But sooner or later you stop writing and you then kick yourself around the block for points you could have done better. My hero is still Locke. I must say I've never found Hume quite as congenial because I never thought he had the vision of how it is you start with a world of people and unowned things and end up with representative government. Bentham had a kind of cynicism about other writers that one doesn't find in Locke. Locke is still my hero.

BERNARD: Well, a lot has gone by since your remark, Mark. What was the point you made about the Palo Alto gas station?

MARK: Price doesn't drop to marginal cost.

BERNARD: What is the specific situation?

MARK: The nature of it is people follow price-discriminating policies as well as a shopper attracting policy to be a profit maximizing entrepreneur.

BERNARD: Maybe no one is buying that gas . . .

MARK: Let's say self-service regular gas sells for \$1.00, unleaded \$1.10, premium \$1.20. The price for the full-service, however, remains well above cost under anybody's definition of cost. How do we know that? Number one, it's different for all three grades of gasoline, although there's no conceivable way in which the cost of filling the tank for all three grades of gasoline can be distinct. The full-service terms are also more than four times as high as they are in some other parts of the country.

BERNARD: You think these guys are making enormous amounts of money?

MARK: Enormous amounts? No. It's simply an illustration of price not matching cost. The reason I am using this case is that it is extremely clean.

BERNARD: Can another gas station get in there?

MARK: Yes, sure.

BERNARD: If there's so much money to be made there, then why isn't . . .

MARK: You're falling back on one of the two parts of the theory, which is that there is some tendency in a competitive market for prices to drop to cost to attract new customers. In a world where some customers are price sensitive, there is another strategy that may or may not be price profit maximizing—to act as a discriminating monopolist. Neither of those dominates the other at the theoretical level; it is an empirical question which dominates in any particular case.

RICHARD: But the interval is small, and that we do know.

MARK: Which interval?

RICHARD: The interval of possible extractive profits.

MARK: What do you mean by small?

RICHARD: Well, in the kinds of cases that you are talking about, the larger that thing becomes the more likely the interest strategy will dominate.

BERNARD: Well, there might be no entry there because of zoning laws.

MARK: There are plenty of stations. Any one of them can drop its prices and we don't need new stations. All of the stations are potential entrants in the full-serve market. There are twelve stations selling both full and self-serve. There is probably zoning against the thirteenth station. I don't know for sure. But that can't help your case.

BERNARD: My reaction is that the stations are not making an excessive profit, in the sense that an 8, 10, or 12% profit is ordinary.

MARK: We're talking about the term. I'm not talking about whether these consumers are exploited in some global sense; I am trying to analyze the theory that the competitive market will allocate that term by resource cost. It need not. If the point of allowing competitive markets is to ensure that things are neither under or over produced, this is a partial discriminating monopoly with some misallocation.

BERNARD: Resource costs may include how closely the gas station . . .

STEVE: I don't see how you can draw those conclusions without a lot more information. For instance, you say there could be no possible explanation of the differential. How can you say that more information isn't needed? For instance, what if someone did a study and found out that purchasers of premium gasoline had larger, more expensive cars, which made it more likely they would ask for service?

MARK: This is the simplest example. There's a more complicated explanation where the differentials are the opposite in other nearby cities.

STEVE: I am skeptical, and until I know more about the other cities, I'm simply not in a position to draw any conclusions.

BERNARD: Why is it that some towns are a certain way and other towns are another way? Is it because in Palo Alto they like to be monopolist, and in other towns they don't like to be monopolist?

MARK: No. Presumably, the insight that price discriminating theory has, that no cost theory has, is that you're dealing with differentially rich towns, and different price discriminating strategies are better in some.

BERNARD: Different kind of demand?

MARK: Yes, that's right; the demand side. That's my point. Supposedly a tendency of a competitive market is to transfer all such surplus to consumers. This is the question though: Who seizes that surplus? The demand side is irrelevant to the question of what cost is accepted to the provision of the term. Steve points out that it may affect intensity, which actually has some impact on sunbelt/nonsunbelt differentials; but whether it can explain the level of differentials is extremely problematic.

BERNARD: It's all part of one equation—supply and demand—and to extract completely the demand side . . .

RICHARD: Mark is saying that in a competitive market, the price doesn't equal marginal cost. I'm saying he's probably right, but I'm also saying it's not worth worrying about.

MARK: I agree, for this particular case, that it might not be worth a regulation. I'm using it as an illustration.

RICHARD: It's a natural monopoly problem. You have the regulatory scheme in chapter 15.

ELLEN: I'm going to talk about Mark's example too. I don't concede any worth to the example because you simply have taken a cranky argument of economists for the competitive market as the exclusive and only possible justification for the market. Libertarian philosophers give a very different argument, which is that people who own property are entitled to use and dispose of it. One part of that entitlement is the discretion to set prices. What's going on here is that gas station owners are making different judgments about the preferences of people who are likely to buy regular gas, and their willingness to spend money to sit in their car and have someone else pump that gas; or different judgments about people who have big cars and buy premium gas (and that's where the greatest spread is). Different gas

station owners are making different judgments about how much money consumers are willing to pay, and if they're wrong, they just keep changing their prices until they find the price that's profit-maximizing.

CASS: Let me jump in here. I remember a conversation I had with Richard when I was going across the midway of my first year of teaching. We were talking about Epstein and Posner and Richard said, "You know there are people who think that the dispute between Dick and me is a trivial dispute," and I looked at him and said, "That's crazy," and he said, "Yes, that's crazy." A lot of the conversation in the last couple of sessions would suggest the dispute between Posner and Epstein is, at best, an intramural dispute.

Now let me say a few things in elaborating on that, and then make a law and economics defense of rent seeking—whatever it might be. To the extent that there is now a distinction between the Posner view and the Epstein view, the issue is: Do you have to provide compensation? This has implications both for the negligence/strict liability debate at the private law level, and governmental action at the public law level, and that ends up being a dispute between Pareto and Kaldor-Hicks. This is an exceedingly narrow disagreement, in which, it seems to me, the response to Jules Coleman's question was unpersuasive because it was either wrong or incomplete.

Then I think to myself, what is the *économique* view of substantive due process, *Lochner*-style, and of takings in general? And the answer is as follows: Holmes was basically right in *Lochner*, though not for the conventional reason. The reason Holmes was right is that politics should be regarded as a market—just like economic markets should be regarded as markets—and in politics what you have is intensities and numbers of preferences being filtered exceedingly well in legislative responses to citizen demand. So what you have through politics is preference aggregation working out just right, under the agency theory of government.

Now Gary Becker says something very much like that. In other words, the theory is, for Becker, that rent seeking is the best we can do if we want to aggregate preferences. By rent seeking, I guess what's meant is self-interested action by political actors trying to obtain wealth or opportunities. So it seems to me in a world of preference aggregation, the Epsteinian solution should be not to have a bigger takings clause at all. Instead, one should let the political market proceed unimpeded. Now why might one reject the Becker solution? I can give a kind of technical answer that Richard might want to offer, but I'm not sure it's very powerful. The technical answer would

be that numbers and intensities of preferences aren't in fact very well reflected in political maneuvering. Maybe that's what he would say. I'm not sure that's right. In any event, the political market may be the best we can do. It's an imperfect market, it's not as disciplined, but it's the best we can do.

Another way to avoid this defense of rent seeking would be Ellen's route, which is based on natural rights, and which, for present purposes, Richard has abandoned. A third route would be to distinguish between preferences that deserve to be satisfied and preferences that don't deserve to be satisfied. That route is congenial to me but not to Richard. I guess what I would say is that the only exits I can see from a conclusion that rent seeking through politics is the best we can do, are either ad hoc and incomplete, or impossible to make consistent with Richard's description of his own theory.

JULES: A small point on Cass's remark. Just to say that these are two kinds of markets, that doesn't capture the whole concept. Part of the problem is: Which sorts of issues are going to be allocated through the political market? And one could make a defense on Richard's behalf that his theory minimizes the extent to which the political market is used, for any reason. In this case, rent seeking means using real resources, not for productive uses, but instead for redistributive purposes only.

MARK: What about it?

JULES: Well, that has a meaning. I just gave it a meaning.

MARK: People really want it and that's why it gets "redistributed"?

JULES: Aggregating preferences, maximizing satisfaction of preferences, increasing a person's well-being or welfare, maximizing utility, being Pareto-optimal, are not by any stretch of the imagination, all the same concept. Having said that, I want to get on to another thing. I'm puzzled—not that I have a solution to this—but I really want to know now, when one does constitutional theory, which I don't do at all, are you wedded to the theory that the framers made reference to right or wrong? The framers made reference to natural rights theory, but now, you don't really believe in natural rights per se; you have a utilitarian theory. Is it just a matter of great good-fortune that, in spite of all the rest of us who thought that natural rights theory and utilitarianism really did conflict with one another at some fundamental level—not only in terms of what their underlying premises were, but actually, in real-world application—they pointed in the same direction? Did you just luck out—in that, as a matter of fact, we were all wrong—and if you did constitutional theory by

appealing to the theory that the framers just happened to mention, or by appealing to the correct theory, which is utilitarianism, you just happened to get the same result?

RICHARD: That's my position.

JULES: Which one is the one you ought to do when you do constitutional theory?

RICHARD: I think you have to look at the text. You have to put yourself to some extent in the natural rights mode, and that means property rights are sacred and absolute. Well then you take it away with the just compensation clause which is . . . let me just cast one point that I do want to mention. I think it is more profound to say . . .

FRANK: Cass is right. You can give an economic theory that is a normative, economic account of constitutional government, in which rent seeking is normally benign. That's Dahl's *A Preface to Economic Democracy*.¹⁹¹

RICHARD: No, I don't think that's right . . .

FRANK: If it's properly constrained, then the democratic representative system is supposed to maximize welfare through the combination of market and governmental activities. The third book I was going to mention is Vincent Ostrum's *Political Theory of the Compound Republic*,¹⁹² which is another one of these economic accounts of the so-called republican constitution. If you constrain the political system astutely, then you may be able to get a system in which the trading that goes on through politics, compounded by the trading that goes on through markets, gets you about as close to the optimum output as you are likely to get. The constraints include separation of powers, checks and balances, federalism and an appropriate allocation of competencies between the two levels, equal protection, guaranteed judicial review of so-called arbitrary and capricious legislation, and a takings clause with taking defined appropriately, even if somewhat crudely. I don't know how seriously to take these economic accounts of the Constitution, but they do exist and are not totally implausible. So when you make the simple unadorned statement that rent seeking through politics may be an economically desirable phenomenon, the door opens for Richard to respond. But how desirable rent seeking is, or whether it is even desirable in the net, may depend on how it is constrained through constitutional provisions.

CASS: The point I am making is that Richard uses the term

191. R. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* (1985).

192. V. OSTRUM, *POLITICAL THEORY OF THE COMPOUND REPUBLIC* (1971).

"constitutionally bad," where "constitutionally bad" means that the measure in question does not maximize utility. That argument seems at least odd, in light of the fact that some of the main law and economics preference aggregators look benignly on rent seeking. This view is that if you prevent the process of rent seeking, like minimum wage legislation, you bottle up preferences which will manifest themselves in more destructive forms. In any event, I'm trying to figure out where Richard, as a preference aggregator, differs from other preference aggregators. It's at least interesting that some other preference aggregators often see rent seeking as good. Now, maybe the scheme you were describing would promote maximization of aggregate utility. But I don't know of anything in the book or from what Richard says that makes that claim clear.

BRUCE: I'm interested in the concept of rent seeking, so let's focus on the word—doubtlessly intended as pejorative—and imagine what is this activity that is called rent seeking? A bunch of guys who are growing wheat think that the price is too low. They think that the farmers are losing out, and they waste a lot of time arguing with one another. So they decide to send somebody to Washington because the situation is really terrible, and the country stands and falls with the farmers. It is so easy for you to call them rent seekers. But they actually believe that if they didn't seek help they wouldn't have a job, and that wheat growing is important. Of course, with your economic theory, we know that this is false because they really want a monopoly. So rent seeking is just another way to describe participation in government. I could trivialize your point by saying that these "rent seekers" are producing and consuming goods, but this is to really trivialize it. Arguments about what the public good is take time and resources.

Cass and I very much disagree with Richard. Richard imagines that there is something called raw preferences, as if these wheat growers can look inside their hearts and know that they're really evil people. In order to know what a rent seeker is, as opposed to a seeker of the public good, you need a political philosophy. Political conversation and organization is a process people are interested in, and it also produces something, a definition of the "public good." Some people who lose in the political struggle may believe that "rent seekers" call their endeavor the "public good" in public, but that in private they're calling it something else. The point is that Madison did not think that this kind of talking about the public good was a waste of time or resources or energy. He thought that this was the central activity of American government.

I should point out that we need a theory of the Constitution. We have to develop a theory of the Constitution without the bill of rights, which after all, was added on subsequently. The founders didn't think they needed a bill of rights. They thought that the structure of representative government, machinery by which to organize the process of wasting time and energy arguing about what's good for the farmers, was pretty much all that was needed. We didn't need a takings clause. At the very least, Richard's does not recognize that the concept of rent seeking is a fundamental concept of political theory. Nor does he recognize that to have an unambiguously negative attitude toward rent seeking—which is the keystone of the book and of Richard's argument at this Conference, whatever its relationship to the book itself—is to make the statement that spending time and money participating in the public debate, and arguing about what is in the public good, is always a "waste of resources." An analysis of rent seeking should have been the first chapter of your book.

RICHARD: That is a little bit of a caricature of the position. Participation and rent seeking are not co-extensive because some of the things happening in Washington are seeking, through one means or another, redistribution. But also there may be theoretical arguments over whether the pie can be enlarged, for example by deregulation of one sort or by regulation of another sort. That behavior does not count as rent seeking, but all these behaviors are participatory.

BRUCE: I want to follow up on one of the thoughts Jules was heading towards. You don't say very much about the relationship between your political theory and your constitutional theory. That's because you think the constitution has, *mirabili dictu*, fully incorporated your utilitarian-based theory of Lockean rights. Suppose for a moment, though, that you were wrong about this. Looking over the Constitution and refining your utilitarian theory, Richard, suppose you came to the conclusion that the Constitution construed with semantic rigor does not produce an optimal utilitarian result. Now what kind of obligation would a judge have in this situation and why?

RICHARD: Fidelity to the text and hope for the amendment. I think that this case of convergence is great. It astonishes me. The way I reached it was to think of cases in which the convergence did not take, and I couldn't do it.

I want to ask the rest of you one interesting question. You don't like my view of the eminent domain clause. Yet to some extent you can't break it internally, or textually. But you try to do it culturally. If you had to draft a substitute, so that somebody who was as textually rigorous as I would desire would consent, what would you draft

to put in its place? I'm not so sure what I would draft if I were trying to capture the modern consensus because the Grey constitution which ends with explicit compensation is basically more restrictive than the current construction of the eminent domain clause.

The point I want to talk about is one that Cass mentioned. I know what rent seeking is. I regard rent seeking as the analogue of theft in the public arena. It is a sort of coerced transfer. That is the reason why the moral intuitions about the point are so strong.

I have a further point. The question Cass said is this: Is this debate all a family dispute between Kaldor-Hicks and Pareto? Well, I think that is clearly wrong. It sounds like a family dispute, we all are accustomed to thinking of it as a family dispute; but let me just put the Kaldor-Hicks constitution in front of you. It says, "nor shall private property be taken unless the aggregate social benefit is advanced." That's a very different constitution as far as I'm concerned in a very fundamental sense from the one that we've got, by anybody's standard.

FRANK: My constitution says that if the social costs exceeded the social benefits, then it wasn't supposed to happen at all.

RICHARD: You're a Kaldor-Hicks man. The Kaldor-Hicks constitution, reads, "nor shall private property be taken unless the . . ."

CASS: . . . for public use . . .

RICHARD: No, unless the aggregate social benefit exceeds the aggregate social costs.

BRUCE: Involved in the compensation.

RICHARD: No, no, no. Bruce, that's wrong, its been called the Hicks hypothetical compensation . . .

CASS: No one has the public use test.

TOM: You don't have to, because the aggregate . . .

CASS: Because Bruce's point is you have to take the demoralization costs.

RICHARD: I submit to you that the constitution in that Kaldor-Hicks world would be unrecognizable to judges in our world, even if we took Joe Sax's view of the Constitution¹⁹³ which I think it is fair to say is more restrictive than that of the courts.

SPEAKER: Well, this is all very confusing really, look, if I say no, you say "nor shall private property be taken unless the following is true."

JULES: Putting my claim this morning together with this, first

193. See, e.g., Sax, *supra* note 23.

of all, let's mention two things. One is that I was just trying to say this morning that there is no argument from the utilitarian perspective—sensitive to transactions costs—for Paretianism over Kaldor-Hicks. I think you are wrong. Forget that. I am not saying that there ought not be compensation. That's not what I'm committed to. I'm not committing myself to Kaldor-Hicks. What I'm saying is that this argument for compensation cannot be the strictly utilitarian one you suggest. If you were purely utilitarian about it, there is no reason for preferring Paretianism to Kaldor-Hicks. That's not an argument for the takings clause. One could have a traditional takings clause, but then the justification for it couldn't be utilitarian.

RICHARD: That would mean the whole level of construction is entirely different. Because what you are simply doing is reading the Kaldor-Hicks test into the public use language, instead of keeping it all to one side. Let me see if I could tell you why I think you are wrong on the narrow point. I believe that a good constitution, which cared about transaction costs, prefers the Paretian test to the Kaldor-Hicks test.

JULES: The way I understand your argument is this: The reason why everybody liked Kaldor-Hicks as opposed to Pareto is that all of the explicit cash transfers, back and forth, would require evaluation of . . .

RICHARD: What that misses, it seems to me, is a point which Frank never called by these words, but nonetheless that's what he was thinking. Frank is the man who inspired me in a sense. What's wrong with Jules's transaction cost argument is that it ignores implicit-in-kind compensation. My position is once you mention implicit-in-kind compensation, the generality of the regulation will often supply the needed compensation. Regulation has its incidence of both benefits and costs. At that point the disciplinary function of Pareto is much more important, because the pay-out nightmare which the Kaldor-Hicks people envisioned was misconceived because they forgot to consider the element of generality. On moral grounds people always prefer the Pareto test to the Kaldor-Hicks test. Pareto involved no interpersonal comparisons of utility. Now implicit-in-kind compensation, as I understand it, obviates the transaction cost argument. Then Pareto dominates Kaldor-Hicks on both scores. The central theorem in the book is that if you understand disproportionate impact correctly, you get around the measurement problem by having the social welfare function exactly mirror each individual welfare function that lies exactly underneath it. The essence of what this

book is, in some sense, is chapter 14. It's not the redistribution chapter. I don't care about that in the same way.

STEVE: I want to ask about insurance, which is one thing that hasn't come up yet. If it's the case that Richard is moving toward a utilitarian basis for this, and if it's also the case that he has a certain amount of faith in the market, then a natural question is how many of these questions, if any, he would want the insurance market to handle. That is to say, persons who were risk averse to government takings could purchase insurance against them. In fact, there are certain arrangements for doing that for overseas investment in case some foreign government zaps you.

I suppose there are several problems here. You might give one answer only if there were actuarially fair premiums, and maybe some other answer if there were not. You might allow insurance for some takings, but not for all of them. If the foundation for your view is now going to be utilitarian, then it's not clear to me how you foreclose the possibility that some takings are best handled by some kind of private insurance market. So, to put it in a one-sentence question: With your new utilitarian view, what is your reaction to the general idea of some sort of private insurance market?

RICHARD: I touch on this issue in chapter ten, with the highway case. The reason you cannot handle eminent domain by private insurance markets is that the risk that you're trying to insure against is government misbehavior. Simply dealing with the private victim's conduct does nothing whatsoever to control the problem of public abuse. Oddly enough, the just compensation the state must pay is its insurance policy, funded for all of those individuals who benefit from state action.

This point ties into my central argument—that is, imperfections which are driving the whole system: the moral hazard, high transactions, and risk aversion. I don't need anything else to generate this entire structure. Sure you can buy this kind of private insurance and it may well have some private gain, but I cannot see how the gain that you generate from that insurance is going to obviate the need for social control on the other end. It's roughly like saying the way in which we're going to control the malpractice problem caused by terrible doctors is to allow individuals to buy Blue Cross, first party insurance, which is a radically different arrangement from saying in effect that there could be some kind of contract between the provider and the recipient of care, which might in fact override the common law tort.

STEVE: It could be that I just don't have an adequate grasp of

what your view is. But to the extent that it's utilitarian in character, then it's not plain to me that you can appeal to some independent sense in which government action is wrong or improper, except in so far as it impinges on individual preference satisfaction. If that's what is at stake, then it's not plain why you could fail to regard government action as a perfectly eligible solution to that problem, in the way that a private insurance market is a solution.

RICHARD: No. Your point is correct if I can't get to the inner-pie. My argument was that if I reconstruct my chapter five, put it into chapter one, introduce the concept of bilateral monopoly, and thereby reproduce the standard bundle of rights that we normally associate with property, we now have that inner-pie. You now have the starting point which you're going to defend against all others. I don't think I have given up on the argument if I could show that my utilitarian calculus generates the inner-pie, which the natural rights theorists would say that they can establish by some alternative means. I think that my argument does that. This is the point that we've argued before. Although there are certain contestable elements to the idea of property, none of them go this far. In fact, the cases that Bruce and others wanted to give, interestingly enough, were all cases of ambiguity by grant. The importance of the Lockean notion is that we're talking about title—and note the term they use because Ellen will love it—by natural occupation. That's the way in which the common lawyers described first possession. However, politics in it's ugly way intruded and prevented that rule from controlling because there was only one natural occupier. He was called the King. The King, of course, recognized the inherent right of alienation because he dealt much of the lands he had to somebody else, with all sorts of strings attached. The reason our historical tradition is so utterly muddled is that the grant, as opposed to occupation, controlled private ownership in the beginning. One other element, which I didn't mention last time, but which is also key, is that the original grants were contracts for services, where the assignability problem is radically different from that for land, for the same reason that today's contracts for services do not allow free delegation by the performing party.

SPEAKER: I'm sure there was a feudal system.

RICHARD: I think in some sense that our own constitutional system works from the other direction. That is, oddly enough, I think, Locke was a radical precisely because, in his own view of the world, the rights came from the people below rather than coming from the crown above, he would have no truck with a system of property which started from royal grant. That's the great historical ten-

sion. It's roughly the constitutional dilemma around private property in the earlier days, much the way I regard incorporation as the profound constitutional tension in our own day. It also proves the point, with which I think everybody agrees, that the world gets much messier when people start making mistakes and then acting on the mistakes as though they were not errors. Then we disagree as to which was right, and which was error.

TOM: I just want to briefly say that for a proper construction of the clause, I would treat the property clause like the seventh amendment.¹⁹⁴ It's essentially a clause that's in the text of the Constitution, but which has lost its vitality. And I construe it the way Bruce sketched it in his book.

If I had it to do over, I'd knock out the contract clause and the just compensation clause, and deal with both problems under the substantive due process law of retroactive civil legislation.

RICHARD: Would you just simply say, well, all retroactive legislation taking property is invalid?

TOM: No it's certainly not all bad; it's subject to a higher degree of scrutiny than prospective economic legislation, but not a very high one.

MARK: Richard's response doesn't seem to answer Steve's question at all, so I want to follow up on that. Steve is saying that if you're so interested in reducing transaction costs, then there is a rule that seems perfectly appropriate: All owners of property should understand that the state may regulate their property for wealth maximizing purposes, and that they better insure themselves so that they don't end up being hurt by a particular regulation. This ties into Jules's question, as I think Steve's did also. Steve's question was a good example at this specific level of something Jules was asking more generally. If your point is to reduce transaction costs, and your other point is to insure that you're going to get a bigger pie, then this accomplishes both.

RICHARD: No you're not, because you're not constraining the ability or the desire of the state to misbehave.

MARK: Yes you are. There has to be a wealth-maximizing transaction to meet the public use requirement.

RICHARD: No, what you have to do at that point is find some independent way to monitor state conduct. You see the problem with *Just* is once you . . .

MARK: That's a possibility; one possible way of doing it. What

194. U.S. CONST. amend. VII.

if for close cases, in order to make the government reconsider, we'll require compensation. But where it's obviously in the public interest, we save the transactions cost and organize "compensation" in the cheaper, private insurance market.

RICHARD: You draft your document and you'll see that you will simply have too many cases that are quite close to the line. Now you're saying in effect, "nor shall private property be taken for public use where in close cases . . ."

SPEAKER: Period?

RICHARD: ". . . just compensation must be given."

MARK: There would be very few cases, in fact, where compensation would be paid. Most transactions would just be shifted to a private insurance market, or the government could create the insurance market, which is yet another transaction cost reducing proposal.

RICHARD: I don't believe you; I think that's just a fundamental disagreement.

ERIC: The talk about getting to the inner-pie is really the part I try to understand. I thought that maybe we should never call you simply a regular utilitarian, but rather, something like a constitutional utilitarian, where the Constitution is not the legal document, but a sort of moral constitution. But I'm very unclear on where we get these general rules out of utilitarianism—at what level these rules operate on. During some of the gas station examples, and some other examples brought out before, it seemed that you were hinting towards the following reply: You've defined a certain case, and I can maybe even imagine that your proposed intervention will be utility-maximizing. The problem is that we can't open it up for people to put in these types of proposals. So you're saying I want a type of constitutional barrier, although it might be a local constitution against certain proposals. So sometimes you're directing this type of utilitarian constitutional argument on that level. You're also talking about using this type of argument to get to the inner-pie, which I take it, means vindicating the sorts of rights that Locke would have gotten somewhere else.

RICHARD: From God is what you think . . .

ERIC: From God, or perhaps even a little bit better argument than God. So this is one point, and this is the question: I just would like to have a clear picture of at what level or levels—and if there is more than one level, how these levels interact—does this utilitarian calculus give us these various rules? That's a real problem, and I have to understand what your position is. Let me just illustrate that in one way. If you do have this calculus that gets you to what you call the

inner-pie, then why not say, "I've got to that inner circle. In this gas station case, the regulation would be a taking and not for public use, and so I don't have to worry about even the local constitution utilitarian argument."

RICHARD: My answer is that which I gave to Mark. By and large you could show me all the noise associated with many separate sellers, as distinguished from perfect competition; still in any case where we have many sellers I will treat them like the perfect competition case, because the error-costs of going Mark's way are just far greater than the error-costs of intervention.

ERIC: So all of that type of consideration is among the things that go into the argument to get you to the inner-pie. Is that right?

RICHARD: Yes. As I was walking over here, I had another revision of my theory right here on the beach this afternoon. I asked myself, "What are the kinds of facts that we're willing to consider at a constitutional level." I said to myself, "We're talking about scarcity, about individual self-interest, and how complicated it was because of inclusive fitness, because of cognitive bias, and because all human beings don't have it in equal intensities." I said that, "We know something about the way in which people will work in contestable markets, if they exist." And I say, "What are you doing, Richard?" I answered, "Making an inquiry that's awfully similar to the kinds of facts John Rawls was prepared to take into account when he was forming his general constitution." The only difference is that those were not the facts that he took into account—I don't remember them all—but the element of self-interest isn't there. It's that kind of an image that one generally gets and uses in the individual case.

ERIC: What's an individual case?

RICHARD: Just this. When you're looking to see whether or not a discharge in bankruptcy statute or a rent control statute is unconstitutional and so forth, you basically want to simultaneously direct and confine both government and individual behavior; the compensation rule then dominates direct regulation rules. This outlook leads to the next constitutional judgment. Kaldor-Hicks is systematically inferior to the Pareto, so that point where there's measurement of loss, the state pays, but where there's no measurement, courts look to two objective factors that we know bear on implicit compensation: common pool regulations and disproportionate impact. You can evaluate those two questions on knowledge of the particular case. Nothing more comes into the equation—nothing else.

Take a point that Cass and Mark have made. Everybody agrees that the moment you have a system of welfare rights, there's going to

be some necessary productive loss. Hence there's going to be some difficulty with Pareto norms, but if you were a pure utilitarian, that problem could be overcome. And they said, look, for heaven's sake, you can't make a categorical rule unless you know something about the slope of the demand curve. My answer is if you could figure out the precise slope of the demand curve, then you can't make a constitutional rule. What do you do, if the slope turns out to be -0.6, -0.4, or -0.2? It's one of two solutions. Either you say "anything goes" with the legislature or alternatively that "nothing goes." The intermediate solutions necessarily fail having run that thought experiment. You then try to run another thought experiment. Which of these two systems is going to be more stable if you really believe the compensation brake is critical? You might then carry over the very crude moral, but nonetheless very powerful practical judgment that theft for good purpose means that we're a bunch of collective Robin Hoods. You get out and you work through other institutional structures: e.g., imperfect obligation.

SPEAKER: May I ask what you mean to say about theft again?

RICHARD: Theft means there's coerced transfer of anything from one party to another without his consent.

SPEAKER: I thought you would have to say that it's not utility maximizing.

RICHARD: No, you don't because that's the whole point. If you do that then the game is over because you're playing Kaldor-Hicks. The Epstein world doesn't allow that to happen, so you just have to make some categorical judgments. The common laws have some noble categorical judgments, the one about free trade has always been under the guise of *damnum absque injuria*. The one about the sanctity of property has always been another. These turn out to be the basic architecture of our legal system. Then there's the third element. Tom says that the problem with me is that there's this huge element called culture that floats about there and I've just not taken it into account. I think there are two ways to take it into account. One is you could redefine the appropriate social circumstances under which coercion, by which I mean guns, force, can be used in the legal system. The other way to do it is to develop this network of informal or imperfect obligations. My own sense about society is that middle class between the pure consumption choice, which Cass talks about, and enforceable obligation. That middle class is not empty. It's extremely, powerfully, culturally defined, and highly regular. Even today when you have massive coercive redistributions you start to look at the level of voluntary charity, and it turns out to be simply

enormous, sixty, eighty, a hundred billion dollars a year. It's organized by people on lines which show their tenacity. People know how to specialize, to pick local markets, to find all sorts of games, to use matching grants and so forth, to pick their targets, to go to their alumni. Anyone who wants to play that game can get into it. The free-rider problem is not going to stop them from raising a lot of cash. That's my sort of tripartite solution. The odd thing is I regard the debate between Tom and myself as basically not one over ends but over means.

JULES: I have a real question now. Frankly, I must be slow, but there are certain things I'm not following. If I could just go back to Kaldor-Hicks and Pareto, and utility and the creation of the inner circle. (It sounds like it's a spy game; the inner-pie, etc.) The inner-pie is the expected outcome of having Lockean property rights. Now, when we generate the Lockean property rights, is the claim that they will be generated by choosing any of the following: The general principle of utility, the Pareto principle of utility, or the Kaldor-Hicks principle of utility?

RICHARD: It's a combination of one and two.

JULES: The combination of one and two? Wait a minute, I have a real problem now; forget three? One and two I'm happy with. The earlier argument about Pareto, as opposed to straight utilitarianism, was that it was a constrainer at another level—to go back to Eric's kind of concern—at which a utilitarian calculation might play. And we needed such a principle once we had a government and once they were taking property. Now I want to know, at this level, what is the application of the Pareto principle, as opposed to the straight utility maximization principle, or some other principle? Why one principle rather than another?

RICHARD: Because at the first circle you're not talking institutions; in the second you take enforcement into account.

JULES: No, that isn't exactly my point. At the first circle, we're not pre-institutional.

RICHARD: That's right.

JULES: So you don't have available the argument in favor of Pareto, as opposed to straight utilitarianism. So why aren't you just a straightforward utilitarian?

RICHARD: I've said that's what the anxiety is—to many practical problems.

JULES: If you were a straightforward utilitarian, I would love to see the proof that, from a straight forward utility maximizing initial premise, you could generate anything like uniquely Lockean prop-

erty rights. That is an argument I would love to see. Rather than get it free, I'll buy the next book; I'll buy the articles; I'll do anything for that book—almost. While I acknowledge that one could get uniquely Lockean property rights out of a principle of maximizing utility, it's just that this first pie does not generate *only* the Lockean book and nothing else. I am really puzzled by that; deeply puzzled by that, in fact.

BRUCE: This is actually related, because I was going to make an historical observation that the utilitarian turn Richard has announced at the Conference is really a turn back to Bentham. With one exception, and an important one for this purpose, Bentham thought that he could produce Richard's proof favoring laissez faire. The one exception is that he also acknowledged a few welfare rights. Nonetheless, he most importantly wanted to convince people that stable and secure property was utility-maximizing, and that contract was utility-maximizing. The reason why Richard's promise of future proof doesn't carry conviction is that the history of economics, political economics, beginning with Bentham's hope that he could produce this happy convergence of utility and laissez faire (plus some modest welfare rights), is one long history of failure. The last fifty years of general equilibrium economics, in particular, is one long formal proof of the enormous number of special assumptions that are required before a laissez faire property converges on anything that looks like a utility maximum. Now, quite suddenly, you announce that you'll out-Bentham Bentham any minute now; that you're going to be able to deliver a proof that will establish, once and for all, the link between laissez faire rights and utility. Until you actually deliver on this promise, you shouldn't blame us for being skeptical.

RICHARD: But

Editor's note: At this point, Professor Larry Alexander brought the Conference to a close. Professor Frank Michelman then presented Professor Richard Epstein with a card and several gifts on behalf of the participants. Most notable among the gifts was a statue inscribed with Japanese lettering, which the group purchased in a curio shop. Professor Michelman said that the inscription, loosely translated, read "Rent Seeker."