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Bargaining with the State

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BARGAINING WITH THE STATE. By *Richard A. Epstein.* Princeton: Princeton University Press. 1993. Pp. xvi, 322. $29.

The doctrine of unconstitutional conditions holds that the government may not require individuals to give up their constitutional rights in exchange for certain government benefits, even though the government is under no obligation to provide those benefits in the first place. For example, although a state does not have to grant property tax exemptions to veterans, it cannot grant exemptions to veterans on the condition that they take a loyalty oath.[1] The doctrine implies that the greater power to deny benefits altogether does *not* necessarily include the lesser power to grant benefits only on certain conditions.[2]

Since the first articulation of the unconstitutional conditions doctrine, courts and commentators have struggled to define a consistent principle for determining which conditions on state action are permissible.[3] The Supreme Court's approach reflects concern with the bargaining risks associated with conditions, generally concluding that those conditions that appear to coerce the individual into waiving a right in order to receive a government benefit transgress constitutional boundaries.[4] Other related analyses suggest that imposing certain choices on individuals offends their "dignitary" interests.[5] Broader approaches have denied the adequacy of a single determinate principle, suggesting judicial review of conditional government action using multiple criteria.[6]

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1. Speiser v. Randall, 357 U.S. 513 (1958).

2. Justice Holmes rejected this formulation of the doctrine: "Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

3. Early examinations of the unconstitutional conditions doctrine include Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 COLUM. L. REV. 321 (1935), and Maurice H. Merrill, *Unconstitutional Conditions,* 77 U. PA. L. REV. 879 (1929). Other notable analyses of the issue — only the most recent in a long list — include Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 COLUM. L. REV. 473 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion),* 70 B.U. L. REV. 593 (1990).

4. *See* Sullivan, *supra* note 3, at 1428-42 (discussing the coercion approach in unconstitutional conditions cases).

5. *See, e.g.,* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory,* 61 B.U. L. REV. 885 (1981). Mashaw's article examines the constitutional rights involved in government employment, one of the many contexts in which the doctrine of unconstitutional conditions operates. *See infra* notes 26-29 and accompanying text.

6. *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State,* 132 U. PA. L. REV. 1293 (1984) (arguing for review using baselines of equality, history, and prediction to differentiate between government threats and offers); Sullivan, *supra* note 3, at 1489-505 (arguing for heightened scrutiny of conditions that (i) affect the balance of power be-

Richard Epstein's[7] most recent entry into this fray, *Bargaining with the State*,[8] analyzes unconstitutional conditions as a bargaining problem, as the book's title implies, but rejects the idea that common law concepts of coercion and duress sufficiently explain the doctrine (p. 13). Adhering to a formalist approach to contract law,[9] Epstein claims that a condition obtained through coercive bargaining could "be set aside as a matter of right, regardless of its content" (p. 13). In contrast to the coercive bargaining model, Epstein's view of the problem of unconstitutional conditions focuses on the substantive conditions imposed, much like the private law concept of unconscionability (p. 13). Thus Epstein proposes an "overtly functional and utilitarian" (p. 17) approach that would analyze conditions on the basis of expected "social improvement" (p. 16).

The central theory of *Bargaining with the State* is that courts should invalidate conditions that reduce or improperly divide the social surplus created by "efficient" government intervention into private ordering. Epstein expressly rejects the notion that a conditional regulation is permissible so long as it does not leave individuals or groups worse off than they would have been without any regulation.[10] He argues instead that courts should invalidate conditions that reduce the social value produced by such efficient state action as, for example, the creation and regulation of highways.[11] The proper baseline, according to Epstein, is "not the status quo ante, but a *best achievable* state of affairs in which the program is put forward without the conditions attached" (p. 102). Any condition that reduces the state of affairs below the ideal is, for Epstein, an unconstitutional condition.

The analysis in *Bargaining with the State* follows from — and is often dependent upon — the exhaustive analysis of state action in Ep-

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tween government and rightholders, (ii) skew the distribution of rights among rightholders, or (iii) create a caste hierarchy); Sunstein, *supra* note 3 (arguing that no determinate principle exists in the post-New Deal state so courts should review government justifications on a case-by-case basis).

7. James Parker Hall Distinguished Service Professor of Law, University of Chicago.

8. This book is the culmination of Epstein's earlier work on the subject. *See* Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189 (1989); Richard A. Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

9. *Cf.* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (arguing for a restricted notion of what constitutes an unconscionable contract).

10. *Cf.* Kreimer, *supra* note 6, at 1353 (defining unconstitutional conditions as those moving the recipient below some natural baseline, rather than declining to move her above the baseline).

11. For example, conditioning use of state highways by nonstate residents on agreement to service of process for lawsuits arising out of highway use might be a benign condition, because it is directly related to the effective operation of the highway. Conditioning such use on agreement to service of process in *all* lawsuits, however, could deter nonresidents from using the state's highways, proportionately reducing the benefits of the creation of highways for use by all. The second example might therefore represent an unconstitutional condition. *Cf.* pp. 14, 128-31, 161-76.

stein's 1985 book *Takings.*[12] In *Takings,* Epstein concludes that the just compensation requirement of the Takings Clause prohibits government action that does not create sufficient social surplus for the state to compensate the "losers" under the regulation.[13] By contrast, *Bargaining with the State* analyzes those situations in which government action does create a net surplus, and this time Epstein concludes that the doctrine of unconstitutional conditions prohibits actions that reduce that surplus. In this book, Epstein seeks to empower courts to "see that useful projects go forward in a sensible fashion, not to strike down unwise projects that should not go forward at all" (p. xiv), having already made the latter effort in *Takings.*

Epstein begins this project by establishing in the first third of *Bargaining with the State* a detailed theoretical framework for deciding whether attached conditions reduce the social surplus created by state action (pp. 3-103). This section attempts to refine the meaning of *coercion* in the context of bargaining with the state. Conceding that common law concepts of duress and fraud do not apply in cases when a citizen may freely choose to reject the government's conditional offer, Epstein analogizes to other contexts in which the law properly rejects agreements that are not strictly coercive but that are the product of noncompetitive bargaining. Epstein contends, for example, that the common law grant of privilege in situations of necessity exists to avoid inefficient agreements arising from the monopoly bargaining situation (pp. 54-56). Blackmail, another example, involves nonproductive bargaining games between parties in a bilateral monopoly, so the law properly allows disclosure or silence but prohibits silence conditioned upon payment (pp. 61-63). In both cases, according to Epstein, the law rejects agreements because they are socially inefficient, even though they are not coercive in a traditional contract law sense.[14]

The lesson Epstein draws from the common law is that when a state has monopoly power in a given area,[15] bargaining difficulties may result in conditional regulations that produce less social benefit than all-or-nothing regulations. Thus the degree of expected social im-

12. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

13. P. xiv. *See* EPSTEIN, *supra* note 12, at 161-81. Epstein candidly confesses in *Bargaining with the State* that his view of just compensation would allow unelected judges to keep democratic bodies "from undertaking foolish projects (i.e., those that cause more harm than they do good)." Pp. xiii-xiv.

14. Agreements resulting from necessity or blackmail are not technically coercive because they are not fraudulently or forcibly induced. Rather, Epstein argues, the law rejects these agreements because of the tremendous costs associated with noncompetitive bargaining in these situations. Pp. 56, 63.

15. A state has monopoly power when a regime of common ownership will produce efficient allocation of the good more easily than will a regime of private ownership. Thus, for example, states generally have monopoly power over waterways because a system of private rights would not normally produce the optimum use of waterways. *See* pp. 34-35, 52-54.

provement becomes the determinate baseline by which courts should accept or reject conditional regulations (p. 102). Epstein therefore proposes a two-part test for unconstitutional conditions: first, courts should "establish some use of monopoly power by the state" (p. 102); second, courts must examine the conditions individuals must accept along with the proffered benefit with the goal of "ensur[ing] full preservation of the social surplus" created by the state's entrance into the private market (p. 102).

In the latter two-thirds of the book, Epstein applies this analysis to a myriad of cases, organized loosely into three categories. The first category discusses "Government Relations Within a Federal System" (pp. 105-57). In this section Epstein focuses primarily on the problems of discriminatory taxation that typically fall under the dormant commerce clause doctrine.[16] Epstein argues, for example, that although states have monopoly power to provide highways, unconstitutional conditions should prevent states from conditioning the use of highways by nonstate residents on the payment of a special tax.[17] Epstein reasons that the power to tax discriminatorily will force states into a prisoner's dilemma, in which "each [state] is tempted to raise the fees on out-of-state carriers regardless of whether other states do the same" (p. 129). Denying states the power to tax foreign truckers discriminatorily would reduce the threat that such strategic behavior will ultimately create "a total burden of taxation . . . sufficiently great to drive out of business substantial portions of interstate transportation and trade" (p. 129). The unconstitutional conditions doctrine thereby preserves the full social surplus produced by public ownership of highways.

In the second category of cases, "Economic Liberties and Property Rights," Epstein applies his test of socially efficient bargaining to reject rate regulation of private carriers, conditions on land use permits, pro bono requirement conditions on attorney licenses, and conditions on employee wages for government contractors (pp. 159-236). In each of these cases, according to Epstein, courts should reject these conditions because they each reduce public welfare by unnecessarily interfering with competitive outcomes.

In his final category of cases, Epstein examines "Positive Rights in the Welfare State" (pp. 237-312). In this section he rejects the idea

16. The dormant commerce clause doctrine, loosely defined, holds that the Constitution's grant to Congress of the power to regulate commerce among the states prohibits states from passing laws that interfere with interstate commerce, even in the absence of congressional action. *See, e.g.*, Tyler Pipe Indus. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987) (invalidating a state tax that discriminated against interstate commerce as a violation of the dormant commerce clause).

17. *Cf.* American Trucking Assns. v. Scheiner, 483 U.S. 266 (1987) (invalidating state trucking operation taxes that had the effect of imposing a higher tax on out-of-state truckers). Epstein discusses *Scheiner* at pp. 136-39.

underlying *Goldberg v. Kelly*[18] that the government may not grant welfare benefits on the condition that recipients relinquish certain procedural protections in the administration of their benefits. Epstein contends that courts should defer to state action in this context, insisting that the risks of political abuse are small[19] compared with the tremendous risk of recipient abuse (pp. 283-84).

One theme in this section sure to provoke controversy is the role and effect of religion in the problem of unconstitutional conditions. Epstein rejects the idea of a strict separation between church and state, contending instead that courts should strike down only those state benefits — tax exemptions, for example — that *selectively* subsidize or penalize religious institutions. Epstein believes the Supreme Court was therefore wrong to uphold, in *Bob Jones University v. United States,*[20] the selective denial of a charitable tax exemption to the university on the basis of its overt racial discrimination. According to Epstein, the Court should have overturned the prohibition on race discrimination as an unconstitutional condition on receipt of the tax exemption because Bob Jones University allegedly practiced racial discrimination for constitutionally protected religious reasons (pp. 249-51).

Although an attack on the Court's decision in *Bob Jones* cries out for a response,[21] *Bargaining with the State*'s exhaustive survey of the cases involving the unconstitutional conditions doctrine deserves a more comprehensive assessment. The central project of the book is to establish and justify a single functional baseline that focuses courts' attention on the relative degree of social improvement produced by conditional regulation. In this project the book is principally opposed to more flexible approaches that recommend multiple baselines or criteria by which courts should scrutinize government action under the unconstitutional conditions doctrine.[22] There is undeniable appeal in establishing a determinate standard in this complicated area, and Epstein makes a strong case in defense of his utilitarian social improvement standard. Certainly the analysis is thorough, and it is undoubtedly compelling given a political outlook consistent with both neoclassical economic assumptions and public choice skepticism of democratic mechanisms.

Epstein's insistence on a consistent and determinate principle, one

18. 397 U.S. 254 (1970).

19. To prove his counterintuitive claim that one can expect the political process to act favorably toward welfare recipients, Epstein observes that "the political process . . . has developed extensive rules governing the withdrawal of benefits," including written statements of reasons and review by another welfare official after notice to the recipient. P. 284.

20. 461 U.S. 574 (1983).

21. Indeed, the book's dust jacket trumpets Epstein's attack on the *Bob Jones* decision, essentially inviting critical response.

22. *See supra* note 6.

that is "functional, not intuitive," (p. 16) ultimately fails to persuade, however, because the book never delivers a coherent, nonintuitive theory of how courts are supposed to assess social improvement, or why they should even try in a post-*Lochner* world. Epstein's theory focuses on the ways in which difficulties in bargaining with the state reduce the prospects for maximum social improvement. As such, his theory therefore depends upon a rigorous and detailed system for evaluating social improvement. Yet as Epstein himself recognizes, social choices often reflect markedly different types of valuations,[23] such that it becomes almost impossible to compare the outcomes of different social choices. If social choices are therefore difficult to value consistently, one immediately wonders how courts are supposed to decide whether a particular social choice creates the requisite amount of social improvement. Thus, even if one accepts social improvement as a standard, the problem of social choice valuation suggests a complicated relationship between democratic decisionmaking and judicial oversight. At a minimum, a consistently strong role for courts in this environment demands a strong defense, but here Epstein retreats from reasoning and hides behind aphorism: "In a world rife with imperfections, it is a serious mistake to treat the best as the enemy of the good."[24] But the best — presumably a perfectly consistent standard — is not this book's real enemy. Rather, Epstein's standard of social improvement must compete with other standards he rejects early on as insufficiently determinate.[25] Yet the reader never learns why an indeterminate social improvement standard is better, for example, than an indeterminate system of historically and institutionally respectful criteria.

Some examples may demonstrate the malleability of Epstein's stan-

23. Pp. 96-97 ("It is just that gap between market and subjective values that explained why environmentalists could in principle oppose improvements that increased the market value of their holdings."). Even here, however, Epstein appears to miss the crucial insight that not only may subjective valuation conceal value from the market but people's subjective valuation may operate on an entirely different plane from that of the market. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 117-40 (1993); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994). Thus, environmentalists may believe that *no measure* of additional compensation beyond the market value will account for the subjective valuation of their holdings. Some economists may wish simply to label this behavior irrational, but they do so at the peril of condemning a great deal of human interaction, not unlike the insane man who thinks it is everybody else who is crazy.

24. P. 87. This answer is especially disappointing because earlier Epstein promises to offer "some explanation as to why the risk of judicial abuse is an acceptable price to pay to control the legislative abuses that all too often do occur." P. 19. Yet ultimately his explanation is simply that "the strength of the combined problems of faction and knowledge" justify judicial intervention to ensure social improvement. P. 87. It remains unclear, however, why a public choice critique of legislative behavior justifies a standard of *social improvement*, as opposed to any other criterion or several criteria.

25. *See* p. 14 ("[T]he use of balancing tests in this context leaves far too much room for the legal imagination."); p. 16 (arguing that one commentator's "inability to offer a single baseline for assessing conditional government benefits renders his account problematic. . . . The desired theory . . . has to be functional, not intuitive.").

dard. Chapter Fourteen analyzes government employment contracts, concluding that under the monopoly test for unconstitutional conditions, the doctrine usually should not apply because the state does not have monopoly hiring power in the competitive labor market (pp. 214, 227). As a result, Epstein denies any constitutional concern with procedural due process in the hiring and firing of government employees (p. 225), a position rejected by an eight-to-one vote in the Supreme Court.[26] Epstein claims, without empirical support, that the government "hires workers in an intensely competitive environment"[27] and that "individual employees are capable of deciding whether procedural benefits are more important than the wage and other benefits provided by the job" (p. 227). Yet the constitutional grounding for empirically refutable neoclassical assertions seems no more stable than, as but one example, that underlying baselines of equality, history, and prediction.[28] Indeed, both a historical view of government employment standards and an equality-based analysis of the bargaining relationship seem to justify judicial restriction on the government's bargaining with individual employees who lack access to the resources and information available to the government. It is similarly unclear from Epstein's text why economic theory has higher constitutional status than notions of individual dignity that the Court might also use to insist on fair disciplinary procedures.[29]

The normative claims inherent in the social valuation standard further reveal themselves in a chapter on land use restrictions (pp. 177-95). Epstein defends the Supreme Court's decision in *Nollan v. California Coastal Commission,*[30] in which the Court held that the Commission did not have the power to give a coastal developer permission to build conditioned on a requirement that the developer deed an easement to the state, when the condition lacked a sufficient nexus with the state's goals.[31] As a result of *Nollan,* state agencies must either refuse

26. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

27. P. 225. Epstein uses the very existence of *some* procedural protections to prove the competitiveness of the labor market in this context. P. 225; *cf. supra* note 19. He thereby ignores other norms that could be at work, including the political judgment that workers simply deserve certain protections before being fired — protections that government can enforce against itself, if not all private employers. The government may of course also enforce some version of that norm against government contractors, — a position Epstein also rejects. Pp. 218-19 (criticizing prevailing wage and affirmative action requirements for government contractors).

28. *Cf.* Kreimer, *supra* note 6.

29. P. 226 (rejecting the dignitary theory in Mashaw, *supra* note 5).

30. 483 U.S. 825 (1987).

31. 483 U.S. at 837. In an opinion handed down immediately prior to publication of this Notice, the Supreme Court extended *Nollan,* holding that even when a sufficient nexus exists, conditions on land use permits are unconstitutional if they do not satisfy a test of "rough proportionality" between the conditions exacted and the projected impact of the land use. Dolan v. Tigard, No. 93-518, slip op. at 16 (U.S. June 24, 1994). Epstein's analysis of *Nollan* dovetails with *Dolan,* which purports to set "outer limits" on how democratic entities may fulfill certain public goals. *Dolan,* slip op. at 21.

to give permission to build altogether or grant permission without certain conditions. According to Epstein, *Nollan* is correct because it "narrows the size of the bargaining range," reducing inefficient bargaining games by removing the conditional grant from the state's side of the table (pp. 183-84).

Developers, however, would appear to be no less capable of evaluating a conditioned benefit than individual government employees are. Developers can arguably "exit" the market to develop elsewhere if the bargain is not fair from their perspective,[32] and the empirical claim that there is a competitive market for development opportunities sounds at least as plausible as Epstein's claim about the competitiveness of the government employee labor market.[33] Epstein rejects the "exit" argument here, however, first pointing out that the plaintiff in *Nollan* had no credible threat of exit because he was a "sitting tenant" (p. 185). Surely, however, the exit threat is no more credible for individual government employees mistreated on the job. Epstein also argues that annexation and extended jurisdictions make it difficult for developers to flee the bargain (pp. 185-86). Again, surely individual employees often face equally high obstacles to exit should they attempt to change jobs midcareer. In addition, Epstein declares that the exit right is insufficient because regulations may be imposed after "extensive planning has been made in reliance on the previous state of affairs" (p. 185). Such reliance, however, must pale in comparison to the personal investments individual employees make in their jobs and lives.

Epstein is thus left with a general claim about social loss that occurs when hard bargains force developers to move to their second-choice locations (p. 186). Yet for some reason Epstein seems reluctant to account for similar social loss that should likewise occur when conditions force individual employees out of jobs they would otherwise prefer. A more serious objection to Epstein's analysis of land use restrictions, however, is that the representatives of the people — in *Nollan,* the Coastal Commission — may simply place a social value on the condition that is higher, or different, than the cumulative loss to developers forced to exit.[34] Epstein's analysis reduces to a sustained claim that courts should impose rules that increase market valuation measured along a single metric, even though they have little authority to do so in the post-New Deal world,[35] and even though differing modes of social valuation make it often impossible for them to do so.

The above observation about post-New Deal jurisprudence dramatizes one other problem with the analysis in *Bargaining with the State.*

32. *See* Been, *supra* note 3, at 506-33.

33. *See supra* note 27 and accompanying text.

34. *Cf. supra* note 23 and accompanying text.

35. *See* Sunstein, *supra* note 3, at 600-01.

Although Epstein insists that "many of the arguments advanced in this book survive even if I am wrong in my stubborn allegiance to discarded [pre-1937 constitutional] doctrine" (p. 23), controversial theoretical tools for disciplining legislative behavior pervade *Bargaining with the State,* often leaving the reader confused about the real purpose — and practical usefulness — of the project. Epstein relies in particular on two claims that have failed to shift the mainstream: the first, unsurprisingly, is taxation as a takings risk; the second is the related "public trust" doctrine.

Epstein imports from *Takings* the claim that taxation is only permissible to "raise the revenues necessary to purchase public goods" and that courts should invalidate almost every other form of taxation on the basis of its coercive threat.[36] Although he concedes that the unconstitutional conditions doctrine has much less effect in limiting Congress's power to tax in the modern era (p. 146), his argument nonetheless depends on it in certain key areas. For example, Epstein defends the Supreme Court's decisions in *Rust v. Sullivan*[37] and *Harris v. McRae,*[38] two abortion-related cases upholding the government's power to grant federal money with conditions that restrict the recipients' exercise of constitutional rights relating to abortion counseling and the abortion choice itself. Epstein argues that the conditions in these cases were justified because they took into account the coercive takings effect on those who oppose the use of their taxes for what they consider to be murder.[39]

In contrast to his use of the takings risk of taxation to justify these conditions, Epstein uses the public trust doctrine to condemn other legislative judgments as unconstitutional conditions. Under the public trust doctrine as Epstein defines it, taxpayers imbue the state with a public trust much as trust beneficiaries imbue a private trustee with fiduciary responsibilities.[40] Accordingly, all government decisions must improve the value of taxpayer holdings. Epstein contends that public trust creates a potential bargaining problem because individual taxpayers may not be direct parties to the bargain, even though the state may violate their trust as a result (pp. 70, 217). Unconstitutional conditions, then, should also require the state to account for its public trust responsibilities in its bargains with individual citizens. Relying on the public trust doctrine, Epstein finds prevailing wage requirements in government contracts and laws permitting public employee

36. Pp. 145-46 (citing EPSTEIN, *supra* note 12, at 283-305).

37. 500 U.S. 173 (1991).

38. 448 U.S. 297 (1980).

39. Pp. 285-94 (discussing *Harris*); pp. 297-302 (discussing *Rust*).

40. Pp. 70, 217. *See also* Richard A. Epstein, *The Public Trust Doctrine,* 7 CATO J. 411, 421 (1987) (stating that officials in charge of public trust must act "for the benefit of all the individuals who had . . . some undivided interests" in the resource sold to private individuals).

collective bargaining constitutionally repugnant because they violate the government's supposed duty to invest public money efficiently (pp. 214-20).

Epstein's analysis of taxation as takings and his view of the requirements of public trust are both controversial claims. Epstein's analysis and application of public trust in particular depends on a conception of value that is open to serious dispute.[41] Perhaps more importantly, however, the controversial nature of both claims demonstrates the book's conflicted agenda. Several arguments turn on public trust or taxation as takings, which casts doubt on the claim that the thesis of the book applies with equal vigor to both pre- and post-1937 settings. Even though Epstein promises not to declare the New Deal unconstitutional a second time (p. xiv), few New Deal statutes would survive either theory. As a result the reader is often left unsure whether the argument she has just read would make sense to a modern court. In this project, Epstein suffers from the conflict of the revolutionary-from-within: he cannot seem to justify full participation in the system he despises.

Accepting the normative judgments underlying his view of social valuation, however, the arguments fall neatly into place within Epstein's framework. *Bargaining with the State* follows the important precedent set by *Takings,* offering an examination of the complicated doctrine of unconstitutional conditions impressive for its thoroughness and for its consistent devotion to a principle that is at least articulable, even though controversial. Perhaps by now Epstein has tired of defending neoclassical constitutionalism; perhaps he simply expects readers to accept this position on faith and to test the arguments that follow from it. If so, Epstein's analysis of unconstitutional conditions passes easily.

Readers, however, may expect a more complete argument from a book-length effort. Certainly an enterprise predicated in part on replacing multiple or flexible standards for unconstitutional conditions with a more functional standard should give a closely reasoned explanation of how that standard should function. Yet in an area truly rife with imperfections, *Bargaining with the State* offers no new argument against the post-1937 insight: in most circumstances, democratic bodies interpret variable assessments of social value better than unelected judges.

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41. *See supra* note 23 and accompanying text.