

JUDICIAL CONTROL OF THE POLITICAL BRANCHES: PUBLIC PURPOSE AND PUBLIC LAW

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I. Introduction

The Supreme Court of the United States long has enjoyed a history of economic error,¹ especially in its reviews of actions taken by the political branches of government. In defense of the Court, we must acknowledge that neither the Constitution nor its own pronouncements delegates to the judiciary a "roving commission" to decide cases on economic grounds. Nor is it apparent that we would prefer such a delegation.² The Court, for that matter, seldom indicates any concern at all for the economic content of its cases and decisions, and economic sophistication certainly is not one of its stated goals. Nevertheless, the conclusion that the Court often is incapable of "doing" economics correctly finds supporting evidence in cases decided wrongly (from an economist's perspective) even during the reign of substantive due process, when it is alleged to have

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¹See, for example, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) (refusing to overturn an 1869 Louisiana law granting a monopoly in slaughterhouses and stockyards, because the state's police power here could find no limitation *inter alia* on privileges and immunities or equal protection grounds).

²See, for example, Richard A. Epstein, "Taxation, Regulation, and Confiscation," *Osgood Hall Law Journal* 20 (September 1982): 433-53, and James M. Buchanan, "Good Economics—Bad Law," *Virginia Law Review* 60 (March 1974): 483-92.

specifically accepted the economist's garb,³ as well as in more recent cases that it decided at least partially or implicitly on economic grounds.⁴ More often than not the Court's announced rationale for its economic decisions overtly concerns issues of law and the plain (or ambiguous) language of statutes, rather than the economic preferences or conclusions of the justices. So, for example, in *Barron v. the Mayor and City of Baltimore*,⁵ on economic grounds the Court could well have awarded Barron damages for the injury to his wharf brought about by the city's rechanneling of streams. It declined to do so, because it could find no power to do so: There did not yet exist a Fourteenth Amendment, applying the Bill of Rights and the Fifth Amendment's takings clause to the states.⁶

Today, the Court specifically rejects many invitations to apply economic analysis to the cases brought before it. Instead, it grants to federal, state, and sometimes local legislatures the nearly unassailable rights to define their goals and to fashion legislation to achieve them.⁷ Even so, many legal writers recently have urged the courts to

³See, for example, *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state statute setting a ten-hour maximum work day for women employed in laundries). For a brief discussion of the economic error involved, see Richard A. Posner, *Economic Analysis of Law*, 2d ed. (Boston: Little, Brown, & Co., 1977), p. 502. See also *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding statute limiting manufacturing employees' work day to 10 hours). But see *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding District of Columbia minimum-wage law unconstitutional under due process clause of the Fifth Amendment); *Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587 (1936) (holding New York act setting minimum wage for women repugnant to the due process clause of Fourteenth Amendment); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating Oklahoma entry restriction on ice manufacturers); and *Adams v. Tanner*, 244 U.S. 590 (1917) (holding unconstitutional a statute outlawing employment agencies that collect fees from workers).

⁴See, for example, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (upholding as not a taking application of New York City act to limit use of air rights over Grand Central Terminal), discussed at text accompanying infra notes 75-82; *Monsanto Company v. Spray-Rite Service Corporation*, 104 S. Ct. 1464 (1984); *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), discussed at text accompanying infra notes 29-40; and *Block v. Community Nutrition Institute*, 104 S. Ct. 2450 (1984).

⁵7 Pet. 343, 8 L. Ed. 672 (1833).

⁶*Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

⁷See, for example, *Nebbia v. New York*, 291 U.S. 502 (1934). The Court there held: So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor

(re)apply doctrines that strongly resemble the substantive due process requirements more or less consistently rejected since *Nebbia*.⁸

This essay's central themes are that judges as economists—Posnerian judges, if you will—can provide at best only a feeble protection for economic liberties as constitutional rights; that this casting of the judge's role as economist would be constitutionally, philosophically, and even economically unacceptable; and that judges should interpret broadly and comprehensively the plain language of the Constitution to protect existing economic rights. They should be less concerned with promulgating economically preferable results. Protecting such rights, we hasten to add, will nearly always promote the economically "correct" results. But courts must find doctrinal, not economic, bases for containing the growing mischief of the political branches.

Getting to these conclusions is not difficult, but it requires an argument in several parts. Section II begins this task by examining briefly the Supreme Court's stated reasons for eschewing the activity of economic analysis and by reviewing one theory of the Court's reluctance to constrain the political branches.⁹ Section III discusses some recent Supreme Court decisions, to illustrate the Court's inadequate hold on economic principles, brought about by error itself as

discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. [Id. at 537]

The most broad ranging application and extension of this doctrine in recent years is *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), discussed at text accompanying *infra* notes 29–40. Existing judicial limitations on legislative action are discussed at text accompanying *infra* notes 55–6, 71–3, 119–31, 141–44, 155–56, and 165–72.

⁸See, for example, Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980) (arguing that Congress intended the Fourteenth Amendment to require judicial scrutiny, on economic due-process grounds, of economic legislation); Epstein, "Taxation" (arguing for a test of "disproportionate impact of a tax or regulation [to serve] . . . as an indirect measure of the adequacy of compensation," p. 438); Richard A. Epstein, "Toward a Revitalization of the Contract Clause," *University of Chicago Law Review* 51 (Summer 1984): 703–51; and Jerry L. Mashaw, "Constitutional Deregulation: Notes Toward a Public-Public Law," *Tulane Law Review* 54 (June 1980): 849–76, who argues:

The Constitution presumes that private activities will be constrained only to promote public purposes. The recognition, first, that there is a wide range of such purposes, and second, that democratic, collective choice may pursue any or all of them in a complex and eclectic body of regulatory statutes, in no way reduces the force of the basic principle. The citizen has a constitutional right to demand that public law be public-regarding. Otherwise, his private harm is constitutionally inexplicable. [Mashaw, p. 849]

⁹William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics* 18 (December 1975): 875–901.

well as by a reluctance to apply economic analysis. Section IV brings the argument full circle by showing the inadequacy of economic analysis as a protector of economic rights as well as the inherent threat that such an analysis can pose to those rights, especially if carried on at higher appellate levels. Section V outlines a strategy for leading the Court to an assertion of those rights within a constitutional framework.

II. The Court's Reluctance to Apply Economic Judgments

It is useful at the outset to review the Court's stated reasons for its reluctance to review statute law on economic grounds, if only to form the factual predicate for constitutional judgments. Then, we examine one economic theory proffered to explain this reluctance. The Court's reasons and the theoretical explanation are not competing views, in that the Court's reasons provide a legal rationalization for the economic theory's predictions. An acknowledgment of the theory's implications nevertheless remains central to an understanding of how and why the Court might become the guardian of economic rights.

The Court's Rationale

During its 1977 Term, the Supreme Court decided the case of *Moorman Mfg. Co. v. Bair*.¹⁰ *Moorman* involved a challenge to Iowa's method of apportioning the income of interstate corporations in calculating the Iowa corporate income tax. At the time *Moorman* was decided, 43 states and the District of Columbia used a three-factor apportionment, which calculated the ratios of sales, property, and payroll in the taxing state to the corporation's total national sales, property, and payroll, usually giving equal weight to each ratio, and multiplying the resulting fraction (divided by three) times total national profit, to arrive at a tax base.¹¹ Iowa, by contrast, used a single-factor tax based on sales, although it did allow taxpayers to petition for a different formula if the single-factor formula subjected the firm "to taxation on a greater portion of its net income than is 'reasonably attributable' to business within the state"¹²

¹⁰437 U.S. 267 (1978).

¹¹*Id.* at 283 n.1 (Powell, J., dissenting). The footnote points out that West Virginia uses a two-factor formula. Colorado uses a two-factor apportionment, and Missouri uses a single-factor apportionment based on sales, but each of these states allows these formulae as alternatives to the three-factor apportionment. The rest of the states had no corporate income tax.

¹²*Id.* at 270.

Considering the existential datum that nearly all other states used a three-factor formula, Iowa's single-factor tax, based solely on sales, would discriminate against certain foreign (out-of-state) corporations. Firm A might do all of its manufacturing, warehousing, and managing in Illinois, but sell its product exclusively in Iowa, through traveling salesmen living beyond Iowa's boundaries. Such a firm would have its full income taxed as if it had originated in Iowa. Firm B, completely domiciled in Iowa, but selling exclusively in Illinois, would pay no Iowa corporate income tax at all. Moorman Mfg. Company, an Illinois corporation doing some of its business in Iowa, not unlike firm A, brought suit in Iowa's courts, claiming that Iowa's application of the single-factor formula to calculate its tax base constituted "extra-territorial taxation" in violation of the due process clause of the Constitution,¹³ and that the resulting tax liability of profits to more than 100 percent of the net-income base also worked a violation of the commerce clause,¹⁴ because firms could only escape this "double taxation" by locating their entire operations in Iowa.¹⁵

The unusual aspect of *Moorman* is that a group of distinguished economists of every political stripe submitted a brief *amicus curiae*, urging the Court to overturn Iowa's single-factor formula.¹⁶ The brief pointed out, on purely theoretical but altogether compelling grounds, that Iowa's formula *perforce* had to burden interstate commerce, relative to a taxing scheme that used a three-factor attribution. In truth, the brief was more an exercise in accounting than in economics, and the conclusions stated therein equally well supported the charge of extraterritoriality.

The Court, per Justice Stevens, gave short shrift to this argument, principally on the ground that no empirical evidence was before it:

Appellant does not suggest that it has shown that a significant portion of the income attributed to Iowa in fact was generated by its Illinois operations; the record does not contain any separate accounting analysis showing what portion of appellant's profits was attributable to sales, to manufacturing, or to any other phase of the company's operations. But appellant contends that we should proceed on the assumption that at least some portion of the income from Iowa sales was generated by Illinois activity.¹⁷

¹³Id. at 272-73.

¹⁴Id. at 276.

¹⁵This relocation strategy would eliminate Illinois taxes. The firm could only avoid Iowa taxes by selling no goods in Iowa. The trial court found for Moorman, and the Supreme Court of Iowa reversed, 254 N.W. 2d 737 (1977).

¹⁶Brief *amicus curiae*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

¹⁷*Moorman Mfg. Co. v. Bair*, 437 U.S. at 272.

And then the economists were dismissed: "Whatever merit such an assumption might have from the standpoint of economic theory or legislative policy, it cannot support a claim in this litigation that Iowa in fact taxed profits not attributable to activities within the State . . ." ¹⁸ Justice Stevens went on to argue that Illinois operations might show a loss, leaving Iowa profits to subsidize those operations. ¹⁹ But all of Moorman's manufacturing for the Iowa market was done in Illinois. ²⁰ And even though the firm had over 500 salesmen and six warehouses in Iowa, ²¹ nevertheless the firm's percentage of total income attributable to Iowa was about 50 percent higher under the single-factor formula than under the three-factor calculation. ²² In short, Justice Stevens's hypothetical rebutter does not appear to be logically possible.

The Court rejected Moorman's due process claim largely on precedential grounds. ²³ Then, it turned to the commerce clause challenge. Again rejecting the claim as "speculative" because of a lack of evidence, the Court went on to consider the wisdom of judicial action in this and similar cases. "If the Constitution were read to mandate such precision [invalidating overlapping taxes] in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States . . . do not follow identical rules. Accepting appellant's view of the Constitution, therefore, would require extensive judicial lawmaking." ²⁴ Or would it? Only Iowa, West Virginia, Missouri, and Colorado might have been affected, ²⁵ but then only if their taxes were challenged. More important still, the Court here conveniently glosses over any distinction between judicial lawmaking and judicial *constraints* on lawmaking. Moorman's claim was eminently sensible on both due

¹⁸Id.

¹⁹Id.

²⁰Id. at 269.

²¹Id.

²²Id. at 271.

²³Id. at 274-75.

²⁴Id. at 278.

²⁵The Court points out that it might find uniformity problems with other kinds of taxes. See Id. at 279. Certainly, this possibility, as well as the likelihood that various taxes may have interactive effects, might imply that I have read Justice Stevens's opinion at text accompanying supra note 24 too broadly. But the Court's practice is to consider various taxes separately and require facial equality for each tax. See *Armco, Inc. v. Hardesty*, 104 S. Ct. 2620 (1984). Furthermore, as Justice Powell, joined by Justice Blackman, argued in dissent, we must not forget that Iowa's tax was a clear commerce clause violation, because, *inter alia*, a firm could only avoid the tax by locating in Iowa. Id. at 288-90 (Powell, J., dissenting).

process and commerce clause grounds, and the Court might at least have remanded for a consideration of factual questions, even though the economists' brief logically showed violations whose proof required no evidence. But the Court balanced Moorman's constitutional rights against an implied judicial economy and deference to the political branches, to Moorman's detriment and in derogation of the rights that it had asserted.

There was also a commonly expressed sense of relative "fitness" to decide acknowledged in *Moorman*. "Although the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause, it would require a policy decision based on political and economic considerations that vary from state to state."²⁶ Again, a constitutionally based assertion of judicial constraint on legislation becomes equivalent to "a policy decision." But the Court would have none of either (as if its failure to uphold Moorman's challenge was not itself a policy decision). It expressed a concern lest its constitutionalizing of this problem by adopting the majority formula would divest any states that the change disadvantaged of their right to political representation in the decision-making process. The judicially promulgated uniform rule, that is, "could not reflect the national interest, because the interests of those States whose policies are subordinated in the quest for uniformity would be excluded from the calculation."²⁷ Justice Stevens's decision similarly hardened the economic consequences of Moorman's disenfranchisement in Iowa.

The Court referred the matter to Congress, as the more suitable body for deciding such questions:

While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.²⁸

²⁶Id.

²⁷Id. at 279-80 (footnote omitted). Of course, the Court here overlooks the possibility of granting intervenor status to such states. We cannot say whether the Court would accept this possibility as a surrogate for the constitutional basis of representation as mandated for the House and Senate.

²⁸Id. at 280.

Congress has consistently declined such invitations, and its majoritarian but pluralistic "group-veto" nature makes the premise of giving "due consideration . . . to the interests of all affected states" at least doubtful. Nevertheless, in *Moorman* we find spread out before us many of the Court's stated reasons for refusing to provide a judicial protection of constitutional rights: a wrong that exists allegedly only in theory; the need for judicial economy and the repugnance of so-called judicial lawmaking; and finally, the claimed superior fitness of Congress to create "policy" compared implicitly with the Court's "inferior" ability to protect rights.

This acquiescence in legislative determinations reaches its breathtaking but (by its own reasoning) logical conclusion in The 1983 Term, when a unanimous Court decided *Hawaii Housing Authority v. Midkiff*.²⁹ *Midkiff* involved a challenge to a Hawaii statute that empowered the state to transfer land ownership in fee simple from large landowners to residents on the land who held ground leases. The court of appeals³⁰ had reversed a federal district court's³¹ holding that the act did not violate the "public use" provision of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. The Supreme Court reversed, thus upholding the Hawaii statute.

Justice O'Connor's decision for the Court sustained the act by observing, first, that the subject matter of the legislation is well within the scope of the police power, and indeed the act's subject matter need only invoke "a conceivable public purpose"³² to escape constitutional infirmity. In this instance, that power was not unlike an attempt at "land reform" carried out by a banana republic³³:

²⁹104 S. Ct. 2321 (Justice Marshall took no part in the decision).

³⁰702 F.2d 788 (1983).

³¹483 F. Supp. 62 (Haw. 1979).

³²104 S. Ct. at 2329.

³³The dissent in the court of appeals cited at length from a commentary on the act, urging just such a parallel:

One factor that argues in favor of the Act and may be considered by the Court, if only subconsciously, is the current political reality that in much of the world, land reform is essential if democratic forms of government are to emerge or to prevail. In both Asia and Latin America it is taken for granted that a redistribution of the land must be accomplished as a vital first step in carrying out reforms that will allow democratic governments to be established and survive. Land reform is necessary for the economic, political, and social health and stability of many of these nations.

It would be anomalous and somewhat hypocritical if the United States Government were to insist that land reform be undertaken in other countries when its own Constitution prevented similar reforms in the American States.

James P. Conahan, "Hawaii's Land Reform Act: Is It Constitutional?" *Hawaii Bar Journal* 6 (July 1969), p. 53 (cited in *Midkiff v. Tom*, 702 F.2d 788, 808 (1983) (Ferguson, C. J., dissenting)).

The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii legislature, created artificial deterrents to the normal functioning of the State's residential land market and *forced* thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic example of a State's police power. . . . We cannot disapprove of Hawaii's exercise of this power.³⁴

The factual and theoretical predicates required to base the use of the police power on a finding of oligopoly were at best questionable. The Court points out that "[i]n the mid-1960's, after extensive hearings, the Hawaii legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. . . . The legislature further found that 18 landholders with tracts of 21,000 acres or more, owned more than 40% of this land and that, on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles."³⁵

Such land reform seems desirable neither for Hawaii nor for Third World nations. The breakup of large land holdings *subverts* the ability of these nations to exploit scale economies in agriculture and to spread risk through crop and locational diversification. The *urging* of these policies by the United States similarly may elicit small sympathy among those who regard the preservation, not redistribution, of rights as the most important goal for enhancing political stability and advancing human rights.

³⁴Hawaii Housing Authority v. Midkiff, 104 S. Ct. at 2330 (emphasis added) (note and citation omitted). In a footnote Justice O'Connor cites early Virginia and Pennsylvania statutes, as well as two 19th-century cases, to the effect that "After the American Revolution, the colonists in several states took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the colonies." *Id.* at 2330 n.5.

My examination of these cases and of one of the two statutes (the other is unavailable to me at this writing) suggests that Justice O'Connor's reading is inapposite. The Virginia Act of May 1779, 10 *Hening's Statutes at Large* 64, Ch. 13, § 6 (1822), extinguishes the British Crown's rights to royalties paid on former royal mines. *Wilson v. Iseminger*, 185 U.S. 55 (1902), sustains a state statute of repose that extinguished quit rents that attached to sales of title in fee simple, provided that 20 years had elapsed without payment, acknowledgment, or demand of the rent. Those due the rent had three years from the Act's passage to perfect their claims. *Stewart v. Corter*, 70 Md. 242, 16 A. 644 (Md. 1889), perhaps the closest of these cases to Justice O'Connor's view, upheld a Baltimore ordinance providing for the termination of leases running for more than 15 years, on six months notice, if the landlord pays the remaining rent to the tenant, discounted at 6 percent. The ordinance's apparent purpose was to increase alienability of property (including leaseholds), through indirect derogation of long-term leases. Citation of this case, whose decision rested on other, technical grounds, hardly puts into evidence a powerful precedent upon which the Court might rely in *Midkiff*.

³⁵Hawaii Housing Authority v. Midkiff, 104 S. Ct. at 2325 (citations omitted).

To begin with, this concentration of landholding was potentially subject to dilution by federal and state land sales (provided that the lands held by governments were habitable), as governments were the single largest landholders. Second, much of Hawaii's land is allocated to large agricultural units, which exploit scale economies. If land leased for residences indeed earned supracompetitive returns, then converting agricultural land to residential use would reduce the 47 percent statistic. Third, much of the remaining land is not yet appropriate for residential use, but its conversion to residential use again would reduce the 47 percent statistic. Fourth, even "47% [of the land] owned by 72 private landowners" or "18 landowners with tracts of 21,000 acres or more owning 40% of this land" or "22 landowners [owning] 72.5% of the fee simple titles" do not in economic theory or practice an oligopoly make. And, even if it did so, there is no evidence on the record of price coordination, raising the possibility that some or all of the landowners might be receiving at any given time less than the so-called fair market value for their ground leases.

This absence of convincing economic evidence also goes to the question of the means that the Hawaii legislature chose to overcome this probably nonexistent problem. Justice O'Connor wrote: "Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning."³⁶ The Court does not concern itself with the landowner's unwillingness to sell "at fair prices."³⁷ More to the point, the Court refused, in now familiar

³⁶Id. at 2330.

³⁷The Court does advert to the tax consequences of selling willingly versus those of a "forced sale," Id. at 2325, thereby raising the possibility that the Hawaii legislature had done the large landowners a favor. But the very existence of appellee's claim seriously diminishes the force of this argument. The challenged taking also occurred against the background of an estate held in perpetual trust. This feature of *Midkiff* is not compelling, however. Presumably, not all land was so held, and even if it were so, the trustees, when confronted with offers in excess of their reservation prices, could have brought actions to set aside the perpetuity on public-policy grounds. Any court sensibly could have preferred this approach to the unwarranted expansion of the power of eminent domain that *Midkiff* occasioned. For a similar application of this reasoning to the Court's abrogation of the contracts clause in *Home Building and Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), see Epstein, "Contract Clause," pp. 735-38, and text accompanying *infra* notes 244-56.

Here again, the determination of a dangerous level of market concentration is at issue. George J. Stigler, *The Organization of Industry* (Chicago: University of Chicago Press, 1968), p. 39, puts that level at the four largest sellers controlling 70 to 80 percent of the market share. Fredoric M. Scherer, *Industrial Market Structure & Economic Performance*, 2d ed. (Chicago: Rand McNally, 1970), p. 185, puts it at the four largest sellers controlling 40 percent. The land owners in *Midkiff* fall far below either of these thresholds.

language, to review the legislature's chosen means to arrest the supposed effects of this fictitious oligopoly, even if those means were found to be mistaken:

Of course, this Act, like any other, may not be successful in achieving its intended goal. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] legislature *rationaly could have believed* that the [Act] would promote its objective. . . ." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.³⁸

The decision in *Midkiff* rested principally on the meaning of "public use" in the Fifth Amendment's command, "nor shall private property be taken for public use, without just compensation." The court of appeals had held that, "[w]hen we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use."³⁹ Later, we reflect on the court of appeals's and the Supreme Court's conflicting interpretations of "public use," the Supreme Court holding here and in earlier cases that the words mean "public purpose."⁴⁰ Here we

³⁸*Hawaii Housing Authority v. Midkiff*, 104 S. Ct. at 2330 (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–72 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); and *Vance v. Bradley*, 440 U.S. 93, 112 (1979)) (emphasis in original).

Such a broad reading of state legislative power seems fully consistent with the Court's pre-*Lochner*-era cases, in which the *possibility* of damage to the public alone will suffice to legitimate state action. Considering the cartel alleged to operate among Chicago grain warehouses, the Court, per Chief Justice Waite, wrote toward the end of the 19th century:

For our purposes we must assume that if a state of facts could exist that would justify such legislation [regulating rates], it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we must declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge.

[*Munn v. Illinois*, 94 U.S. 113, 132–33 (1877)]

³⁹*Midkiff v. Tom*, 702 F.2d at 798 (1983).

⁴⁰See *infra* note 262. See also *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. at 2328–29, 2331, and *Berman v. Parker*, 348 U.S. 26 (1954) (sustaining District of Columbia's condemnation of land to redevelop slums, where land might eventually be sold to private interests).

emphasize merely that the Court exhibited its usual reluctance to inquire fully into whether the so-called public purpose was indeed “public.” An important preexisting right being in the balance, the Court’s political manners would seem to have overcome its constitutional obligation.

A Theory of Judicial Acquiescence

The Supreme Court’s acquiescence in legislative actions—its failure either to correct economic error or to constrain legislatures that ignore rights of property and contract—would not seem so serious were the errors not so great and, more importantly, were the rights not so fundamental.⁴¹ In *Midkiff*, for example, the Court refused to interpret “public use” narrowly and simultaneously refused to consider the economic question: Is the stated public purpose actually public *qua* welfare regarding? Therefore, under its broad reading of “use” as “purpose,” its stated reluctance to second-guess the legislature on the economic question of the Hawaii act’s economic incidents was dispositive and, we might add, conclusory. While there is no reason to believe that judges are better at doing economics than are legislators (although I think that they are so), they *are* charged with interpreting the Constitution, *inter alia*, to protect individual rights. Why do they commonly fail to constrain (putatively incorrect) legislative “economic” judgments that diminish those rights by imposing their own constitutional judgments that might restore those rights?

Landes and Posner⁴² provide an ingenious theoretical explanation for the judiciary’s reluctance to constrain the legislature in terms of the legislature’s own (economic) evaluation of policy alternatives. The explanation’s central focus is the now developing and increasingly robust economic theory of legislation, sometimes called the “interest-group” theory of legislation, which we discuss at greater length in Section V.⁴³ This theory of legislation holds that lawmakers and bureaucrats design statutes and regulations to benefit private, divisible groups in the population, commonly called interest groups, and that the costs of these statutes and regulations ordinarily (but not always) fall on the population in general. That is, the legislature stands as a market place in which political entrepreneurs create

⁴¹See, for example, Judge Alarcon’s opinion in *Midkiff v. Tom*, 702 F.2d at 790–93.

⁴²Landes and Posner, “Independent Judiciary.”

⁴³See text accompanying *infra* notes 193–210.

private, divisible benefits (allowing them to be residuals claimants) at collective cost.⁴⁴

Landes and Posner's important insight into this process is to recognize that legislators might enact such programs to last for a single legislative period, for several periods, or in perpetuity. Once the proposition is so stated, it becomes apparent that a benefit that flows over several periods should be superior, in both the legislator's and the beneficiary's judgment, to one that lasts for fewer periods or for just a single legislative session. The transaction costs of enactment may be lower for the more nearly permanent program, as compared with the continual transaction costs of reenactment, and the net present value of the associated income stream is certainly greater. Indeed, by enacting a full-blown "entitlement" program to run in perpetuity, the legislator immediately can capture his share of the program's residual value (rent), even if he intends to leave the legislature at the end of the present session.

Two institutional forces threaten this arrangement. The first is the deliberations of the legislature itself in future periods. Next year's Congress could threaten rescission unless its members are paid an amount equal to the program's current surplus value to the recipients. Such a threat would reduce both the interest group's initial willingness to seek such programs and the amount that it would pay for them, thus diminishing the enacting politician's share of the benefits. Legislatures in general, and the Congress in particular, solve this internal, multi-period prisoners' dilemma by adopting procedural rules that raise the cost of both the original and the potentially cancelling legislation. These rules include the filibuster and the enhanced capacity of legislative committees and subcommittees to kill both new bargains and abrogations of old ones. Landes and Posner argue that while both the enactment of new programs and the overturning of old ones grow more expensive (and therefore less likely) under these rules, nevertheless the legislator's net benefits from the operation of these rules are positive.⁴⁵

The second threat to this arrangement is the judiciary, and particularly a judiciary that is not politically "independent." By an

⁴⁴In ordinary spending programs, such as porkbarrel legislation, costs are almost always collective and diffuse, although their incidents may on occasion be concentrated. Concentrated costs sometimes occur in state taxation of out-of-state corporations, in tax exportation generally, and in some regulatory programs, although the theoretical structure of interest-group analysis can accommodate the concentration of costs. See *infra* note 199.

⁴⁵"[U]nder plausible assumptions the increase in the value of legislation will exceed the increase in its cost, since a modest increase in the cost of enacting legislation could multiply many-fold the length of the period in which the legislation was expected to remain in force." Landes and Posner, "Independent Judiciary," p. 879.

independent judiciary Landes and Posner mean “one that does not make decisions on the sorts of political factors (for example, the electoral strength of the people affected by the decision) that would influence and in most cases control the decision were it made by a legislative body, such as the U.S. Congress.”⁴⁶ Were the Supreme Court not independent, for example, then a legislator who sought abrogation of a prior bargain in the face of high legislative transaction costs might turn to the Court to achieve his purpose. If the Court were to become an agent of the current legislature, it doubtless could abrogate the acts of an earlier legislature at a lower cost than could the current legislature, which is constrained by its own rules. Hence, the legislature “buys” protection from the judiciary by making the Court independent, through such provisions as life tenure. The Court reciprocates by not second-guessing the legislature’s political judgments, on economic or political grounds.

The history of the judiciary, especially in its response to occasional threats to its independence such as Roosevelt’s plan to pack the Court, shows that it has indeed adapted its approach to examining legislation, to preserve its own independence by not challenging too often the legislature’s economic—political—decisions.

The Supreme Court’s activity is thus notable, not for what it does, but for what it does not do: namely, interfere with the private-interest bargains struck in the legislature. One can even sense in the Court’s decisions the operation of implicit rules requiring the preservation of prior legislation. The Supreme Court goes beyond not tampering with prior enactments to finding ways to enhance their survival. For example, in statutory interpretation, the Court often examines the original congressional hearings and speeches, to discern the intent of the originating legislators. While this activity sometimes results in peculiar readings of the legislative record, nevertheless, statutory construction is a common judicial practice. Indeed, even when the Court confronts an otherwise unconstitutional statute, it usually tries to narrow the scope of the statute or otherwise interpret its terms so that it will pass constitutional muster, to preserve as much of the original bargain’s intent as possible.⁴⁷

Similarly, “it is in large measure the constitutional structure envisioned by the framers [for example, bicameralism and the presidential veto] that . . . makes it very difficult to dismantle large government programs once they are in place. This fact, however, does not so much reflect shortcomings of the framers’ scheme [to limit government in favor of economic rights] as its abandonment by subsequent legislatures.” Epstein, “Contract Clause,” p. 714 n.32.

⁴⁶Landes and Posner, “Independent Judiciary,” p. 875.

⁴⁷Peter H. Aranson and Peter C. Ordeshook, “Public Interest, Private Interest, and the Democratic Polity,” in *The Democratic State*, ed. Roger Benjamin and Steven L. Elkin (Lawrence: The University Press of Kansas, forthcoming 1985). For examples of the Court’s reading of otherwise unconstitutional statutes to make them constitutional, see *National Cable Television Assoc. v. United States*, 415 U.S. 336 (1974), and *Kent v. Dulles*, 357 U.S. 116 (1958).

As we have seen in our brief review of *Moorman* and *Midkiff*, as well as in our references to other cases, the political forces that Landes and Posner identify result in two strong tendencies of judicial review. First, the Court evaluates legislation on dimensions orthogonal to those economic—political—dimensions that legislators themselves might invoke. For example, the Court will assess an act's constitutionality but not its economic fitness. To do otherwise the Court would have to challenge the legislature in territory that the elected body sees as its own monopoly. Second, even in the application of constitutional standards, the Court ordinarily will be especially forgiving of legislative error. As in *Midkiff*, for example, the Court will allow the legislature largely to decide for itself what a "public use" (*qua* "public purpose") might be. The result is the derogation of individual economic rights and the concomitant expansive acquisition of legislative ones.

This explanation of Supreme Court acquiescence in legislative activity may appear to be counterfactual. First, many of the Court's decisions uphold the actions of *state* legislatures, and not those of the Congress. Why does the Court fail to apply more stringent standards to the state bodies, which, after all, do not directly control any facet of Supreme Court independence? We could argue that the Court's application of judicial-review precedents to the federal legislature's challenged activities provides a decisional penumbra for its judgments about the state legislature's challenged activities. And indeed, this argument seems at least partly reasonable. But we need not rely on it. The Court's institutional memory is certainly long enough to recall the passage of the Eleventh Amendment, eliminating its power to hear "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State," in the wake of its decision in *Chisholm v. Georgia*,⁴⁸ which held that a South Carolina resident could sue the state of Georgia. National politics in the United States enjoys a profoundly local base, and the Congress would doubtless respond quickly today to a perceived serious judicial threat, based on the Court's competing economic judgments, to the states' abilities to make economic policy.

Second, one might argue, contrary to Landes and Posner's explanation, that during its period of applying substantive due process, the Court did confront legislatures with the economic errors of their

⁴⁸2 Dall. 419 (1793). The Court has restored much of its power to hear such suits if, for example, the state originates them (see *Cohens v. Virginia*, 6 Wheat. 264, 411–12 (1821)), or if a state official's actions impair constitutionally protected rights (see *Osborne v. Bank of the United States*, 9 Wheat. 738, 858–59 (1824)).

ways. While there may be some truth to this claim, it does not materially diminish the explanation's power. First, this claim goes more to the effect of the Court's rulings, and less to express language about economics. True, the *Lochner*-era Court did dwell at length on the right of contract as expressed in substantive due process reasoning, but its language sustained this right on perceived *constitutional*, not *economic*, grounds⁴⁹; it also sustained a good many state statutes limiting the right to contract.⁵⁰ Second, one does not have a sense that these cases were decided against a background of national consensus on the issues raised, one way or the other. Some state legislatures appeared to embrace economic regulatory legislation more quickly than did others, even before the New Deal. But the Court's decisions in cases such as *New State Ice Co. v. Liebmann*⁵¹ might well have served the interests of those same legislatures, whose members passed economic legislation under severe political pressure and against their better judgment. Third, the Court did sustain in this period several broad congressional delegations of legislative power to federal regulatory agencies, in which its own traditional *dicta*, whose application might have limited such delegations, were raised and set down again, to no effect.⁵²

A third attack on the Landes-Posner theory might point to the Court's famous 1930s delegation-doctrine cases themselves, as instances in which the theory finds clear contradiction in the judicial nullifications of acts of Congress.⁵³ But even here the matter is not so obvious. Two of the three cases, *Panama Refining* and *Schechter*, struck at the broadly applicable National Industrial Recovery Act (NIRA), a statute crafted in haste, involving most of the economy. NIRA's enactment had not been preceded by the usual focus of interest-group and congressional bargaining that ordinarily presages a political exchange in the market place for public policy. Instead, NIRA was a broad-based omnibus statute providing for self-

⁴⁹The Court relied on due process considerations in the *Lochner* era, because early on it had ruled out the use of the contracts clause of the Constitution to limit prospective impairments of the obligation of contract, as found in most regulations, in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). For a careful and trenchant criticism of this decision and its consequences, see Epstein, "Contract Clause," pp. 723-30, and text accompanying *infra* notes 58-62.

⁵⁰See, for example, cases cited *supra* note 3.

⁵¹285 U.S. 262 (1932).

⁵²See *New York Cent. Sec. Co. v. United States*, 287 U.S. 12 (1932); *Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266 (1933); and *FTC v. R. F. Keppel & Bros.*, 291 U.S. 304 (1934).

⁵³*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 239 (1936).

regulation, from which the members of Congress collected no apparent rents. Indeed, by the time *Schechter* reached the Court, NIRA was in deep administrative and political trouble, and the Court's overturning of the statute saved both Congress and the Roosevelt administration from serious embarrassment.⁵⁴

The *Schechter*-era cases might also reflect the Court's limitations in reading public and legislative opinion. While this *ad hoc* explanation seems less than satisfactory, the Court's rapid turnabout in reaction to its decision in *Schechter* gives it a paradoxical plausibility. The Court's more recent decision in *Chadha*,⁵⁵ overturning the legislative veto, is more problematic to explain within the Landes and Posner theory. Yet *Chadha*, like *Schechter*, was aimed at no particular regulatory device, thus raising the cost of aggregating the interests of legislative opponents, because of high transaction costs and free-rider problems.⁵⁶ At least in terms of transitional gains and losses, *Chadha* threatened all members of Congress and their regulatory-client constituents. Hence, no one had an incentive to do anything about it.

III. Recent Cases

Besides *Moorman* and *Midkiff*, recent Supreme Court decisions provide a rich menu of disputes in which the Court faced economic issues. We can usefully categorize our discussion of a sample of these cases according to whether the Court did or did not apply economic analysis as its principal vehicle for decision, and according to whether or not the Court's reasoning and result reached a correct economic conclusion.⁵⁷ Our purpose here is not to construct a catalogue of

⁵⁴See Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton, N.J.: Princeton University Press, 1966), pt. 1.

⁵⁵*I.N.S. v. Chadha*, 103 S. Ct. 2764 (1983).

⁵⁶See *infra* note 198.

⁵⁷There is considerable hubris in any judgment that the Court got its economics right or wrong. Indeed, in a few instances we must stand mute, because the matter is indeterminate. See the discussion of *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982), at text accompanying *infra* notes 101–18. The kind of error present also differs in various contexts. Sometimes the Court simply gets it wrong, as in its analysis of oligopoly in *Midkiff*, discussed at text accompanying *supra* notes 29–41. In other cases the Court reaches a result that a careful economic analysis might have precluded, as in its finding of unequal treatment in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983), discussed at text accompanying *infra* notes 141–44. In still other cases the Court's opinion, read as economic analysis, is simply incoherent, as in its "diminution-in-use" test applied in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), discussed at text accompanying *infra* notes 75–82. The particular economic problem or error in each case should be apparent from its context. I plead guilty to any and all charges of hubris but regard them as an acceptable cost of getting on with the discussion.

errors. Instead, we wish merely to lay the groundwork for assessing the Court's capacity for economic judgments.

Economic Grounds, Correct Results

Even during the years that substantive due process partly dominated the Supreme Court's decisions about economic legislation, the Court seldom if ever based its opinions on strictly economic judgments. Its decisions often adverted, instead, to individual rights of contract.⁵⁸ In *Lochner*,⁵⁹ for example, the Court in 1905 overturned the conviction of a bakery owner who allowed an employee to work more than 60 hours per week, in violation of a New York labor law. The Court, per Justice Peckham, held the law to be unconstitutional, because "[t]he general rights to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."⁶⁰ While the Court did look to the condition of bakers, it could find no reason to limit the "protected" worker's right of contract. Such laws as New York's, the Court held, "are meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power . . . , unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."⁶¹ While the Court did search for such "material danger[s]," its point of departure was grounded on a constitutional right, not on economic analysis *per se*.⁶²

The Court today seldom applies economics clearly and cleanly to arrive at its decisions. More often, economic analysis provides a factual predicate to fill in the details of a legal test. In one recent case, however, the Court did approach the application of such an analysis and appears to have done so correctly. That case, *Kassel v.*

⁵⁸See *supra* note 49.

⁵⁹*Lochner v. New York*, 198 U.S. 45 (1905).

⁶⁰*Id.* at 53.

⁶¹*Id.* at 61.

⁶²To the extent that the Court's decision rested on a constitutional basis, Justice Holmes was mistaken in chiding the *Lochner* Court that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75 (Holmes, J., dissenting). The Court, at least in terms of its own language, intended no such result, any more than the *Midkiff* Court intended to enact a socialist theory of property. The Court in *Lochner* enunciated a constitutional theory of government, and not "a particular economic theory." *Id.* Nor did the Court in *Lochner* subvert the police power, as most of the New York law regulating bakeries stood unchallenged. See Epstein, "Contract Clause," pp. 732-34.

Consolidated Freightways Corp.,⁶³ involved a challenge to an Iowa statute limiting the length of trucks operating in Iowa. All other western and midwestern states imposed a 65-foot limit on "double" trailers, while Iowa imposed a 60-foot limit. The Court repeated *dicta* concerning its customary deference to state legislatures. "[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."⁶⁴ But the presumption of validity can just go so far, for "the incantation of a purpose to promote public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."⁶⁵ The Court agreed with the court of appeals in finding that Iowa would benefit from its limit principally because other states would carry the rerouted traffic. A state, said the Court, "cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it."⁶⁶ The Court, accordingly, overturned the Iowa statute.

Economists long have understood that regulation is a form of taxation.⁶⁷ And on this reading the tax sustained in *Moorman* seems indistinguishable from the regulation overturned in *Consolidated Freightways*. Here, though, the Court found the "exportation" of damage to other states to be far more explicit than the implied loss to Illinois in *Moorman*. In that case either a defense of rights or a correct economic analysis might have led the Court to overturn Iowa's single-factor tax. In *Consolidated Freightways* the Court only incidentally considered the loss to truckers,⁶⁸ but its economic reasoning turned instead on the issue of the damage to, and the rights of, other states. Hence, its reliance on an economic approach sustained a view of rights that the state otherwise might have truncated. In any case, the decisions in *Moorman* and *Consolidated Freightways*, from the perspective of economic analysis, seem plainly inconsistent.

⁶³450 U.S. 662 (1981). The case is analyzed in Charles E. McLure, Jr., "Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term," *Supreme Court Economic Review* 1 (1982): 69, 93-6.

⁶⁴*Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 667.

⁶⁵*Id.* at 670.

⁶⁶*Id.* at 678.

⁶⁷See, for example, Richard A. Posner, "Taxation by Regulation," *Bell Journal of Economics & Management Science* 2 (Spring 1971): 22-50.

⁶⁸*Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 674.

Consolidated Freightways appears uncommon, however, because it extends the Court beyond the boundaries that it has set for itself in similar cases. In *Moorman*, for example, the Court would not look behind the words of a facially neutral state statute to find a discriminatory intent. This reluctance reached an absurd conclusion in *Commonwealth Edison Co. v. Montana*,⁶⁹ in which the Court turned aside a commerce clause challenge to a sudden seven-fold increase in Montana's severance tax on coal, most of which was either exported to consumers living elsewhere or borne by mine owners and power-company shareholders, again living outside of Montana. But in recent cases, such as *Armco, Inc. v. Hardesty*,⁷⁰ *Bacchus Imports, Ltd. v. Dias*,⁷¹ *Westinghouse Electric Corp. v. Tully*,⁷² and *Maryland v. Louisiana*,⁷³ the Court has struck down facially discriminatory taxes, even where there might have been offsetting taxes on domestic firms (as in *Armco*).

Economic Grounds, Incorrect Results

Cases such as *Consolidated Freightways*, in which the Court "correctly" applied economic analysis to reach its decision, seem scarce in the last several terms. Cases such as *Midkiff*, in which the Court failed entirely to reflect prevailing economic wisdom, seem far more common. And it should come as no surprise that it is precisely in the area of takings in general, and "taking by regulation" in particular, that the Court's grasp of economics seems most flawed.⁷⁴ In *Penn Central Transportation Co. v. New York City*,⁷⁵ for example, the Court heard a challenge to an application of the city's preservation law, forbidding Penn Central from using its air rights to construct a building over Grand Central Terminal. The Court, per Justice Brennan, applied, *inter alia*, a "diminution-in-value" test, which relies not on how much value a regulation has taken, but on how much value remains after the uncompensated loss: "[T]aking' jurisprudence" said the Court, "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular

⁶⁹453 U.S. 609 (1981). The case is discussed in McLure, "Incidence Analysis," pp. 84-89, and the decision is criticized in Epstein, "Taxation," pp. 445-49.

⁷⁰104 S. Ct. 2620 (1984).

⁷¹104 S. Ct. 3049 (1984).

⁷²104 S. Ct. 1856 (1984).

⁷³451 U.S. 725 (1981).

⁷⁴See, for example, James E. Krier, "The Regulation Machine," *Supreme Court Economic Review* 1 (1982): 1-37, for a cogent review of many of the recent takings cases.

⁷⁵438 U.S. 104 (1978).

segment have been entirely abrogated.”⁷⁶ Instead, each property interest represents a bundle of rights, and government may remove an indeterminate number of “sticks” in the bundle as long as what remains provides a “reasonable return” on investment. The Court repeated this logic in *Agins v. City of Tiburon*,⁷⁷ a facial challenge to a zoning ordinance that limited construction on a five-acre tract of land to single-family dwellings at low density. There the Court said that the regulation was not a taking, because the owners continued to enjoy an “economically viable use”⁷⁸ of their property. And again in *Hodel v. Indiana*,⁷⁹ the Court sustained on similar grounds the federal Surface Mining Control and Reclamation Act against another facial challenge:

[T]he prime farmland provisions do not prohibit surface mining; they merely regulate the condition under which the activity may be conducted. The prime farmland provisions say nothing about alternative uses to which farmland may be put since they come into play only when an operator seeks to conduct mining operations on his land. We therefore conclude that these provisions do not, on their face, deprive a property owner of economically beneficial use of his property.⁸⁰

This “economically viable use” or “beneficial use” theory, derived from Michelman’s famous essay on just compensation.⁸¹ On its face the theory is incoherent as economics. No matter how complete or incomplete it might be, loss of value is loss of value, and if the loss is a consequence of governmental action, then there is at least a rebuttable presumption that a taking has occurred. The Court’s use of the terms “reasonable expectation” and “distinct investment-backed expectations” in *Penn Central*⁸² cannot save it from embarrassment. The kind of information required to make judgments about what is “reasonable” and about what the original expectations might have been simply does not exist in any palpable form. In these cases the Court should have been as wary of substituting its judgment for that of the market place as it has been of substituting its judgment for that of the legislature.

⁷⁶Id. at 130–31.

⁷⁷447 U.S. 255 (1980).

⁷⁸Id. at 260.

⁷⁹452 U.S. 314 (1981).

⁸⁰Id. at 335 (footnote omitted).

⁸¹Frank I. Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law,” *Harvard Law Review* 80 (April 1967): 1165–1258. The argument is reviewed in Krier, “Regulation Machine,” pp. 6–8.

⁸²438 U.S. at 124–25, 127, 130 n.27.

Two final cases in this category—economic grounds, incorrect results—go to the heart of two of the Court’s central problems with economics. The first of these, *Texaco, Inc. v. Short*,⁸³ involved a challenge to a 1971 Indiana statute that automatically transferred mineral rights that had not been exercised for 20 years or more to the owners of the corresponding surface rights under which they lay. The act provided for a two-year grace period, but it only required notice to the original owners *after* reversion, and it treated owners of 10 or more such bundles of mineral rights in a single county more leniently than it treated those who owned fewer than 10 bundles.

Texaco asserted that the act was unconstitutional. First, the absence of prior notice denied it due process of law.⁸⁴ Second, the act constituted a taking without just compensation.⁸⁵ Third, the act violated the contracts clause of the Constitution.⁸⁶ Fourth, the act’s unequal treatment, based on the number of bundles owned, violated the equal protection clause of the Fourteenth Amendment.⁸⁷ And finally, the act was not rationally related to the state’s goals, thus violating Texaco’s asserted right of substantive due process.⁸⁸ The Court rejected all of these claims, and in my view the Court’s response was mistaken on all five of them. Here, though, I want to concentrate on the “rational-relation” test.

The Court accepted the opinion of the Indiana Supreme Court, that dormancy of mineral interests “is mischievous and contrary to the economic interests and welfare of the public,” because “[t]he existence of stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests . . . and to the development of the surface rights as well.”⁸⁹

The highest economic use of mineral rights, unlike surface rights, however, may be to keep them in inventory (until prices rise or technology improves):

⁸³454 U.S. 516 (1982). The case is brilliantly analyzed in David D. Haddock and Thomas D. Hall, “The Impact of Making Rights Inalienable: *Merrion v. Jicarilla Apache Tribe*, *Texaco, Inc. v. Short*, *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, and *Ridgway v. Ridgway*,” *Supreme Court Economic Review* 2 (1983): 1–41. My discussion follows theirs closely.

⁸⁴*Texaco, Inc. v. Short*, 454 U.S. at 530.

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* at 538–40.

⁸⁸*Id.* at 525–30.

⁸⁹*Id.* at 523 (quoting 406 N.E.2d at 627).

Most mineral rights are . . . held in inventory. That is, at any moment there is active exploitation of minerals only under a tiny percentage of the total land area of the world, all of the rest being held on the chance that minerals will someday become exploitable through a price increase of that mineral or through innovation of lower-cost production techniques, or that known deposits of exploitable quality will become even more valuable in the future.⁹⁰

The common statute of repose or rule of adverse position thus seems far more appropriate for surface rights (when it is appropriate at all) than for mineral rights:

The active-use *versus* inventory proportions are reversed for surface rights. Most surface rights are actively used for some purpose at any moment. Even that land awaiting imminent conversion to a higher use is often employed in some easily preemptible activity. Consequently, owners or heirs of surface rights periodically take note of their ownership, because of regular rental payments, recurring taxes, and the like. Such reminders encourage them to reevaluate the use to which they are putting that asset, with uses being allocated as conditions change.⁹¹

It is contrary to a public policy aimed at efficient extraction rates to enact adverse possession laws that, in the view that the Indiana Supreme Court urged, would treat surface and mineral rights alike, inasmuch as these laws may encourage too rapid extraction and less efficient use as inventory. After all, if state legislators can go as far as they did in *Short*, might they not go further, to confiscate other inventoried mineral rights on "public policy" grounds? To the extent that owners worry about such possibilities, in the wake of *Short*, they may hasten extraction rates. Indeed, future state enactments of the *Short* variety might actually require inefficient extraction rates. But "rapid extraction is substantially more costly than extraction at a more deliberate rate, in part because some of the minerals actually become lost in isolated underground pockets if extraction is too rapid."⁹² Similarly, because of common-pool problems, "there is an incentive to consolidate mineral holdings into relatively large units before minerals exploration occurs, thus reducing the bargaining costs incurred when negotiating for extraction at the proper rate after mineral discoveries become known."⁹³ But the act reimposes the

⁹⁰Haddock and Hall, "Making Rights Inalienable," p. 21.

⁹¹Ibid.

⁹²Ibid., p. 20 (footnote omitted).

⁹³Ibid.

"bargaining costs associated with the consolidation . . . , all to no socially valuable purpose."⁹⁴

Haddock and Hall suggest two reasons why the Indiana legislature went wrong. First, surface-rights owners, compared to mineral-rights owners, are proportionately more likely to be Indiana residents. Hence, the act resembles a tax whose incidence falls disproportionately on those without political representation in Indiana.⁹⁵ Second, politicians, whose future incumbency is uncertain, may have a higher discount rate, preferring more tax revenues now to a greater amount later, than is efficient for the state or nation.⁹⁶

But the social costs of the Indiana act are greater still. These include the effects of reduced interstate diversification of mineral-rights holdings, increased resources wasted in monitoring state legislatures, and the costs of the "redundant consolidations"⁹⁷ mentioned earlier. Surely, the Court's economic probing in *Short* might have been deeper, and that result might have occurred if the Court was less generous on constitutional grounds in the deference that it gave to the Indiana legislature. For that matter, the same outcome would have followed from the Court's noneconomic but principled sustaining of Texaco's constitutional rights.

Two of the Court's problems with economics, which Easterbrook identifies,⁹⁸ but about which he is far more optimistic than are we,⁹⁹ concern its handling of private-interest legislation and its resolution of *ex ante* versus *ex post* analysis. *Short* clearly indicates that the Indiana legislature was responding to private demands for a redistribution of rights from mineral-interest owners to surface-rights owners. The Court simply has no way to limit such expropriations, given both its deference to legislative bodies and its consistent gutting of the contracts clause and of other constitutional provisions controlling the actions of state governments.¹⁰⁰ Similarly, it has not come to grips with the notion that *ex post* redistributions have *ex ante* consequences of the sort found in our analysis of *Short*. The decision in *Short* thus changes potential mineral-interest owners' and state legislators' incentives, *ex ante*, in wholly undesirable ways.

⁹⁴Ibid., p. 21.

⁹⁵Ibid., p. 23.

⁹⁶Ibid., p. 21.

⁹⁷Ibid., p. 24.

⁹⁸Frank H. Easterbrook, "Foreword: The Court and the Economic System," *Harvard Law Review* 98 (November 1984): 4-60.

⁹⁹See text accompanying *infra* notes 173-82 and 212-30.

¹⁰⁰See Epstein, "Taxation," and "Contract Clause."

The final case in this category is *Arizona v. Maricopa County Medical Society*,¹⁰¹ in which the Court decided, for the first time, that horizontal *maximum-price* agreements are *per se* violations of the Sherman Act. The Court focused, *inter alia*, on the claim that such a “restraint . . . may discourage entry into the market and may deter experimentation and new developments by individual [medical] entrepreneurs.”¹⁰² This claim implied that the Maricopa County Medical Society might have set maximum prices low enough to eliminate potential competition from HMOs. Thus, the Court really applied a *per se* rule to a potential act of predatory pricing, but without any evidence that predation had actually occurred.

The Court invoked its usual reasons for finding a practice to be a *per se* violation of the Sherman Act:

The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable.¹⁰³

But in *Maricopa* the Court could predict nothing “with confidence,” for no court had made any inquiry at all. Indeed, the United States Court of Appeals for the Ninth Circuit had upheld the application of the rule of reason, pointing out that the “record reveals nothing about the actual competitive effects of the challenged arrangement. . . . In truth, we know very little about the impact of this and many other arrangements within the health care industry.”¹⁰⁴ Hence, the application of a *per se* rule without a judicial inquiry into the effects of the maximum-price agreement would “substitute an unsupported belief for proper proof.”¹⁰⁵ With this proposition the dissenters in the Supreme Court agreed:

Before characterizing an arrangement as a *per se* price fixing agreement meriting condemnation, a court should determine whether it is a “naked restrain[t] of trade with no purpose except stifling of competition.” . . .

¹⁰¹ 102 S. Ct. 2466 (1982).

¹⁰² *Id.* at 2475.

¹⁰³ *Id.* at 2473 (footnotes omitted).

¹⁰⁴ *Arizona v. Maricopa County Medical Soc’y*, 643 F.2d 553, 556 (9th Cir. 1980).

¹⁰⁵ *Id.* at 557.

... the fact that a foundation sponsored health insurance plan *literally* involves the setting of ceiling prices among competing physicians does not, of itself, justify condemning the plan as *per se* illegal. ... [T]he *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case.¹⁰⁶

The *Maricopa* decision seems especially troubling in light of the history of American antitrust law. When Congress passed the Sherman Act in 1890, it created an overly broad statute that declared illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . .”¹⁰⁷ It takes little imagination to understand that *any* contract between buyer and seller is a restraint of trade, the buyer binding a part of his budget to the seller, and the seller binding a part of his output to the buyer, each to that extent to the exclusion of all others.¹⁰⁸ To leaven this overly broad statute, the Court has often applied a “rule of reason” to various restraints and practices, which rule requires that courts “consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable.”¹⁰⁹ The development of economic theory since 1890, and especially in the last 20 years, commends this practice. Activities such as alleged predatory pricing,¹¹⁰ vertical integration,¹¹¹ retail price-maintenance agreements,¹¹²

¹⁰⁶102 S. Ct. at 2482-83 (Powell, J., dissenting) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972), quoting in turn *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)) (italics original).

¹⁰⁷15 U.S.C. § 1 (1976).

¹⁰⁸As Justice Brandeis noted, “[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.” *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

¹⁰⁹*Id.* at 238.

¹¹⁰John S. McGee, “Predatory Price Cutting: The Standard Oil (N.J.) Case,” *Journal of Law & Economics* 1 (October 1958): 137-69.

¹¹¹Ronald H. Coase, “The Nature of the Firm,” *Economica* 4 (November 1937): 386-404, and Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, “Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,” *Journal of Law & Economics* 21 (October 1978): 297-326.

¹¹²Lester Telser, “Why Should Manufacturers Want Fair Trade?” *Journal of Law & Economics* 3 (October 1960): 86-105. The argument is cogently explained in Howard P. Marvel, “Hybrid Trade Restraints: The Legal Limit of Government’s Helping Hand,” *Supreme Court Economic Review* 2 (1983): 168-77 (reviewing *Rice v. Norman Williams Co.*, 102 S. Ct. 3294 (1982)).

and base-point pricing,¹¹³ when considered in the light of recent economic analysis, turn out to be improbable (predatory pricing), *benign* (base-point pricing), or actually beneficial (vertical integration and retail price-maintenance agreements).

The Court in *Maricopa* departed from its usual practices in at least two ways. First, it adopted a *per se* rule of illegality with no inquiry at any judicial level about the maximum-price agreement. Second, while the Court did not explicitly call the maximum-price agreement an instance of predation, its reasoning implicitly embraced that view. But predatory-pricing cases had never contemplated *ex ante*, prophylactic prohibition under a *per se* rule, although that is exactly what the Court invoked in *Maricopa*.¹¹⁴ Thus, *Maricopa* abandons a judicial approach—the rule of reason—designed to tame what would otherwise be an unreasonably broad statute, arguably to the detriment of both sellers and the citizenry.

Economists and other scholars have disagreed over whether the horizontal maximum-price agreement declared illegal in *Maricopa* is actually beneficial or harmful. Easterbrook,¹¹⁵ for example, suggests that such agreements and their publication might inform consumers about lower-price alternatives. Hall¹¹⁶ argues that the arrangement is economically efficient. And Leffler,¹¹⁷ using a model similar to but more complex than Hall's, argues that HMOs might suffer. It was doubtless this confusing economic picture that led both the district court and the court of appeals to deny summary judgment under a *per se* rule and to require instead that the case be tried under a rule of reason. The Supreme Court was seriously in error when it decided otherwise, as the underlying theory of predation itself is fundamentally flawed.¹¹⁸ But for our purposes the problem lies elsewhere. Economic complexity appears to have led the Court to declare a practice illegal *per se*, to the derogation of the right of physicians to contract with each other to lower prices. Their rights have fallen

¹¹³David D. Haddock, "Base-Point Pricing: Competitive v. Collusive Theories," *American Economic Review* 72 (June 1982): 289–306.

¹¹⁴The Court also suggested that the maximum-price agreement might become a minimum-price agreement, promoting uniform pricing as well, but again there was no proof on the record. See *Arizona v. Maricopa Medical Society*, 102 S. Ct. at 2475.

¹¹⁵Frank H. Easterbrook, "Maximum Price Fixing," *University of Chicago Law Review* 48 (Fall 1981): 886–910.

¹¹⁶Comment, "Physician Maximum Price Agreements: *Arizona v. Maricopa County Medical Society*," *Emory Law Journal* 31 (Fall 1982): 913–71.

¹¹⁷Keith B. Leffler, "*Arizona v. Maricopa County Medical Society*: Maximum-Price Agreements in Markets with Insured Buyers," *Supreme Court Economic Review* 2 (1983): 187–211.

¹¹⁸See, for example, McGee, "Predatory Price Cutting."

away in the face of a theoretically unlikely charge that, in any case, remains unproved.

Noneconomic Grounds, Correct Results

The third set of cases involves decisions that the Supreme Court decided on noneconomic grounds but which it could have decided equally well on the basis of consistent economic analysis. These cases, nevertheless, are marked by occasional analysis in *dicta*, which often seems inadequate. The first of these is *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*,¹¹⁹ which concerned a challenge to the application by a California court of appeals of the Supreme Court of California's decision in *Wellenkamp v. Bank of America*,¹²⁰ which in turn nullified the right of banks in California to enforce due-on-sale clauses in home-mortgage contracts. In *Wellenkamp*, the California court granted the plaintiff injunctive relief against the bank's foreclosure on her property, when she refused to agree to accept escalation of the interest rate on a mortgage that she had assumed from the sellers. The Court held that the due-on-sale clause violated a California statute, enacted a century earlier, which said that "[c]onditions restraining alienation, when repugnant to the interest created are void."¹²¹ The California Court of Appeals for the Fourth Appellate District's decision¹²² in *Fidelity Federal* applied the *Wellenkamp* doctrine against a challenge of federal preemption, which the lower court had agreed to,¹²³ because of a 1976 Federal Home Loan Bank Board regulation granting federally chartered savings and loan associations the right to place and enforce due-on-sale clauses in mortgage contracts.¹²⁴ The Supreme Court of California refused to review the appeals court's decision.

Considering the competitive nature of mortgage banking, a correct economic analysis of due-on-sale clauses would ask whether a bank will shoulder the risk that interest rates might rise when it had agreed to mortgage contracts assumable at the original contract's interest rate, or whether the mortgagor will accept the risk that the higher rate might impose a lower market price for his property. (A complete analysis would also consider the effect of interest rate declines.)

¹¹⁹102 S. Ct. 3014 (1982). The case is discussed cogently in Haddock and Hall, "Making Rights Inalienable," pp. 25-30.

¹²⁰21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

¹²¹Cal. Civ. Code § 711 (West 1982).

¹²²102 S. Ct. at 3020.

¹²³*Id.*

¹²⁴12 C.F.R. §§ 545.8-3(f) (1982).

Absent substantial market failure, competition among banks and mortgagors should be sufficient to insure that the contracting parties "got it right." Hence, the judicial (or, implicitly, legislative) nullification of the due-on-sale clause could only benefit present home sellers (and some buyers, depending upon the economic incidence of nullification), to the detriment of future mortgagors. Thus, on economic grounds we can approve of the Supreme Court's decision to overturn the California court's ruling.

The Court based its decision on a narrow reading of federal preemption, and it would have been untoward for it to have done otherwise. Congress then quickly removed any doubt about the matter by extending to all banks, not just to those that are federally chartered, the right to incorporate due-on-sale clauses in mortgage contracts.¹²⁵ But it is useful to consider how the Court might have treated *Fidelity Federal* in the absence of the preempting federal banking regulation or congressional action. Surely, the same Court that decided *Midkiff* could not find in its own arsenal grounds to argue with a California legislature or court that identified a significant public danger in inflated housing costs and rising interest rates. After all, an imaginary threat to ownership is common to both the California and Hawaii situations. Nor should we conclude that the banks would be entitled to compensation for their lost income in *Wellenkamp's* present and prospective judicial impairment of the obligation of contract.¹²⁶ After all, the banks would continue, in the words of *Penn Central*, to receive a "reasonable return" on their mortgages. Three courts interpreted the preemption question in *Fidelity Federal* in three different ways. But it would have been comforting to know that, reflecting a constitutionally based set of principles laid down by the Supreme Court, even the California courts would have regarded

¹²⁵Garn-St. Germaine Depository Institution Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C.).

¹²⁶It is generally agreed that the contracts clause does not apply to decisions by state courts about the law of contracts. See Epstein, "Contract Clause," pp. 747-50. There are limits to this rule, however. See *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1864). To the extent that the California courts relied on an old and otherwise innocuous state statute to void due-on-sale clauses, however, it is at least arguable that the federal courts might have vacated the judgment below. Judicial common law activity in contract cases, moreover, is largely prospective, filling in details when contracts stand mute about particular rights and obligations. The overriding intent of this kind of judicial activity is to reduce both uncertainty and transaction costs, for the benefit of future contracting parties. The decisions of the California courts in both *Wellenkamp* and *de la Cuesta* seem plainly at odds with this intent. And in these cases, as in so many others, California courts have transcended a judicial role and taken on the mantle of legislatures.

the de la Cuestas' suit as a frivolous attempt at a private, uncompensated taking, and would have treated it accordingly.

The second case involving noneconomic grounds but economically correct results is *Edgar v. Mite Corp.*,¹²⁷ in which the Supreme Court struck down the Illinois Business Take-Over Act. That act, passed in 1977, set up substantial barriers, far beyond those contemplated in the federal Williams Act, to corporate takeovers. The Court, per Justice White, decided that the Williams Act preempted the Illinois act and as well, the state statute placed an unacceptable burden on interstate commerce. We could certainly analyze *Edgar v. Mite* in the category of "economic grounds, correct results," because Justice White's opinion relies heavily on recent developments in the law and economics of corporate governance.¹²⁸ Indeed, considerations of efficiency in the market for corporate ownership and control tipped the balance against the interests of Illinois in Justice White's application of the commerce clause.¹²⁹ Similarly, the judicially recognized belief in a congressional "balance" struck between the interests of present shareholders and future owners provided support for the majority's claim that the Williams Act preempted the Illinois statute.¹³⁰

The problem with *Edgar v. Mite*, as Jarrell¹³¹ has carefully argued, is that the Williams Act is fully subject to all of the criticisms that Justice White's opinion aims at the Illinois act. Any hindrance of corporate takeovers, save those involving common law fraud, renders the market for corporate control less efficient and thereby *ex ante* reduces all investors' returns. If Justice White is correct about the Illinois act's economic mischief, then he can only argue that the Williams Act works a slightly reduced degree of mischief.

Noneconomic Grounds, Incorrect Results

The final group of cases involves decisions in which, from an economic perspective, the Supreme Court came to incorrect results

¹²⁷102 S. Ct. 2629 (1982).

¹²⁸See, for example, *Id.* at 2642 (citing Frank H. Easterbrook and Daniel R. Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer," *Harvard Law Review* 94 (April 1981): 1161-1203, and Daniel R. Fischel, "Efficient Capital Market Theory, The Market for Corporate Control, and the Regulation of Cash Tender Offers," *Texas Law Review* 57 (December 1978): 1-46).

¹²⁹102 S. Ct. at 2640.

¹³⁰*Id.* at 2629-35.

¹³¹Greg A. Jarrell, "State Anti-Takeover Laws and the Efficient Allocation of Corporate Control: An Economic Analysis of *Edgar v. Mite Corp.*," *Supreme Court Economic Review* 2 (1983): 111-29. Jarrell adds that Justice White emphasizes the "inefficient-management" explanation for takeovers but pays no attention to "synergy"-related explanations. *Ibid.*, pp. 121-23.

but on noneconomic grounds. In terms of the deference paid to state legislatures, *Midkiff* and *Moorman* fall easily into this category, although in the first the Court uttered economic heresy and in the second it specifically rejected compelling economic reasoning. Three other cases, however, help to document how legal opinion with neither constitutional principle nor economic reasoning as guides often can lead the Court astray.

The first case, *Ridgway v. Ridgway*,¹³² involves a dispute over the proceeds of a deceased serviceman's GI insurance. Sgt. Ridgway, as part of a divorce decree, had agreed to designate his ex-wife as the policy's beneficiary, in trust for their minor children, or to replace the GI insurance with a comparable private policy. Sgt. Ridgway subsequently remarried, designated his new wife as the policy's beneficiary, and then died one year later, without replacing the original policy. The Supreme Judicial Court of Maine turned aside a lower-court ruling against the first wife, based on federal-preemption grounds.¹³³ The United States Supreme Court then reversed the Maine court, relying on a reading of the Serviceman's Group Life Insurance Act of 1965,¹³⁴ which provided that servicemen could redesignate beneficiaries at will, and that the policy's proceeds "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."¹³⁵

The Court's supremacy clause argument rested partly on public-policy grounds. In a related case, the Court had earlier decided that "insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman."¹³⁶ And so it might, although the application in *Ridgway* seems strained. By a correct reading of the underlying economics, however, the Court might have found the application of its supremacy clause argument contrary to public policy and certainly contrary to the spirit, and even, by implication, the letter of the 1965 act. The obvious difficulty that the Court's opinion in *Ridgway* poses is that it makes inalienable the serviceman's property interest in his GI insurance policy's proceeds. He can no longer enter a contract that designates the policy's beneficiary, because after *Ridgway* such a designation provision would be unenforceable. The

¹³²454 U.S. 46 (1981). For a discussion of *Ridgway*, see Haddock and Hall, "Making Rights Inalienable," pp. 4-7. My discussion follows theirs at several points.

¹³³*Ridgway v. Prudential Ins. Co.*, 419 A.2d 1030 (Me. 1980).

¹³⁴38 U.S.C. § 770(a) (1976).

¹³⁵*Id.* at § 770(g).

¹³⁶*Wissner v. Wissner*, 338 U.S. 655, 660-61 (1950).

serviceman's choice set is thus restricted, and he may have to turn to a less preferred alternative, such as a contractual hostage, if the Court will allow it, to satisfy his opposite number in any negotiations. In sum, the Court's opinion in *Ridgway* has reduced the value of GI insurance for all servicemen covered under these policies.¹³⁷

The same reasoning applies to the Court's opinion in *Merrion v. Jicarilla Apache Tribe*.¹³⁸ In *Jicarilla*, several companies had been operating under long-term mineral leases on tribal lands. The leases contemplated rents and royalties on oil and natural gas extracted following exploration. But in 1976 the tribe decided to impose an *ad valorem* tax in addition to the royalties previously agreed upon. Noting the special circumstances and sovereignty of Indian tribes, the Court sustained the tax against commerce clause, federal preemption, and breach of contract challenges.

Jicarilla resembles *Ridgway*, but with an important twist. The resemblance is clear. After *Jicarilla*, no oil company can make a contract with an Indian tribe whose sovereignty is recognized by law, without the possibility of subsequent confiscatory tribal taxation. The tribes therefore have lost some of their ability to sell—alienate—mineral rights, to their substantial detriment. Hence, the Court's opinion(s) in *Jicarilla* (*Ridgway*) have harmed precisely those persons that federal Indian (servicemen's) law sought to protect. Now the tribe may have to go to the less preferred and more risky alternative of extracting minerals itself, of foregoing exploration and possible extraction altogether, or, as in *Ridgway*, of developing a contractual hostage, if the Court determines that its form of sovereignty so allows.

The twist in *Jicarilla* seems equally clear.¹³⁹ Payments for mineral rights can take two forms: a rent on the use of the land and a royalty on the amount or the value of the minerals extracted. To the extent that the contract calls for a royalty, the tribe carries some of the risk that exploration will prove fruitless. Before *Jicarilla*, these contract terms emerged from the parties' information, bargaining, and market conditions. After *Jicarilla*, however, the tribes can charge one price (a rent) for exploration, and if it is successful, charge yet another price

¹³⁷Whether or not *Ridgway's* first wife would have an action against his estate under contract law is problematical. Future similarly situated plaintiffs probably have been put on notice that they could not sustain such an action.

¹³⁸455 U.S. 130 (1982). The case is carefully analyzed in Haddock and Hall, "Making Rights Inalienable," pp. 7–18.

¹³⁹The following argument relies on Haddock and Hall, pp. 8–9.

(a royalty) for extraction in an apparently lawful exercise of post-contractual opportunistic behavior.¹⁴⁰

The final opinion in this category, *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*,¹⁴¹ was the most startling and widespread in its implications. In *Norris*, the Court held as illegal, under Title VII of the Civil Rights Act of 1964 as amended,¹⁴² the practice of providing lower monthly annuity payments to women than to men. Title VII reads in pertinent part, that it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."¹⁴³

The practice complained of is simple enough to understand. Suppose that an employer pays a man and woman equal salaries over equal periods of employment and sets aside or contributes equal percentages of their wages into earmarked retirement funds. Both employees retire at age 65, and the funds provide each with a monthly annuity calculated to pay out the full value of the earmarked amount, net of administrative costs and related fees, over each employee's actuarially calculated remaining life. Since women, on average, live longer than do men, the woman's monthly payments are commensurately smaller than the man's payments.

The Court required little effort to place such annuities in the category of "compensation, terms, conditions, or privileges of employment," and to regard the apparent inequality as discrimination. But the inequality was far more apparent than real. Considered *ex post*, as the Court had done, the monthly payments are unequal. Considered *ex ante*, as a proper economic analysis (and the market) would do, during the period of employment, the net present value of the income streams from the man's and woman's annuities are exactly equal. "Inequality" must reside somewhere in this calculus, no matter which payment method is chosen, and the Court plainly chose the wrong place. One result of the *Norris* decision is that the Court worked a serious inequality as between men and women. A second result is that the Court has created an implicit wealth transfer from women who remain at home and rely on their husbands' pensions to those who enter the job market and rely on their own

¹⁴⁰For a discussion of post-contractual opportunistic behavior in the context of decisions to integrate vertically, see Klein, Crawford, and Alchian, "Vertical Integration."

¹⁴¹103 S. Ct. 3492 (1983).

¹⁴²42 U.S.C. § 2000e *et seq.*

¹⁴³*Id.* at §§ 2000e-2(a)(1).

pensions. A third result of *Norris* will be some decoupling of employee remuneration and the purchase of annuities. A fourth result will be a serious distortion of economic decision making and a reduction in welfare.¹⁴⁴ Nothing in Title VII specifically compelled such a result. We may nevertheless explain it as the Court's misguided attempt to expand on congressional intent in a "good cause." The decision betrays the Court's inconsistency, however, as in cases such as *Norris* it appears to accept the role of legislature, but only because, in its view, the legislature itself has pointed the way.

IV. Judges as Economists Reconsidered

One simple response to this litany of economic error might hold that judges should learn more about and apply economic analysis to the cases and controversies that they must decide. In certain areas of law, such as antitrust and the traditional common law areas—property, contracts, and torts—this response has much to recommend it, and indeed it holds good where the courts must answer explicit economic questions. In these same areas there is at least an argument, yet one that we later question, that the Supreme Court is showing a growing sophistication.¹⁴⁵ But in the area of constitutional law generally, as well as in common law cases that rise to the level of constitutional disputes, this response may be seriously ill-founded.

I hasten to add, beyond the confines of a mere footnote, that my dissatisfaction with the explicit judicial application of economics to the law of the Constitution does not grow out of a dissatisfaction with the economic analysis of law as an academic discipline. That discipline, like all other academic pursuits, comes in all shapes and sizes. Similarly, the discipline's practitioners, like its critics, have provided works that range from the profound¹⁴⁶ to the frivolous.¹⁴⁷ The academic exercise of law and economics views judges and litigants,

¹⁴⁴For a careful analysis of the annuity-equality problem, see George J. Benston, "The Economics of Gender Discrimination in Employee Fringe Benefits: *Manhart* Revisited," *University of Chicago Law Review* 49 (Spring 1982): 489–542.

¹⁴⁵See Easterbrook, "Court and Economic System," and text accompanying *infra* notes 173–82 and 212–30.

¹⁴⁶See, for example, Buchanan, "Good Economics."

¹⁴⁷See, for example, Mark G. Kelman, "Misunderstanding Social Life: A Critique of the Core Premises of 'Law and Economics,'" *Journal of Legal Education* 33 (June 1983): 274–84. Kelman's errors probably reflect at least in part a reaction to Posner's procrustean bed of wealth maximizing. See, for example, Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies* 8 (January 1979): 103–40, and Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication," *Hofstra Law Review* 8 (Spring 1980): 487–507.

producers and consumers, and governors and the governed, as *objects* of study, not as those whom we might approach as supplicants, and whom we are driven to advise because we share “the fire of truth.”¹⁴⁸ Our experience with both courts and legislatures suggests a different approach.

The Problem of Welfare and Rights

The first problem with asking judges to become the ultimate social controllers in pursuit of social efficiency—wealth maximizing—seems apparent in the manner that the proposition is thus stated. As a normative model for judges to follow explicitly, wealth maximizing incorporates the notion that all of the wealth in society, and correspondingly all of the rights of property and contract, are available for contraction, expansion, and redistribution, at the expense of their owners or of others.¹⁴⁹ Sometimes these reallocations will come with *compensation*, as in *Midkiff*, and sometimes without compensation, as in *Penn Central* and as in the vast array of other takings by regulation.

The philosophical basis for such a view of rearrangeable rights would place the courts, as agencies of the state, above the ultimate source of consent. It would create a hubris that knows no bounds. And it seems contrary to any notion of ordered liberty. Courts that adopt this view would become indistinguishable in their purpose from super regulatory agencies and legislatures, charged with promoting the general welfare, and with all of the property and rights in the hands of the citizens available for confiscation and redistribution. If we assert for the judiciary the efficiency goal and nothing more, then we must assert as well the means for its accomplishment. Our assessment of this view of law found its best summary in the words of an otherwise very staid and dispassionate colleague of mine

¹⁴⁸See Edmund W. Kitch, ed., “The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970,” *Journal of Law & Economics* 26 (April 1983): 163–234.

¹⁴⁹As Epstein notes,

Into this picture of uncontested hegemony I should like to inject a note of doubt. It must be asked by what warrant, by what title, does the public policy analyst proceed on the implicit assumption that all entitlements lie within the public domain? At the very least the question deserves some sort of an answer because of the way in which the study of law and economics—even that of the conservative stripe—cuts against the ideals of limited government, individual liberty and private property, which, especially in the American context, have deep and powerful roots of their own.

[Epstein, “Taxation,” p. 433]

who, after reading Judge Posner's *Economic Analysis of Law*,¹⁵⁰ offered the opinion that Posner is a socialist.

This interpretation of Posnerian law and economics doubtless holds the elements of a caricature, but it is a caricature by invitation. This interpretation doubtless also will convey the impression of a nothing intellectual atavism, not the least because all law incorporates some capacity for redistribution. But such redistribution is "less bad" if it is an incidental by-product of preserving rights, rather than the explicit judicial tool of wealth maximizing.¹⁵¹ Here, judicial motive and form become central, because they condition the citizen's expectations of how secure his rights of property, contract, and person might remain under the alternatives.

Judges as Legislators

The most apparent counterclaim to the assertion that the wealth-maximizing jurist is a less than desirable normative model grows out of recent literature on the common law.¹⁵² The model of common law adjudication developed in this literature is ingenious and, I believe, correct, even in its utter simplicity. Rubin's model examines the contesting parties' incentives to sue or settle out of court. If the judicial precedent governing the dispute is efficient (for example, it places liability in a tort case on the least-cost accident avoider), then the parties have an incentive to settle rather than sue. But if the precedent is inefficient, then they have an incentive to go to trial. The only assumption about judges' decisions in this model is that they tend to follow precedent. The end result is that efficient precedents tend to remain unchallenged, while the parties continually litigate cases governed by an inefficient precedent until some court overturns the inefficient rule. The theory's predictions are most robust if both parties have a continuing future interest in the precedent and if there are few serious free-rider problems in aggregating the interests of all potential future litigants.

The notion that Supreme Court justices or appellate court judges should decide cases and set precedents so as to maximize wealth rests on two critical assumptions. The first is that judges should be conscious (and educated) about what they are doing. The second is that they should do it at a constitutional level. The problem with the

¹⁵⁰Posner, *Economic Analysis of Law*.

¹⁵¹See *supra* note 126.

¹⁵²See, for example, Paul H. Rubin, "Why Is the Common Law Efficient?" *Journal of Legal Studies* 6 (January 1977): 51-63, and George Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6 (January 1977): 65-82.

first assumption is that it would have courts act consciously and explicitly as super legislatures. Indeed, the judicial model implicit in this view is precisely the Supreme Court's own caricatured model of the legislature, expressed in cases such as *Nebbia*, *Midkiff*, and *Moorman*, but absent any degree of representativeness.

Such a comparison immediately raises the question of whether a court seized by this view of its role would act any differently than do present legislatures. Even though the Supreme Court, in the deference that it grants to the political branches, has explicitly eschewed such a role, we might consider what would happen if it specifically embraced it. Present models of legislatures, which Section V¹⁵³ reviews, indicate that legislators face powerful incentives to produce private benefits for private, divisible groups in the population, all at collective costs that probably exceed the groups' benefits (to the extent that such costs and benefits remain comparable). A court that decided explicitly to maximize wealth would to that extent cast off precedent and ignore preexisting rights, because these could only impair its operation. The broad-based collection of the citizenry would face severe free-rider problems in assembling its interests to provide a defense against the inevitable interest-group assault on its welfare through judicial territory. The only litigants that would tend to remain, and whose welfare would have standing in fact, would be the interest groups themselves, as banks would battle brokers, truckers would assault railroads, small towns would attack airlines, in a process now carried on in the legislatures and regulatory agencies.¹⁵⁴ What surprises us about this proposed model (but really should not) is that it predicts an outcome that strongly resembles the present order. The Court today, by becoming *functus officio*, tends merely to recapitulate the legislature's process and determinations.

But there is more. On a few occasions the Court does find grounds for reversing legislative determinations. As mentioned earlier,¹⁵⁵ for example, in *Maryland v. Louisiana*, *Armco*, *Bacchus*, and *Tully* the Court read the explicit language of state tax statutes to discriminate impermissibly against out-of-state corporations. But it did so on principled, constitutional grounds, not on economic ones. Indeed, in *Armco* it might have found on economic grounds that a different state tax on local firms offset (or was larger than) the tax on foreign companies. And in decisions such as *Chadha*, the Court has taken a dim

¹⁵³See text accompanying *infra* notes 193–210.

¹⁵⁴See Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, "A Theory of Legislative Delegation," *Cornell Law Review* 68 (November 1982): 1–67.

¹⁵⁵See *supra* note 7 and text accompanying *supra* notes 69–73.

view of congressional attempts to circumvent what it held to be constitutionally mandated legislative processes.

Suppose that, in each of these and similar (or even different) cases, the Court came to similar results on the merits but based its opinions on explicit economic grounds, not on principled constitutional ones. Now it says to Congress: "We have argued and bargained among ourselves, and our opinion is different—and controlling." How would Congress respond? Recall that Landes and Posner's model¹⁵⁶ asserts that the judiciary maintains its "independence" by not becoming an auxiliary legislature. By implication, the Court can more easily "get away" with opposing legislative determinations occasionally on grounds orthogonal to those engaged by the political branches. Could it do so if it merely recapitulated the legislative process, and particularly the political considerations inherent in that process? I think not. The Court's appellate jurisdiction is a gift from Congress, and it is subject to rescission. Hence, the result of explicit judicial legislation, on economic or other nonconstitutional grounds, well might be the negation of any control that the judiciary now imposes on the political branches through constitutional argument.

Judges as Planners

Conscious and explicit judicial decision making on wealth-maximizing grounds might create other mischief as well, although here the analysis becomes far more speculative. Let us draw an analogy from actors in a competitive market place to the participants in a common law process. Firms as price takers face horizontal demand schedules and in long-run equilibrium set output and scale where marginal cost equals marginal revenue (price) and where long-run average total cost is minimized. None of this occurs, nor need it occur, as the result of conscious calculation.¹⁵⁷ Indeed, the Austrian economists teach us that it cannot be planned or perhaps even be done consciously.¹⁵⁸ The firm, that is, by using a heuristic or even by acting randomly, either adopts the "correct" output and technology or tends to go out of business or be subject to takeover by more "efficient" owners and management teams. The traditional judgment of welfare economics is that the resulting resource allocation is

¹⁵⁶See "Independent Judiciary" and text accompanying supra notes 41–56.

¹⁵⁷See Armen A. Alchian, "Uncertainty, Evolution, and Economic Theory," *Journal of Political Economy* 58 (June 1950): 211–21.

¹⁵⁸See, for example, Friedrich A. Hayek, "The Use of Knowledge in Society," *American Economic Review* 35 (September 1945): 519–30. Here, I extend an Austrian argument from a foundation of neoclassical economic equilibrium. Austrians justifiably might protest.

efficient, even though none of the parties—buyers and sellers—specifically intended it to be so.

By analogy, the participants in common law adjudication each face a set of incentives and operate under a set of heuristics designated as rules of legal procedure, *standing*, *jurisdiction*, and the like. The judge applies these rules and (usually) a precedent to arrive at a decision. Again, if we credit much of the recent literature in law and economics, the resulting resource allocation is efficient. The central question is: “What would happen in each setting if the actors sought to promote economically efficient results, instead of seeking to apply their respective heuristics (or even random decision making, as the case might be)?”

The question is at least partly fanciful, because the analogy breaks down at certain critical points. The firm’s manager, for example, need not know the nature of each buyer’s preferences, because price provides an adequate summary. The judge, by contrast, “knows” only the preferences of the instant litigants and the datum that they have not come to a settlement. Similarly, this market, by definition, is devoid of external effects, while these same effects often form the core of efficiency judgments about common law rules, especially at the appellate level, where judges “sell” not merely decisions on the merits but also precedents governing the disposition of future disputes.

But substantial similarities between the two situations remain. Neither the manager nor the judge has sufficient information to make adequate globally efficient welfare judgments in the face of geographically different conditions. Neither has an incentive to collect, nor could each collect, Pareto-relevant information about widespread external effects, because the manager “knows” only price and the judge “knows” only the litigants’ interests and arguments. Most important, the analogy breaks down when the judge’s decision loses its “competitive” nature and governs a widespread territory of many litigants with diverse preferences operating under different conditions. And this is precisely the point at which the second critical assumption of the notion that Supreme Court justices or appellate court judges should decide cases and set precedents so as to maximize wealth comes into play—the notion that judges should do this at a constitutional level.

The model of the Posnerian judge is highly seductive, not the least because it works, and sometimes such judges are even conscious about what they are doing. But the model applies best to a local judge applying common law, whose lesser lack of the *correct* information can do little mischief, rather than to a national judge applying constitutional law, whose lack of information may be far more profound,

and thus cause far greater harm. Consider, for example, a simple problem in landlord-tenant (and tort) law: Who should be liable for injury caused a third party by negligence on the leased property, the landlord or the tenant? For many years the common law placed liability on the tenant, and then it changed to the landlord. Goetz¹⁵⁹ provides an interesting explanation for this change. In earlier years leased residences were principally single-family dwellings with long periods of tenancy. The tenant was in the best position to know about dangerous conditions. More recently, renters tend increasingly to occupy multiple-family apartment units, and especially those with short-term leases and common areas. Information asymmetries between the landlord and tenant and free-rider problems among tenants, with some exceptions, would place liability at reduced relative cost on landlords.

At lower judicial levels judges at common law might distinguish cases involving large apartment complexes with high tenant turnover from those involving single-family dwellings leased for long periods of tenancy. The judge would have the best grasp of local conditions, and in the absence of specific contractual provisions, we would approve of his acting "like an economist" to find the least-cost accident avoider. At the national level, however, matters are different. First, the judge is not likely to understand local conditions. Second, he may have to worry, more than would the local judge, about legislative opposition. Third, the problem of asymmetric interests may grow larger at the national than at the local level. Recall that in the Rubin model, both parties must have a continuing interest in precedent, and both parties must be reasonable proxies for all other potentially similarly situated persons. But to the extent that the litigation rises to the federal appellate level, one or the other of these assumptions seems likely not to apply. Large housing corporations that own and operate apartment complexes, for example, may be better able to internalize some of the collective benefits of litigation than are individual tenants, leading the tenants to underinvest in litigation, with the consequent adoption of an inefficient precedent.¹⁶⁰

¹⁵⁹Charles J. Goetz, "Wherefore the Landlord-Tenant Law 'Revolution?' Some Comments," *Cornell Law Review* 69 (March 1984): 592-603.

¹⁶⁰Both parties—landlords and tenants—lose if the precedent is inefficient. Because of free-rider problems, the tenant will take a less than efficient amount of care (reflecting free-rider problems) if the landlord is not held liable, but simultaneously he might have to invest more than the landlord would have to pay in pursuit of an efficient level of precautionary measures (if he alone bears the entire cost of an efficient level of care), because the landlord can identify and repair hazards at a lower cost. The tenant, if he alone pays for an efficient level of accident avoidance, will also be willing only to pay a lower rent than if the landlord were liable. If the landlord is liable, then he will pass

Left to their own devices, federal appellate judges will have only what the litigants and intervenors tell them and their own ideological predilections to rely on in deciding such cases. They certainly could not (and might be unwilling to) rely on their knowledge of local conditions. In *Javins v. First National Realty Corporation*,¹⁶¹ for example, Judge J. Skelly Wright held that tenants who had not paid their rent could not face eviction where the landlord had failed to meet an implied warrant of habitability, based on the standards found in the local housing code, which warrant he created out of whole cloth. Judge Wright's later justification for this and similar decisions contains most of the elements leading to a failure to get the economics right:

I was . . . influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustices of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord and tenant decisions.

I came to Washington in April 1962 after being born and raised in New Orleans, Louisiana for 51 years. I had never been exposed, either as a judge or as a lawyer, to the local practice of law which, of course, included landlord and tenant cases. I was Assistant U.S. Attorney, U.S. Attorney, and then U.S. District Court judge in New Orleans before I joined the U.S. Court of Appeals in Washington. It was my first exposure to landlord and tenant cases, the U.S. Court of Appeals here being a writ court to the local court system at the time. I didn't like what I saw, and I did what I could do to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital.

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.¹⁶²

along some of the expected cost of liability to the tenant, but the cost will be lower than the tenant (efficiently) would bear if he were liable. All of this is merely an application of the Coase Theorem. See Ronald H. Coase, "The Problem of Social Cost," *Journal of Law & Economics* 3 (October 1960): 1-44.

¹⁶¹428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

¹⁶²Letter to Professor Edward H. Rabin from Judge J. Skelly Wright, in Edward H. Rabin, "The Revolution in Residential Landlord-Tenant Law: Causes and Consequences," *Cornell Law Review* 69 (March 1984): 549.

The *Javins* opinion may seem inappropriate to cite here, in the light of the previous hypothetical, which found large rental firms to be better able to represent—aggregate—all other similar firms' interest in precedent. Here, the tenants have "won," or so they might believe. The actual interests aggregated were those of the so-called public interest groups. First National Realty Corporation was represented by Mr. Herman Miller, of Washington, D.C. Ms. Javins was represented by Mr. Edmund E. Fleming,

The problem with Judge Wright's decision in *Javins* and in his other landmark landlord-tenant cases¹⁶³ is a failure to understand the underlying economic nature of contracts. Unless a lease contract so specified, there was no implied warrant of "habitability,"¹⁶⁴ of the sort that he contemplated, in the common law. Thus, the tenants in *Javins* and in similar cases had agreed to live in the affected residences. Requiring landlords to do "more" would simultaneously require tenants to pay more and to face a reduced availability of housing stock. The reduction in available and affordable housing following *Javins* and its terms' enactment in several state codes therefore should occasion no surprise. Nor is Judge Wright's reliance on ideology and ignoring of economic reality an astonishing development. He enjoyed neither the information nor the perspective necessary to get it right. Landlords' rights and tenants' welfare (and contract rights) suffered as a consequence.

V. Constitutional Principles and Economic Rights

The preceding discussion of judges as economists would appear to close off one possible avenue of improving judicial control of the political branches. First, the notion of judges as economists seems philosophically objectionable, because it eviscerates any notion of the judiciary as a protector of rights. Second, if judges acted as legislators, their actions would incorporate in the judiciary all of the failures of legislatures, threaten judges' independence, and obliterate any reasonable control that judges now exercise. Finally, the idea of judges as planners—Posnerian judges—might be an acceptable normative model for local, common law adjudication, but certainly not for federal appellate-level disputes involving constitutional questions, in which the judges may tend to substitute their personal ideologies in the absence of information and a roughly symmetric

of Boston. In addition, briefs *amicus curiae*, urging reversal in Ms. Javins's favor, were filed by the Washington Planning and Housing Association, the Neighborhood Legal Services Program (with Patricia M. Wald on brief), and the National Housing Law Project. The financial supporters of these groups (probably including the federal government) had aggregated *their* ideological interests.

¹⁶³See, for example, *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (barring failure to renew lease in retaliation for tenant's complaining to housing authority over code violations), and *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (barring failure to renew lease in retaliation for tenant's abatement of rent for code violation and requiring landlord to keep property on market, repair it, and bear burden of proof that any subsequent lease nonrenewal is not retaliatory).

¹⁶⁴Judge Wright's implied warrant of habitability goes far beyond requiring the provision of barely suitable housing to requiring that all appliances, outlets, and so forth actually "work" up to the specifications of the operant housing code.

interest of the litigants. Furthermore, the activities of common law judges, unlike those of federal jurists, as in *Javins*, or of state appellate court judges, as in *Wellenkamp*, would seem to promote contract and property rights, not to subvert them. In sum, almost by the default of the other branches, the judiciary becomes a source of control of those branches, but there is not yet available a set of robust rules, doctrines, or even attitudes, that courts might apply to accomplish this task.

Citizens' Welfare in the Political Branches

Any attempt to use the judiciary to control the apparent failures of federal, state, and local political branches to advance, rather than to diminish the interests of the citizenry must first confront the existential fact that the Supreme Court gives scant recognition that such failures exist. In the view of the Court, the public interest is what the legislature says it is, and the appropriate means for pursuing that interest ordinarily are the means that the legislature has embraced. The Court's very peculiar applications of specious economic reasoning, more often than not, are but frail attempts to give color to patently welfare-diminishing and rights-derogating legislative actions.

The rare exceptions to this generalization indicate the very restrained lengths to which the Court is willing to go to repair legislative damage. Some of these exceptions entail attempts to perfect the basis of representation itself. In cases such as *City of Port Arthur, Texas v. United States*,¹⁶⁵ *Anderson v. Celebrezze*,¹⁶⁶ and *Karcher v. Daggett*,¹⁶⁷ the Court has sought recently to protect citizens from racial discrimination, statutory handicapping of minority candidates, and congressional-district numerical inequality and gerrymandering, respectively. At best, the Court's decisions aimed at providing for "fair" and "equal" political representation serve only to give legitimacy to the welfare-diminishing decisions of legislatures. But the Court's reading of other recent cases, such as *Brown v. Thompson*¹⁶⁸ and *Ball v. James*,⁶⁹ also suggests limits as to how far the Court is willing to go to insure numerical equality. Certainly, it is fair to say that the Court has no *a priori* theoretical basis for asserting the existence of *any* connection between voting inequality and unequal treatment in public policy. And recent advances in public choice can

¹⁶⁵103 S. Ct. 530 (1982).

¹⁶⁶103 S. Ct. 1564 (1983).

¹⁶⁷103 S. Ct. 2653 (1983).

¹⁶⁸103 S. Ct. 2690 (1983).

¹⁶⁹451 U.S. 355 (1981).

offer the Court no guidance, because no empirical or theoretical basis for claiming that such a connection prevails appears to exist.¹⁷⁰

A second set of cases, namely those involving alleged commerce clause violations, would appear to have the Court claiming that foreign corporations suffer from an absence of representation in the offending states' legislatures. And indeed, we may read the Court's opinions to that effect in cases such as *Maryland v. Louisiana*, *Armco, Bacchus*, and *Tully*, in which state legislatures have adopted facially discriminatory taxation. But if this claim about the absence of representation holds true, it certainly cannot explain the Court's decisions in cases such as *Moorman*, *Commonwealth Edison*, and *Western & Southwestern Life Ins. Co. v. State Board of Equalization*,¹⁷¹ where the discrimination, while not facial, seems just as palpable. Nor is there any evidence that the Court has achieved any great degree of sophistication about tax "exportation."¹⁷²

Finally, Easterbrook,¹⁷³ in a highly creative essay, recently has argued that the Court has grown more sophisticated, *inter alia*, about the economic theory of politics, which we shall discuss here as the interest-group theory of representative democracy. In his view of recent cases, the Court limits the extent of damage that such political decision making creates by applying literally the maxim: "Statutes in derogation of the common law are to be strictly construed."¹⁷⁴ In other words, if an interest group does not specifically secure a right in the legislative arena, then the Court should not supply it. These interest-group promoting cases are to be distinguished from those (perhaps, mistakenly, such as *Norris*) in which the general welfare is engaged as motive: "Remedial statutes are to be liberally construed."¹⁷⁵

The problem with Easterbrook's optimistic claim is that it may be counterfactual. For example, in *Silkwood v. Kerr-McGee Corp.*,¹⁷⁶

¹⁷⁰See William H. Riker, "Democracy and Representation: A Reconciliation of *Ball v. James* and *Reynolds v. Sims*," *Supreme Court Economic Review* 1 (1982): 31-68, and Peter H. Aranson, "Political Inequality: An Economic Approach," in *Political Equilibrium: A Delicate Balance*, ed. Peter C. Ordeshook and Kenneth A. Shepsle (Boston: Martinus Nijhoff, 1982), pp. 133-50.

¹⁷¹451 U.S. 648 (1981). *Western & Southwestern* concerned a retaliatory tax that California levied against insurance companies domiciled in other states that taxed California firms more than California taxed the relevant out-of-state firms. The court upheld the tax, which appears difficult to classify as to its facial neutrality. The effect of the tax is to punish other states' firms because their states did not adopt California's tax rate.

¹⁷²See generally McLure, "Incidence Analysis."

¹⁷³Easterbrook, "Court and Economic System," pp. 42-58.

¹⁷⁴*Ibid.*, p. 15.

¹⁷⁵*Ibid.*, p. 14.

¹⁷⁶104 S. Ct. 615 (1984).

the Court turned aside a federal-preemption challenge to a state court's award of punitive damages against a utility company generating electricity in nuclear power plants. In Easterbrook's view, the Court was correct in not granting the utility a federal-preemption based exemption from state tort law that it could not find explicitly in congressional actions in favor of the nuclear-energy "cartel." If the Court had read the statute as based on the public interest, then it might have granted such an exemption. While I agree with Easterbrook's analysis of *Silkwood* on the merits, I cannot agree with him (or disagree, for that matter) on the majority's putative motives. The decision looks too much like a "deep-pockets" reaction to the facts, especially in view of its punitive-damage aspects.¹⁷⁷

The other cases that Easterbrook points to in support of his argument for increased judicial sophistication about interest-group legislation seem equally ambiguous, and perhaps more so. In *Local No. 82, Furniture and Piano Moving, Furniture Store Drivers v. Crowley*,¹⁷⁸ the Court held against aggrieved union members, who had brought a private action in federal court against their union, which, the Supreme Court so held, had violated their rights to a fair election as guaranteed under Section I of the Labor Management Reporting and Disclosure Act. The Court found that Section IV of the Act gave sole power for an action against the union to the secretary of labor, if the election had already begun, and the secretary's actions may occur only after the election. Easterbrook¹⁷⁹ reads the statute as providing for this result in the legislative bargain. Justice Stevens,¹⁸⁰ I believe correctly, did not. In any case, no reading of the statutory history or of the opinion in *Local No. 82* provides evidence that either Easterbrook or the Court understood the underlying interest-group conflict.¹⁸¹ Readings of other cases that Easterbrook treats in a similar

¹⁷⁷Easterbrook argues against just such reactions in "Court and Economic System," pp. 19-33. Similarly, Easterbrook here repeats the oft-committed error of asserting that federal "public interest" statutes require preemption. This claim, which the Court often has embraced, is a *non sequitur* whose implication we can show to be false. In environmental regulation, for example, federal statutes often fail to "internalize" Pareto-relevant externalities, creating situations that further litigation might ameliorate. The Court apparently found otherwise in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) and in *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 101 S. Ct. 2615 (1981).

¹⁷⁸104 S. Ct. 2557 (1984).

¹⁷⁹Easterbrook, "Court and Economic System," pp. 48-49.

¹⁸⁰104 S. Ct. at 2572 (Stevens, J., dissenting).

¹⁸¹On the interest group's preference for ambiguity in legislative delegations to bureaus and departments, see Aranson, Gellhorn, and Robinson, "Legislative Delegation." The act in question, the Landrum-Griffin Act, was a blatantly anti-union statute.

manner, such as *Block v. Community Nutrition Institute*,¹⁸² show his reasoning to be equally inapposite.

Can we rise above the tautology that the public interest is what the legislature says it is? I believe that we can, although we cannot, as Easterbrook would wish, use the Court's language and reasoning. More important still, we must interpret the words and reasons that we substitute for the Court's merely as tools of criticisms, to get us out of the *cul de sac* in which the Court and its apologists have placed us. Our goal here is to sever the Court from the myth of legislative infallibility. It need not adopt our words and phrases, but it must acknowledge the existence of political failure and its incorrigibility through judicial monitoring of the equality of representation alone. Once the Court has done so, it can reflect, as shall we, on appropriate *judicial* means for confining the untoward effects of that failure.

Because the Court provides no standards of success or failure, we shall, again as a critical tool, propose our own: the economic theory of welfare.¹⁸³ In this theory competitive markets, in the absence of Pareto-relevant external costs or benefits, or market power, reach allocatively efficient results. Several problems may intervene, however, to prevent decision makers in such markets from achieving a theoretically desirable result. All of these problems reflect a failure to include a relevant cost or benefit in the decision maker's economic calculation, given the prior structure of rights. That is, because of some transaction cost or inability to exclude, say, it is impossible or too costly to make an efficient market in the associated good or service.

The first problem concerns the provision of public goods, such as national defense and public peace. The theory holds that he who provides a public good, because beneficiaries are not excludable, cannot capture the benefits of his actions. Free-rider problems abound, and a suboptimal (or no) supply of the public good may result. The potential existence of a public good, of course, is not a sufficient condition for governmental action. The cost of even "optimal" supply may exceed the benefit, or the extent of the public-good problem may not be Pareto-relevant.¹⁸⁴ Nor does the presence of significant potential external benefits compel a particular manner of political

¹⁸²104 S. Ct. 2450 (1984). See Easterbrook, "Court and Economic System," pp. 49-50.

¹⁸³This discussion follows that of Aranson and Ordeshook, "Public Interest."

¹⁸⁴See, for example, Edwin G. West, "The Political Economy of American Public School Legislation," *Journal of Law & Economics* 10 (October 1967): 101-28, and West, "An Economic Analysis of the Law and Politics of Non-Public School 'Aid,'" *Journal of Law & Economics* 19 (April 1976): 79-101.

response¹⁸⁵ or jurisdiction.¹⁸⁶ Many public-goods problems can also find a market solution, sometimes with but a modest readjustment of property rights.¹⁸⁷

The second problem is that of public "bads," external diseconomies such as air and water pollution. This problem is the same in structure as that of public goods. People find it individually beneficial to use the ambient air or a water source as a "sink," but they pay neither for this benefit nor for the damage that their actions impose on others. Again, the presence of a potentially reversible public-bads problem does not by itself compel a governmental solution, a particular kind of solution, or an appropriate jurisdiction.

The third problem, that of property rights, is in truth a public goods-public bads problem, but we commonly associate it with common pool-inefficient usage patterns, such as occur with the too rapid extraction of petroleum¹⁸⁸ or crowding in the radio-frequency spectrum.¹⁸⁹ Inefficient usage, brought about by uncoordinated action or the inappropriate definition of property rights, constitutes the public bad. The application of appropriate rules or rights raises the value of the common resource to all users.

The fourth problem, redistribution, is hotly contested, but it exhibits an undeniable public-goods aspect. Persons A and B, being wealthy altruists, both gain welfare from increases in poor man C's consumption. Thus stated, the free-rider problem of A and B seems apparent.¹⁹⁰

The final problem relates to the presence of monopoly and various sources of market power. As noted earlier,¹⁹¹ most of the alleged problems of market power, such as vertical integration and resale

¹⁸⁵See, for example, Ronald H. Coase, "The Lighthouse in Economics," *Journal of Law & Economics* 17 (October 1974): 357-76.

¹⁸⁶See, for example, Peter H. Aranson, "Pollution Control: The Case for Competition," in *Instead of Regulation: Alternatives to Federal Regulatory Agencies*, ed. Robert W. Poole, Jr. (Lexington, Mass.: D.C. Heath, 1982), pp. 339-93, and Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64 (October 1956): 416-24.

¹⁸⁷See, for example, Marvel, "Hybrid Trade Restraints"; Stephen F. Williams, "Free Trade in Water Resources: *Sporhase v. Nebraska ex rel. Douglas*," *Supreme Court Economic Review* 2 (1983): 89-110; and Coase, "Lighthouse in Economics."

¹⁸⁸See generally James C. Cox, R. Mark Isaac, and Vernon L. Smith, "OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions," *Supreme Court Economic Review* 2 (1983): 43-87; Haddock and Hall, "Making Rights Inalienable"; and text accompanying supra notes 91-4.

¹⁸⁹See, for example, Ronald H. Coase, "The Federal Communications Commission," *Journal of Law & Economics* 2 (October 1959): 1-40.

¹⁹⁰See, for example, Harold D. Hochman and James D. Rogers, "Pareto Optimal Redistribution," *American Economic Review* 59 (September 1969): 542-57.

¹⁹¹See text accompanying supra notes 110-13.

price-maintenance agreements, turn out to be beneficial practices. But a core of problems remain, concerning such matters as natural monopolies. In these situations there is too little surplus, because of restricted output and price set above average total cost. Again, however, the existence of a monopoly problem does not compel a particular political solution.¹⁹²

Because the market is said to fail under all five problems to produce theoretically preferred results, scholars sometimes argue for a governmental solution—a redistribution of rights and resources to increase welfare. For example, “[g]overnmental provision of public goods is required precisely because each individual in uncoordinated [*sic*] pursuit of his self interest must act in a manner designed to frustrate the provision of these items.”¹⁹³

The intellectual dismemberment of this claim has held a central place in the development of public-choice theory over the last two decades. Our review of this theory is necessarily brief, but it begins with two central observations. First, the claim asserts the costless and error-free operation of a series of political and economic connections: (1) the citizenry costlessly and effortlessly aggregates and expresses its preferences over various public policies to “solve” the five problems just listed and so informs election candidates of its wishes; (2) these candidates reflect the electorate’s revealed preferences and, if they win, enter office to carry them out; (3) the legislative process (and elected chief-executive decision making) responds to the instructed delegates’ wishes, which results in the enactment of a set of laws reflecting citizens’ preferences; (4) bureaucrats likewise act as a set of perfect agents in carrying out legislative intent; and (5) the judiciary reinforces this process and does not impermissibly violate citizens’ preferences.¹⁹⁴ Second, the claim asserts that the same conditions of utility interdependencies—free riders, public goods, and the like—do not infect the political process.

Both assertions are demonstrably false, for one (or both) of two reasons. First, the aggregation of preferences in the electorate and

¹⁹²See, for example, Harold Demsetz, “Why Regulate Utilities?” *Journal of Law & Economics* 11 (April 1968): 347–59, and George J. Stigler and Claire Freidland, “What Can Regulators Regulate? The Case of Electricity,” *Journal of Law & Economics* 5 (October 1962): 1–16.

¹⁹³William J. Baumol, *Welfare Economics and the Theory of the State*, 2d rev. ed. (Cambridge: Harvard University Press, 1965), p. 21.

¹⁹⁴For a detailed discussion of these connections, see Aranson, Gellhorn, and Robinson, “Legislative Delegation,” pp. 30–36.

in the legislature is subject to global intransitivities.¹⁹⁵ As a consequence, there may be no public-policy platform in the electorate or motion in the legislature that can defeat or tie all other platforms or motions. For example, proposal *x* might defeat *y*, while *y* defeats *z*, and *z* defeats *x*. The resulting electoral or legislative outcome then occurs by accident or by agenda control or as the result of sophisticated voting,¹⁹⁶ but it has no necessary connection to a “welfare”-regarding “public interest.”¹⁹⁷

Because electoral or legislative voting equilibria may be absent, and the resulting social choice may be unstable, neither we nor the Court can say anything about the desirability of the public policies that majority-rule institutions eventually choose. Citizens’ or legislators’ preferences do not map unambiguously into desirable social choices. But this suspension of judgment does not prevail concerning the second reason for claiming that public policies are most unlikely to be welfare-regarding, namely, that the political process itself is crenelated with—indeed driven by—the same public goods-public bads problems that are said to afflict the market.

First, consider the electorate, and assume that a group within it is organized to pursue the public supply of a (not necessarily public) good or service, at collective cost. By virtue of its organization, the group can monitor, reward, sanction, and inform its own members, election candidates, and legislators far better than can any unorganized subset of the rest of the electorate, or the entire unorganized electorate itself, for that matter.¹⁹⁸ In any public policy decision,

¹⁹⁵See, for example, *Political Equilibrium: A Delicate Balance*, ed. Peter C. Ordeshook and Kenneth A. Shepsle; William H. Riker, “Implications from the Disequilibrium of Majority Rule for the Study of Institutions,” *American Political Science Review* 74 (June 1980): 349–66; Charles R. Plott, “Axiomatic Social Choice Theory: An Interpretation and Overview,” *American Journal of Political Science* 20 (May 1976): 511–96; and Kenneth J. Arrow, *Social Choice and Individual Values*, 2d ed. (New York: Wiley, 1963).

¹⁹⁶See, for example, Richard D. McKelvey, “Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control,” *Journal of Economic Theory* 12 (June 1976): 472–82; Riker, “Disequilibrium of Majority Rule”; Riker, “The Paradox of Voting and Congressional Rules for Voting on Amendments,” *American Political Science Review* 52 (June 1958): 349–66.

¹⁹⁷Easterbrook has also demonstrated that the problem of intransitive social choice may limit the Supreme Court’s ability to develop consistent doctrine over a line of related cases. See Frank H. Easterbrook, “Ways of Criticizing the Court,” *Harvard Law Review* 95 (February 1982): 802–32.

¹⁹⁸Olson points out that members of such groups often face free-rider problems in establishing and maintaining these organizations. See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, rev. ed. (New York: Schocken, 1971). Ordeshook and I show, however, that elected officeholders pass laws to overcome these problems, such as statutes mandating union membership, when they calculate that it is in their interest to do so. See Aranson and Ordeshook, “Public Interest.”

therefore, candidates and officeholders will be disproportionately more responsive to the preferences of group members, if only because the transaction costs in the public policy market place will be lower with them than with members of the general electorate.

But what kinds of public policies do such groups demand? Our models show very generally that when faced with a budget constraint, these groups will pursue the political production of private, divisible benefits, to be provided at collective cost, rather than the political production of public goods.¹⁹⁹ Furthermore, the tendency is for such groups to purchase cost-benefit efficient goods and services in the private sector, while spreading the costs of inefficient goods and services by demanding their public-sector supply; in a dynamic view, political service thus becomes an inferior good.²⁰⁰ In sum, all interest groups are locked in an n-person prisoners' dilemma, which is exactly analogous to the situation of private-sector persons and firms that create a public bad by "overgrazing the budgetary commons."²⁰¹

Second, consider the legislature. The structure of elected legislatures and the incentives of their members are perfectly consistent with those of interest groups. Groups in a legislator's constituency—perhaps the entire constituency itself in the case of porkbarrel legislation—will not reward the legislator for helping citizens in other districts, nor will they credit his claim that he was influential in shaping beneficial legislation aimed at producing appropriate levels of broadly national public goods or suppressing public bads.²⁰² Instead,

¹⁹⁹Peter H. Aranson and Peter C. Ordeshook, "A Prolegomenon to a Theory of the Failure of Representative Democracy," in *American Re-evolution: Papers and Proceedings*, ed. Richard D. Auster and Barbara Sears (Tucson: University of Arizona Department of Economics, 1977), pp. 23–46.

Costs also may fall on concentrated groups, as sometimes occurs with state taxation of out-of-state firms. See text accompanying supra notes 69–72. The problem in such circumstances is not that interests are diffuse but that representation is absent. I address the regulatory problem of concentrated costs at text accompanying infra notes 206–7.

²⁰⁰Peter H. Aranson and Peter C. Ordeshook, "Alternative Theories of the Growth of Government and Their Implications for Constitutional Tax and Spending Limits," in *Tax and Expenditure Limitations*, ed. Helen F. Ladd and T. Nicholas Tideman (Washington, D.C.: Urban Institute Press, 1981), pp. 143–76.

²⁰¹Kenneth A. Shepsle, "Overgrazing the Budgetary Commons: Incentive-Compatible Solutions to the Problem of Deficits," in *The Economic Consequences of Public Deficits*, ed. Lawrence Mayer (Boston: Martinus Nijhoff, 1983), pp. 211–19.

There is no apparent easy way out of the resulting prisoners' dilemma. Any group or coalition of groups that might oppose this process would, in effect, be supplying a public good to all other groups, which is a result that these models do not predict. The same problem afflicts the legislature.

²⁰²See, for example, Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven, Conn.: Yale University Press, 1977) and David R. Mayhew, *Congress: The Electoral Connection* (New Haven, Conn.: Yale University Press, 1974).

constituents reward legislators for providing them with private, divisible benefits, supplied at collective cost. Indeed, by the very nature of the nondivisibility of public goods, legislators who produce them could not assure themselves of rewards from any beneficiaries. A market in public policy, like any other market, requires divisibility for its operation.

Third, consider the bureaucracy, and particularly the problem of regulation. How we interpret the bureaucracy's actions will depend on whether we adopt the monopoly-bureau view,²⁰³ the alternative view that the bureaucracy is a reasonably perfect agent of the legislature,²⁰⁴ or the view that it is something in between these two polar interpretations.²⁰⁵ Under the first view, that of the monopoly bureau, we merely (but sometimes in a complicated manner) add another interest group, the bureau itself, as a demander of private benefits at collective cost. Under the second view, that of the bureau as disciplined agent of the legislature, we merely conclude that the bureau reinforces electoral- and legislative-process tendencies to produce private benefits at collective cost. The compromise view, of course, does not suddenly raise the bureaucracy to the level of a promoter of welfare-regarding public policies.

Scholars have exerted considerable effort to studying the problem of bureaucracy as regulator.²⁰⁶ The principal conclusion of their research is that regulation often provides a means for creating private benefits for the regulated industry but at collective cost for consumers, usually in the form of reduced services and higher prices than would prevail

²⁰³William A. Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine Atherton, 1971).

²⁰⁴Barry R. Weingast and Mark J. Moran, "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission," *Journal of Political Economy* 91 (October 1983): 765-800; Weingast, "Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relations," *Law & Contemporary Problems* 44 (Winter 1981): 147-77; Moran and Weingast, "Congress as the Source of Regulatory Decisions: The Case of the Federal Trade Commission," *American Economic Review Papers & Proceedings* 72 (May 1982): 109-13; Weingast, "The Congressional-Bureaucratic System: A Principal-Agent Perspective (With Applications to the SEC)" *Public Choice* 44 (1984): 147-91.

²⁰⁵Cotton M. Lindsay, "A Theory of Government Enterprise," *Journal of Political Economy* 84 (October 1976): 1061-77.

²⁰⁶See, for example, Posner, "Taxation by Regulation"; Posner, "Theories of Economic Regulation," *Bell Journal of Economics & Management Science* 5 (Autumn 1974): 335-58; George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics & Management Science* 2 (Spring 1971): 3-21; Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law & Economics* 19 (August 1976): 211-40; Peter H. Aranson and Peter C. Ordeshook, "Regulation, Redistribution, and Public Choice," *Public Choice* 37 (1981): 69-100; and references cited supra notes 203-205.

in an unregulated market. But one additional aspect of regulation concerns the legislative delegation of legislative authority to regulatory agencies, with the open-ended mandate to act "in the public interest, safety, and convenience." Delegation occurs when two or more industries or sectors of a single industry compete in Congress for economically beneficial legislation. Not wishing to alienate either group, the members of Congress create a public-policy "lottery" by delegating the matter to an agency.²⁰⁷ Whichever group wins the subsequent regulatory battle, the resulting incidence of benefits is private, and of costs, both private (for the losing group) and collective (for the consumers of services).

Fourth, concerning the electoral process, we might hypothesize that the *national* election of a chief executive *qua* chief legislator might tame the process among interest groups, legislatures, and bureaus, just described. But our models of electoral processes with private-benefit provision as issues cannot sustain this belief. Instead, under the not unreasonable assumptions of incremental decision making about which groups' claims to satisfy or reject, and information asymmetries if benefits are concentrated while costs are diffuse, more private-benefit programs are added than are deleted. At the legislative level, with interest groups and constituencies as the fundamental households, the same electoral process merely reinforces interest-group and legislative proclivities to demand and supply private, divisible benefits at collective cost.²⁰⁸

Finally, concerning the courts, we have already reviewed Landes and Posner's explanation of the judiciary's place in the production and maintenance of interest-group based public policies.²⁰⁹ Except where legislatures run up against the barriers of an explicit *constitutional* (noneconomic) issue, as in *Chadha*; or are overtly and facially discriminating in interstate taxation, as in *Maryland v. Louisiana*, *Bacchus*, *Armco*, or *Tully*; or (sometimes) fail to constitute their memberships on one-man, one-vote apportionments, as in *Karcher*; the Supreme Court is unlikely to do anything except stand aside, or perhaps even refine the underlying private-interest legislative bargain.²¹⁰

²⁰⁷See Aranson, Gellhorn, and Robinson, "Legislative Delegation," and Morris P. Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39 (1982): 33-66.

²⁰⁸See, for example, Aranson and Ordeshook, "Public Interest," and "Growth of Government."

²⁰⁹See Landes and Posner, "Independent Judiciary," and text accompanying *supra* notes 41-56.

²¹⁰See text accompanying and cases cited *supra* notes 155-56 and 165-72.

Constitutional Approaches

The preceding discussion compels the depressing conclusions that the political branches are incompetent and incoherent: they cannot enact welfare-regarding policies; those policies that they do enact promote inefficient private benefits at collective cost; and electorates and legislatures experience a profound absence of electoral and public-policy equilibria—majority rule by itself reveals nothing. In the face of these failures, more often than not the judiciary defers to the political branches. Nor is there convincing evidence that the judiciary enjoys the kind of economic expertise or incentives to do otherwise.

It is not surprising that several authors have already documented the judiciary's part in this pattern of institutional failure and have sought various approaches to escape the resulting dilemmas.²¹¹ A review of some of this literature, beginning with Easterbrook, can aid in separating promising from unproductive approaches.

Easterbrook²¹² identifies three areas in which the Supreme Court has failed in the past to exploit the benefits of economic reasoning. These areas concern the use of *ex ante* versus *ex post* analysis, the invoking of marginal versus average effects, and the appreciation that the political branches respond to interest-group demands, not to more nearly diffuse demands for welfare-regarding policies. But Easterbrook then draws samples of cases from the 1953, 1963, and 1983 Terms of the Court to support the proposition that the Court's (at least implicit) use of economic reasoning is actually improving in all three areas.

The first of these areas, *ex ante* versus *ex post* analysis, concerns several cases in which the Court might have, and sometimes did, come to grips with the problem of choosing *ex post* to "divide the stakes" in a lawsuit strictly regarding the conflict between plaintiff and defendant or choosing instead to look prospectively at the effects of the incentives that its decision might create *ex ante*. In his most convincing argument, Easterbrook reviews recent cases in patents and copyrights—intellectual property generally—to show that the Court indeed is at least tending to balance *ex ante* and *ex post* considerations, thus in turn tending "to get it right" where the legislature

²¹¹See, for example, Cass R. Sunstein, "Naked Preferences and the Constitution," *Columbia Law Review* 84 (November 1984): 1689–1732; Easterbrook, "Court and Economic System"; Epstein, "Taxation" and "Contract Clause"; Aranson, Gellhorn, and Robinson, "Legislative Delegation"; and Mashaw, "Public-Public Law."

²¹²"Court and Economic System."

(did not or) stood mute.²¹³ But intellectual-property questions literally cry out for such an approach (although its results are hardly dispositive). Other cases, especially in the face of contrary legislative action, do not do so with such force. Hence, it seems difficult to square Easterbrook's claim of increasing judicial sophistication about *ex post* versus *ex ante* judgments in the light of such recent decisions as *Jicarilla*, *Midkiff*, *Norris*, *Penn Central*, *Ridgway*, and *Short*.

A more difficult claim for Easterbrook to establish is that the Court has tended increasingly to examine effects at the margin rather than changes in the litigants' average positions.²¹⁴ Surely, the intellectual-property cases of the 1983 Term may partake of some implied marginal analysis, because the Court, in the face of rapid technological change and given its penchant for balancing, really has no other analytical course open to it. But Easterbrook also suggests that the commerce clause cases of that term, such as *Bacchus* and *Tully*, involving state taxation of out-of-state firms, invoke the same marginal, instead of average, considerations. We think not. While the Court in *Bacchus* and *Tully* does look to the direction of change on market conditions at the margin, what distinguishes these decisions from those in *Commonwealth Edison* and *Moorman* is that they involve facially discriminatory taxation. The Court's *dicta* in *Bacchus* and *Tully* may weakly suggest a growing sophistication in its use of marginal analysis, as does its decision in *Consolidated Freightways*. But until the Court is willing to apply the tests it laid down in *Complete Auto Transit, Inc. v. Brady*²¹⁵ or similar but far more robust ones to facially nondiscriminatory state taxation, Easterbrook's claim of growing judicial sophistication enjoys merely intellectual force absent any public-policy consequences.

Easterbrook's final claim, which we dismissed earlier,²¹⁶ is that the Court appears to be acting with an increased awareness of the interest-group basis of legislation. Here again, however, as in *Bacchus* and *Tully*, the Court's increased awareness seems to make no

²¹³*Ibid.*, pp. 19–33. See particularly the analysis of *Sony Corp. of America v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984).

²¹⁴Easterbrook, "Court and Economic System," pp. 33–42.

²¹⁵430 U.S. 274 (1977). I do not recommend this course. I merely suggest that the application of the *Brady* rule would indicate that the Court's new-found economic analysis would then have some actual force. The test contemplates that a state tax can pass commerce clause muster if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279. The Court showed in *Commonwealth Edison* that it is unwilling to apply this test seriously. See the discussion in Epstein, "Contract Clause," pp. 447–49.

²¹⁶See text accompanying *supra* notes 173–82.

difference. Easterbrook, for example, contrasts the Court's 1943 decision in *Parker v. Brown*²¹⁷ with its 1984 decision in *Hoover v. Ronwin*.²¹⁸ In *Parker* the Court upheld against an antitrust attack a state of California program aimed at cartelizing the raisin market. In *Hoover* the Court upheld against a similar attack a state system of "curving" bar examination scores to limit the number of lawyers practicing in Arizona. Easterbrook argues that "[t]he Court's analysis [in *Hoover*] revealed that the transition from the public-interest vision of *Parker* to a private-interest perception of regulation is complete. . . . In *Parker* the Court thought it pertinent that the state's plan rectified market failures. All pretense that regulation is ordinarily beneficent now has vanished."²¹⁹ But so what? As Easterbrook himself points out, "[t]he majority [in *Hoover*] observed repeatedly that it did not need to endorse the wisdom of Arizona's choices."²²⁰ Nor would it examine the wisdom of Hawaii's choices in *Midkiff*. The apparent perception of legislative failure overtly counts for nothing in this realpolitik application of *Parker*-doctrine, state-action immunity from the antitrust laws. *Hoover* not so much heartens us as it further hardens us to the force of the Landes and Posner argument concerning the judiciary's "independence." Still, if Easterbrook is right in this matter (although I believe that he is not), then the Court may be one step closer to finding other, and even doctrinal grounds, for overturning the political branches' private-interest apple cart.

The larger problem with Easterbrook's optimistic analysis and sometimes strained reading of cases is not that he is wrong, but that he would set the Court on a tack that we have dismissed earlier as inappropriate.²²¹ Whatever merit there may be in increased judicial sophistication, the political and jurisprudential reality is that economic analysis may be inapposite and even inappropriate for constitutional argument.²²² Our cases show that this road leads nowhere except to the eventual dismemberment of constitutional protection.

²¹⁷317 U.S. 341 (1943).

²¹⁸104 S. Ct. 1989 (1984).

²¹⁹Easterbrook, "Court and Economic System," pp. 53-4.

²²⁰Ibid. (citing 104 S. Ct. at 1995, 1999 n.28, 2000 n.31).

²²¹See text accompanying supra notes 145-64.

²²²This essay concentrates on cases specifically involving economic problems. But the Court recently has applied economic-like reasoning to cases involving, say, the exclusionary rule. Easterbrook points out that "[e]xclusionary rule cases, once addressed in terms of 'judicial integrity' or the moral standing of the police, are today treated as occasions for the assessment of the marginal deterrent effects of excluding particular categories of evidence." Easterbrook, "Court and Economic System," p. 59 n.157

We can sharpen our criticism of Easterbrook's approach by once again juxtaposing common law adjudication with constitutional argument. While most of the cases that Easterbrook considers do not rise to an explicitly constitutional level, enough of the cases considered here earlier do so. And it is in this connection that we might wonder whether we would want the Court to frame constitutional argument in, say, *ex post* versus *ex ante* terms. I think not. The Constitution does not concern the kinds of balancing of judgments that Easterbrook and its own opinions²²³ find so appealing. The Constitution sets out a variety of limitations on federal, state, and local legislatures.²²⁴ It provides for the rescission of these limitations through a difficult amendment procedure, and not through the changing whims of legislatures and courts. In this sense, when a constitutional problem comes to the Court, it asks not for a balancing of *ex post* and *ex ante* considerations, or even for attention to *ex ante* considerations alone. Instead, it asks the Court to apply the Constitution.²²⁵ Such a doctrinal approach even may enjoy utilitarian or economic support, which would deny, on Easterbrook's own grounds, judicial attempts to find ways around the express language of the Constitution.²²⁶

Nor can we find in Easterbrook's analysis any real hope for desirable change. Certainly, in the three areas that he describes there may be a growing sophistication on the Court. But to what end? He argues, for example, that "judges have not been charged with imposing their substantive views on the economic system,"²²⁷ and that their "claim to authority rests on a plausible demonstration that they are faithfully

(citing, *inter alia*, *I.N.S. v. Lopez-Mendoza*, 104 S. Ct. 3479, 3486-90 (1984), and *United States v. Leon*, 104 S. Ct. 3405, 3418-22 (1984)).

While many conservatives have applauded this judicial retreat from earlier, more principled applications of the exclusionary rule, I am reluctant to do so. The Court has gutted, on "pragmatic" grounds, constitutional constraints on economic legislation, for example in its reading of the contracts and taking clauses. This regrettable retreat from constitutional argument in economic affairs should not occasion a similar withdrawal from protecting the rights of those who confront the state agents who enjoy the most palpable monopoly on the use of force. This is not to say that the Court in recent civil liberties cases reached the wrong result on the merits. But its use of pragmatic tests in the face of constitutional guarantees seems highly questionable.

²²³See for example, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and text accompanying *supra* note 215.

²²⁴See text accompanying *infra* notes 227-30.

²²⁵I am grateful to George Butler for pointing out this conflict to me.

²²⁶See, for example, James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962).

²²⁷Easterbrook, "Court and Economic System," p. 60.

executing decisions made by others."²²⁸ Does that mean decisions made by the framers? Probably not, for Easterbrook concludes by arguing that "[t]he consequence of honest and capable discharge of that function may be more rent-seeking legislation, or it may be more general-interest legislation. An increase in economic astuteness among judges facilitates both kinds of legislation. Which occurs is not the judges' affair."²²⁹ Still, there is much to applaud in Easterbrook's essay. It urges the Court to think about what he claims that it is doing. But it must fashion principled constitutional doctrine to go in this direction, and Easterbrook even reminds the Court of some doctrine that is available for this purpose.²³⁰

Sunstein²³¹ takes a more focused approach to the problem of judicial control of the political branches than does Easterbrook, in that Sunstein is interested in the problem of private-interest legislative redistributions *per se*, and not in the additional problems of *ex ante* versus *ex post* and marginalist versus average reasoning. Sunstein's discussion, nevertheless, covers quite as wide a collection of cases and subject matter as does Easterbrook's.

Sunstein argues that several clauses in the Constitution—the dormant commerce clause, the privileges and immunities clause, the due process clause, the contracts clause, and the eminent domain (takings) clause—all “are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”²³² Sunstein calls “this underlying evil a naked preference”²³³ and juxtaposes it to “[t]he notion that government actions must be responsive to something other than private pressure [which] is associated with the idea that politics is ‘not the reconciling but the transcending of the different interests of the society in a search for a single common good.’”²³⁴ Divorced from the mystical idea of transcendence or disembodied interest, Sunstein's distinction coincides perfectly with the notion of private-interest versus welfare-regarding

²²⁸Ibid.

²²⁹Ibid.

²³⁰For example, “[s]tatutes in derogation of the common law are to be strictly construed. . . .” Easterbrook, “Court and Economic System,” p. 15.

²³¹“Naked Preferences.”

²³²Ibid., p. 1689.

²³³Ibid.

²³⁴Ibid., p. 1691 (quoting Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: Norton, 1972), p. 58).

legislation, reviewed earlier.²³⁵ And as Easterbrook, Epstein, and others have noted, this distinction coincides with the framers' concerns about the real world of politics:

The prohibition of naked preferences captures a significant theme in the original intent. It is closely related to the central constitutional concern of ensuring against capture of government power by faction [citing the *Federalist* nos. 10, 51 (J. Madison)]. The framers' hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect, of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover.²³⁶

This interpretation of a wide variety of constitutional provisions appears in Sunstein's essay as "the best candidate for a unitary conception of the sorts of government action that the Constitution prohibits."²³⁷ And it comes brutally close to turning the judiciary to substantive tasks:

The prohibition of naked preferences, enforced as it is by the courts, stands as a repudiation of theories positing that the judicial role is only to police the process of representation to ensure that all affected interest groups may participate. It presupposes that courts will serve as critics of the pluralist vision, not as adherents striving only to "clear the channels" in preparation for the ensuing political struggle. In this respect, the prohibition of naked preferences reflects a distinctly substantive value and cannot easily be captured in procedural terms. Moreover, it reflects an attractive conception of politics, one that does not understand the political process as simply another sort of market.²³⁸

Again, Sunstein overdraws the normative model of politics disembodied from individual preferences, but the error is excusable in his pursuit of a potentially useful distinction between politics as it is and politics as the Court ought to constrain it. Sunstein's analysis, however, suffers from the same problem that afflicts Easterbrook's essay. As we travel with him through a discussion of how the Court might use, and indeed has used, the various clauses of the Constitution to suppress the legislative satisfaction of "naked preferences," we can

²³⁵See text accompanying *supra* notes 183–210.

²³⁶Sunstein, "Naked Preferences," p. 1690 (citations and footnotes omitted).

²³⁷*Ibid.*, p. 1693 (citation and footnote omitted).

²³⁸*Ibid.*, pp. 1692–93 (citations and footnotes omitted).

find mostly what we find in our earlier review of cases: judicial surrender and deference, with only occasional impositions of control. Sunstein may be right, "that the prohibition of naked preferences serves as the most promising candidate for a unitary theory of the Constitution."²³⁹ But in light of decisions such as *Midkiff*, *Penn Central*, *Hoover*, and many others, it is not yet a theory that the Court appears willing to embrace.

Finally, we come to Epstein's analysis of the contracts clause.²⁴⁰ He, like Sunstein, finds behind the clause prohibiting states from impairing the obligation of contracts a general belief shared with Madison, that interest-group politics lead to mischievous results:

This central problem of governance is very old, but in recent years it has been captured in the language of economics: any grant of legislative power will invite "rent-seeking" behavior; each group will try to use that legislative power to expropriate the wealth of its rivals. . . .

. . . The framers were concerned that legislative deals would often be tainted by interest-group politics, and occasionally by outright bribery, and that preoccupation with redistributive matters would divert individuals from productive activities. They sought to control those abuses by adopting a scheme of limited government.²⁴¹

Epstein views constitutional control of the political branches as invoking a variety of instruments. The Constitution imposes on the federal government several procedural burdens, such as bicameralism and the presidential veto, reflecting a belief "that, generally, the error costs from too much legislation exceed the error costs from too little."²⁴² But control of state-legislative mischief, absent control of state-government procedures themselves, must reach to the substance of state enactments. "The control of abuse in state government had to take a different tack. Since state legislative processes were beyond federal control, the Constitution had to place substantive limitations upon state legislative power."²⁴³

The contract clause provides one such substantive limit, but as Epstein carefully shows, it is a limit that the Supreme Court has voided almost in its entirety. In this regard Epstein's important

²³⁹Ibid., p. 1732.

²⁴⁰Epstein, "Contract Clause."

²⁴¹Ibid., pp. 713, 715.

²⁴²Ibid., p. 715. But substantive limitations remain, such as the uniformity clause, which the Court inartfully managed to circumvent in *United States v. Ptasynski*, 103 S. Ct. 2239 (1983) (upholding as not a violation of the uniformity clause the windfall profits tax on oil, exempting oil extracted from northern Alaska).

²⁴³Epstein, "Contract Clause," p. 716.

contribution consists not merely in detailing the history of the clause's judicial abrogation and in arguing forcefully for its revitalization, but also in identifying the central places where the Court goes astray. His analysis of *Home Building and Loan Association v. Blaisdell*²⁴⁴ provides a good example.

In *Blaisdell*, the Court heard a contract clause challenge to a Minnesota Depression-era statute that for a time deferred mortgage payments while outlawing foreclosure sales. The opinion of Chief Justice Hughes, turning that challenge aside, entirely supplanted any contract clause limitations on state actions by replacing them with a police-power interpretation of the problem. Justice Hughes's language is both sweeping and dangerous:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, that statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* that we are expounding"—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."²⁴⁵

Justice Hughes's claim here is thrice wrong. First, there is agreement all around that the practice of relieving debtors through state statutes was precisely the action that the framers had in mind when crafting the contract clause.²⁴⁶ There was nothing new in *Blaisdell* on this count, considered separately. Second, as Epstein points out, Hughes's use of Marshall's decision in *McCulloch*, is ill considered.²⁴⁷ Marshall's words in *McCulloch* argued for giving "full force"²⁴⁸ to the necessary and proper clause of Article I. In *Ogden v. Saunders*,²⁴⁹ however, Chief Justice Marshall had given a similar full-force argument in support of a broad reading of the contract clause. In sum,

²⁴⁴290 U.S. 398 (1934).

²⁴⁵*Id.* at 442–43 (citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

²⁴⁶See, for example, Benjamin F. Wright, *The Contract Clause of the Constitution* (Cambridge: Harvard University Press, 1938), pp. 4–5.

²⁴⁷Epstein, "Contract Clause," p. 736.

²⁴⁸*Ibid.*

²⁴⁹25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

it is the *Constitution*, in Marshall's view, that should receive a broad and expansive reading, not the power of government, as Hughes would have us believe. Third, and most generally, Hughes's words turn the judicial interpretation of the Constitution into "situation ethics," thus subverting the idea of a constitution itself. As Epstein comments:

The operative assumption seems to be that questions of constitutional law are to be answered according to whether or not we like the Constitution as it was originally drafted. If we do not, we are then free to introduce into the document those provisions that we think more congenial to our time. . . . By this standard a court can invest itself with the power of a standing constitutional convention. The importance of a fixed constitutional framework and stable institutional arrangements is necessarily lost once the framework that was designed to place a limit upon politics becomes the central subject of the politics it was designed to limit.²⁵⁰

What else might the Court have done with *Blaisdell*? The answer is far from clear. Epstein argues that "Hughes's error lay in insisting that a change in social conditions required a change in the meaning of a text."²⁵¹ Instead, the Court should have "take[n] into account the vast social dislocations of the Depression without abandoning a principled account of the police power limitation. Such an argument would attempt to show how a change in social and economic conditions could give rise to a novel application of a settled legal principle whose meaning remained wholly unchanged."²⁵² But even so, "[i]t is at this level that *Blaisdell* is an extraordinarily difficult case."²⁵³

If the debtors in *Blaisdell* merely had sought relief from a bad bargain, then the Court should have upheld their obligations. If, instead, as Epstein argues, the federal government's deflationary policies had made fulfillment of the debtors' obligations impossible, then that may have been a different matter, depending on whether mortgagee or mortgagor could better foresee or insure against the federal government's actions.²⁵⁴ "On this analysis, the result in *Blaisdell* clearly serves the ends of the police power limitation. The statute tends to restore the original contractual balance that had been undone

²⁵⁰Epstein, "Contract Clause," p. 736. See also text accompanying supra notes 223-26.

²⁵¹Epstein, "Contract Clause," p. 736.

²⁵²Ibid., pp. 736-37.

²⁵³Ibid., p. 737.

²⁵⁴See, for example, Richard A. Posner and Andrew M. Rosenfield, "Impossibility and Related Doctrines in Contract Law: An Economic Analysis," *Journal of Legal Studies* 6 (January 1977): 83-118.

by [federal] government action."²⁵⁵ This reasoning does not necessarily commend either the state's chosen means or the Court's result on the merits in *Blaisdell*, for appraisals of these matters would take us far afield of our original direction. Perhaps in some circumstances the federal government's mistakes, on frustration grounds, can serve to discharge or delay debtors from fulfilling their contractual obligations. Perhaps not. But that was not the question that Justice Hughes asked or answered. Instead, he destroyed the contract clause:

However, these questions [about frustration and discharge] may be resolved, they highlight the fact that the *Blaisdell* case was extremely difficult not because of anachronistic constitutional doctrine but because of the intrinsic complexity of the world.

Justice Hughes, however, rather than confronting the difficulty of the facts, chose to manipulate the doctrine. The subsequent history of the police power limitation on the contract clause reflects the costs of that choice. Had Hughes written the right kind of opinion, *Blaisdell* would have reflected an inevitable struggle with an intractable set of facts, but the opinion would have announced no broad interpretive principle. The police power exception would not have been transformed into an open invitation to private rent seeking. Instead, *Blaisdell* trumpeted a false liberation from the constitutional text that has paved the way for massive government intervention that undermines the security of private transactions. Today the police power exception has come to eviscerate the contracts clause.²⁵⁶

A Summing Up

There is enough in our preceding recital of cases and of recent public choice research, along with our review of Easterbrook's, Sunstein's, and Epstein's essays, to suggest the broad outlines of further judicial approaches to the judicial control of the political branches. First, the Court must come to recognize, to a greater extent than it does today, that the legislature is the most dangerous branch of government. The evidence for this proposition comes from three sources. The first is the Constitution itself and its procedural and substantive checks on federal and state governments. Sunstein is correct in asserting that the relevant clauses all point to a distrust of legislatures as satisfiers of naked preferences. The second source is the development of public choice theory and its very exciting

²⁵⁵Epstein, "Contract Clause," p. 737.

²⁵⁶*Ibid.*, p. 738.

appearance in the legal literature.²⁵⁷ Legal scholars are showing an increasing sophistication about the manner in which the political system works, and the members of the judiciary will doubtless not be far behind. In this claim we might agree with Easterbrook, although his view seems overly optimistic as a reflection of present Supreme Court developments. The third source is the content of the Court's own cases. Many of the Court's decisions, as our review indicates, grow out of overt expropriations and redistributions, all to no public purpose. The paeon to imaginary public-interest motives found in *Parker v. Brown* might reflect the optimism and enthusiasm about government that marked an earlier age, naive as they may have been. As extended in recent cases such as *Midkiff*, however, the same justification is an embarrassment that will wither respect for the Court as an institution.

Second, the judiciary, and particularly the Supreme Court, should not follow the mistaken path of trying to substitute its own educated economic judgments for the legislature's political ones. There is scant evidence that the Court enjoys a comparative advantage in such a contest. The very content of law and economics itself, furthermore, suggests that this strategy faces severe limitations. The use of such a strategy might invite specific legislative retaliation. Instead, it is precisely the notion that the Court has embraced, that the legislature is omnipotent in its redistributionist activities, that seems the greatest evil. This notion should now become a candidate for serious judicial rethinking.

Careful doctrinal development, of the sort that Epstein urges, remains the single most promising approach for the Court to follow. At the national level a redeployment of the delegation doctrine,²⁵⁸ an insistence on following the constitutional requirements of legislative procedure,²⁵⁹ and the application of the plain language of provisions such as the uniformity clause²⁶⁰ would move the Court in the correct direction, as would its refusal to extend private-interest legislative

²⁵⁷Besides the works of Sunstein, "Naked Preferences," Easterbrook, "Court and Economic System," Epstein, "Taxation" and "Contract Clause," Mashaw, "Public-Public Law," and Aranson, Gellhorn, and Robinson, "Legislative Delegation," we also find applications of this analysis to particular cases in various issues of *The Journal of Law & Economics*, *The Journal of Legal Studies*, and *The Supreme Court Economic Review*, as well as in more traditional legal literature. See for example, Jonathan R. Macey, "Special Interest Group Legislation and the Judicial Function: The Dilemma of Glass-Steagall," *Emory Law Journal* 33 (Winter 1984): 1-40.

²⁵⁸Aranson, Gellhorn, and Robinson, "Legislative Delegation."

²⁵⁹The *Chadha* decision is in this spirit. See *I.N.S. v. Chadha*, 103 S. Ct. 2764 (1983).

²⁶⁰A reversal of *United States v. Ptasynski*, 103 S. Ct. 2239 (1983), would thus be in order.

bargains beyond a strict construal of their statutory terms.²⁶¹ In its review of state legislation, the Court would do well to apply analysis such as Epstein's to refresh the various clauses that Sunstein identifies, to limit the unprincipled redistributionist tendencies of state governments.²⁶² In all matters doctrine, not a pragmatic sanction, must come first, for "it is a constitution that we are expounding." Economic analysis "merely" indicates the presence of uncompensated damage or undeserved protection or the extent to which the political branches have breached the walls that the framers so wisely provided.

²⁶¹See *supra* note 230.

²⁶²Public "use," for example, cannot mean public "purpose" under robust constitutional interpretation. A fully compensated taking of private land to build a flood-control dam is one thing. A taking of A's land and its transfer to B, as in *Midkiff*, is quite another.