

BOOK REVIEWS

Bargaining with the State

Richard Epstein

Princeton, N.J.: Princeton University Press, 1994, 322 pp.

Your family-owned business has been so successful that you decide to expand its facilities on your own land. When you apply to the city for a building permit, however, the City Planning Commission responds that it will grant the permit only on the condition that you dedicate 10 percent of your property to the public for green space and a bikeway. May the city impose such a condition on your plans to enlarge your store?

Until recently, the answer was yes. Fortunately for you—but unfortunately, in the eyes of many city planners—the United States Supreme Court on June 24, 1994 in the case of *Dolan v. City of Tigard*, decided that such a condition constituted a governmental “taking” of private property without just compensation and therefore violated the Fifth Amendment, as applied to state and local governments through the Fourteenth Amendment.

The indirect taking of property through the zoning power, as in *Dolan*, is but one of many ways in which governments “bargain” with their citizens by imposing conditions on the exercise of discretionary powers. Corporations might be prohibited from making political expenditures in order to enjoy the benefits of their corporate status; colleges and universities might be prohibited from discriminating on the basis of race or gender in order to receive federal funds or charitable tax exemptions; recipients of unemployment compensation might be required to work on Saturdays, in violation of their religious beliefs, in order to continue receiving their benefits. Such hard bargains similarly might be struck between different governments: for example, when Congress empowered the secretary of transportation to withhold federal funds for highway construction from states that had not raised the drinking age to 21.

Some of those bargains made between different governments or between governments and their citizens have been declared unconstitutional by the courts—either under the fuzzy doctrine of “unconstitutional conditions” or as violations of specific provisions of the Constitution—but most have been upheld as legitimate adjuncts to the state’s exercise of powers.

Takings, Richard Epstein’s 1985 book, forcefully advanced the provocative thesis that the takings clause of the Constitution, if taken seriously

by the courts, would invalidate most forms of economic regulation—and most major social welfare programs since the New Deal. In *Bargaining with the State*, Epstein has written yet another important book challenging conventional thinking in constitutional law. Building upon the philosophical foundations laid in *Takings*, this new book surveys the vast array of cases in which citizens “bargain” with the state. Epstein seeks to give some coherence to this muddled area of constitutional law by offering a more meaningful formulation of the doctrine of unconstitutional conditions.

Under this doctrine as it has been recognized by the courts, the government may not require one to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the sacrifice of right has little or no relation to the benefit. Government, within its discretionary authority, may decide to grant or deny anyone a privilege or benefit; but, as Epstein notes in his summary of the doctrine, “it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of that person’s constitutional rights.” Whenever government tries to achieve its desired result by obtaining bargained-for consent of the party whose conduct is to be restricted, the problem of unconstitutional conditions arises.

Courts have applied the doctrine sporadically and inconsistently. For example, courts have struck down restrictions on corporate political contributions but have upheld restrictions tied to federal highway funds. More importantly, in many cases where problems of unconstitutional conditions existed, the courts refused to recognize them. In *Bob Jones University v. United States* (1978), for example, the Supreme Court upheld the denial of the university’s charitable tax exemption because it had banned its students from interracial dating and marriage. The university’s professed adherence to sincere religious beliefs, in this instance, did not trump federal laws against racial discrimination. On the other hand, in *Sherbert v. Verner* (1963) the Court had struck down the denial of unemployment benefits to a Seventh-Day Adventist because of her refusal to work on Saturdays. To condition her receipt of unemployment benefits on the violation of her religious convictions, the Court held, would violate her First Amendment right to free exercise of religion. Several years later, however, in *United States v. Lee* (1982), the Court held that it did not violate the Constitution to require Old Order Amish to file Social Security returns and to withhold Social Security payments from their employees, even though compliance with the law seriously compromised their religious beliefs.

Epstein proposes a single test for resolving such problems, one that distinguishes “good” conditions from “bad” ones. His test would require courts first to identify some use of monopoly power by government and then to determine whether the condition sought by the government would advance its legitimate interest in an even-handed way. To use Epstein’s example, consider the state’s control of access to public highways. A rule that all persons on the highway must agree to answer for their torts would

be a good, constitutionally permissible condition because, Epstein notes, "in imposing it the state acts as a mutual agent of all citizens in a way that advances their ex ante welfare by increasing the protection all individuals have against accidents." On the other hand, a toll that is twice as high for persons whose last names begin with A through L as those whose names begin with M through Z, would clearly be a bad, unconstitutional condition—one with "no allocative gains," Epstein observes.

Two classics of 19th-century legal literature—Thomas M. Cooley's *Constitutional Limitations* and Christopher G. Tiedeman's *Limitations of Police Power*—both forcefully argued that government regulation of persons and property were subject to a number of important constitutional restrictions, some written and some unwritten. One of these basic restrictions widely recognized by courts in the nineteenth century was that government treat its citizens equally, that it not grant privileges or restrict liberty in ways that favored some over others. Sadly, this principle and these works that explained it are largely unknown today, even by constitutional scholars. With modern constitutional law concerned more with the permissible ways in which special-interest groups may manipulate the coercive powers of government to achieve their ends, the tradition of constitutional limitations on government powers has become all but forgotten, especially where property rights are concerned.

Perhaps the most important lesson to be learned from *Bargaining with the State* is the lesson that can be derived from the whole body of Epstein's scholarship: that a constitution is meant to limit the power of government. It is a sad commentary on modern legal thought that most courts and constitutional scholars need to be reminded of this truism.

David N. Mayer
Capital University

Peddling Prosperity

Paul Krugman

New York: W.W. Norton and Company, 1994, 292 pp.

Paul Krugman is a brilliant young economist and a fine writer. He has the rare ability to illustrate subtle economic concepts by simple examples. He must be an extraordinary teacher.

That is why this book is so irritating. Krugman is most effective in describing the developments in academic economics. The chapters on the rise of conservative economics and the more recent developments of real business-cycle theory, the new Keynesian economics, the economics of QWERTY, and strategic trade theory should be valuable to both professional and lay readers. These chapters are succinct, fair, lively, and constitute about a third of this book.

Most of this book, however, is a screed about the "policy entrepreneurs" and their alleged malign influence on economic policy. He charges them