Economic Analysis and Unconstitutional Conditions: A Reply to Professor Epstein

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In his *Foreword* to last November's issue of the Harvard Law Review, Professor Epstein tries to make sense of the unconstitutional conditions doctrine.[1] That doctrine holds that a person may not, under certain circumstances, be forced to choose between exercise of a constitutional right and receipt of a government service, grant, or other benefit.[2] For example, it has been held that unemployment benefits provided by the government may not be conditioned on a waiver of one's rights under the free exercise clause of the First Amendment[3] and that the death penalty under the federal kidnapping statute cannot be limited to defendants who insist on exercising their right to a trial by jury.[4] On the other hand, the doctrine did not prevent the Bob Jones University from being forced to choose between its charitable tax status and its religiously motivated prohibition of interracial dating between students,[5] and it does not prohibit

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1. Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).
2. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 681 & n.29 (2d ed. 1988); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).
3. Sherbert v. Verner, 374 U.S. 398 (1963).
4. United States v. Jackson, 390 U.S. 570 (1968). *See infra* note 66 and accompanying text.
5. Bob Jones University v. United States, 461 U.S. 574 (1983). The Supreme Court assumed arguendo that the University's ban on interracial dating was protected by the free exercise clause of the First Amendment. *See id.* at 602 n.28.

plea bargaining, a practice which conditions a lighter sentence on a defendant's waiver of the right to trial.[6]

Various commentators have tried to explain the doctrine on a reward or punishment theory.[7] Such a theory holds that the waiver of a constitutional right may be rewarded but that the exercise of a constitutional right may not be punished. The wrinkle in such a theory is the need to distinguish the imposition of a punishment from the denial of a reward.[8]

This distinction can be drawn if some appropriate baseline separates rewards from punishments. If, for example, we can say that one is entitled to *this much* and not more, then providing more is a reward and providing less is a punishment.[9] Proposed baselines have come from historical analysis,[10] balancing tests,[11] societal norms,[12] and other sources. Professor Epstein seeks a baseline grounded in economics, one that is "functional, not intuitive."[13]

The unconstitutional conditions doctrine is always implicated in the same context. That is, the state offers a bargain in which the offeree is free to choose between two outcomes: exercise of a constitutional right and receipt of some government bounty.[14] When the doctrine applies, the state is prohibited from offering the exchange

6. Santobello v. New York, 404 U.S. 257 (1971).

7. *See, e.g.*, Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 155-64 (1981); Van Alstyne, *supra* note 2.

8. *See, e.g.*, L. TRIBE, *supra* note 2, § 11-5 at 781. Professor Sullivan is particularly harsh in her criticism of the reward or penalty approach. *See* Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1428-56 (1989). She ultimately concludes that "[e]xcessive focus on whether unconstitutional conditions are coercive, and thus 'penalize' rights, has obscured the field. . . '[C]oercion' in this context is a conclusory label masquerading as analysis." *Id.* at 1505-06.

9. *But see* Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 348 ("[A]ny doctrine that draws a distinction between a price for the exercise of a right and a reward for the nonexercise of a right probably begs all the important questions."). *Cf.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 6-7 (1968) (arguing that the distinction between a non-penalty tax and a criminal fine is the violation of internalized standards of behavior).

10. Abrams, *supra* note 7, at 151.

11. *Id.* at 149-51.

12. *See id.* at 162-64; *see also* Epstein, *supra* note 1, at 69 (justifying the CIA's prepublication censorship imposed on agents and former agents in part because "[t]he restriction in question is no doubt similar to ones private employers impose upon employees").

13. Epstein, *supra* note 1, at 13.

14. An alternative way of looking at the setting of unconstitutional conditions is to focus on the government benefit and to observe that it is conditioned on waiver of a constitutional right. From this perspective, the issue becomes one of equal protection: to what extent may state benefits be given to one group but not another. Of course, the defining characteristic of unconstitutional conditions in this context is that the state discriminates on the basis of a mutable characteristic. *See, e.g.*, Sullivan, *supra* note 8, at 1426. State benefits conditioned on immutable characteristics may classify but they cannot coerce. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1114 (1987).

ab initio. Thus, the unconstitutional conditions doctrine imposes a limitation on the generally beneficial freedom to contract.

Consistent with traditional economic reasoning, Professor Epstein proposes to limit application of the unconstitutional conditions doctrine to situations in which market failure taints the bargaining process.[15] The market failures identified by Professor Epstein are state-owned monopolies, bargaining problems caused by coordinating collective action, and exchanges producing significant externalities. Professor Epstein sets out to show "how the doctrine of unconstitutional conditions does, and should, function in a variety of contexts as a check against the political perils" of these market failures.[16]

Unfortunately, Professor Epstein fails to carry through on his promise. I show in Part I that Professor Epstein's economic analysis is unsatisfactory in a variety of ways. With regard to monopoly, Professor Epstein neither persuasively justifies his wholesale condemnation of monopoly nor demonstrates how application of the unconstitutional conditions doctrine responds to monopoly problems. His abstract discussion of collective action is unremarkable and, unfortunately, completely impractical. He fails to suggest a single context in which the doctrine of unconstitutional conditions has or could alleviate a problem of collective action. Finally, Professor Epstein relies extensively on a poorly reasoned analysis of externalities. He neither defines an "externality" properly nor applies the concept evenhandedly.

One notable feature of Professor Epstein's analysis is his persistent, if covert, reference to legislative and administrative motivation. Any issue that relies on determination of motivation ultimately must resist economic analysis because economics can only tell us what people *should do* and why they *might have* done something. Economics never can tell us why people *did do* something.[17] At the very least, Professor Epstein's tacit reliance on a motivational analysis undermines his search for a "functional, not intuitive" solution.

Because determinations of motivation inevitably are intuitive, Professor Epstein's search for a functional approach is doomed. I pursue in Part II an alternative economic analysis of the unconstitutional conditions doctrine which, by showing that motivation must be the

15. Limiting restrictions on freedom to contract to market failure is a mainstay of legal economic analysis. *See, e.g.*, R. CORNES & T. SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 3-5 (1986); R. POSNER, ECONOMIC ANALYSIS OF LAW § 13.1 (3d ed. 1986).
16. Epstein, *supra* note 1, at 15.
17. *See infra* note 125 and accompanying text.

linchpin of the doctrine, identifies the limited role economics can play in this context. Application of the doctrine must turn in each case on the administrative or legislative motivation underlying the particular challenged condition.

A threshold problem with the doctrine of unconstitutional conditions is its name; by calling a condition unconstitutional we have already rejected its legitimacy. Unfortunately, there is no accepted name for generic conditions that might or might not be unconstitutional. In another context I have referred to such conditions—that is, conditions imposed on the exercise of a constitutional right—as "systemic coercion."[18] While that name also carries with it a certain level of condemnation, at least it does not express a prejudgment as to the constitutional issue. For want of a better name, I shall continue to use the term "systemic coercion" here.

As we shall see, the problems posed by systemic coercion highlight the limitations of economic analysis. Ultimately, the propriety of a condition imposed on the exercise of a constitutional right turns on the reasons motivating the condition.[19]Unfortunately, no amount of economic analysis can do more than indicate why an action *might* have been taken,[20] and if a legislative action is to be set aside as constitutionally infirm, more than a suspicion of improper motivation must be required.[21]

What makes the economic analysis of systemic coercion particularly frustrating is that the problem can be recast as that of monitoring the behavior of public officials.[22] Economic reasoning has been especially powerful in this context.[23] Unfortunately, the monitoring problem underlying systemic coercion resists traditional economic analysis because, in this context, those who would benefit from the monitoring cannot protect themselves.

I. PROFESSOR EPSTEIN'S ANALYSIS

A. Monopoly Market Failure

Professor Epstein begins his discussion of monopolies by identifying three "social losses" caused by monopolistic behavior as compared with behavior under perfect competition. The first loss is that resulting directly from the super-competitive price charged by a monopolist: "[W]hen the monopolist raises his price he prevents some

18. Abrams, *supra* note 7, at 134.
19. *See infra* notes 102, 105-08 and accompanying text.
20. *See infra* note 55.
21. United States v. O'Brien, 391 U.S. 367, 383-84 (1968); *see* Abrams, *supra* note 7, at 142-49.
22. *See* cases cited *infra* notes 102-12.
23. *See* Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

mutually beneficial exchanges. . . . The benefits of that foregone exchange are thus one form of loss created by monopoly."[24]

The second social loss identified by Professor Epstein as caused by monopoly involves the various costs incurred by a monopolist in obtaining the monopoly. These costs—such as buying out a competitor or buying government legislation to eliminate competitors—would not necessarily be incurred in a competitive economy.[25] The third social loss encompasses the transaction costs incurred by the monopolist and his customers of engaging in strategic bargaining, behavior that would not be productive (and so would not be incurred)[26] were there a set, competitive price for the monopolist's goods.

Figure 1 illustrates the first social loss identified by Professor Epstein.[27] Line D is the industry demand curve. Pc is the price for the

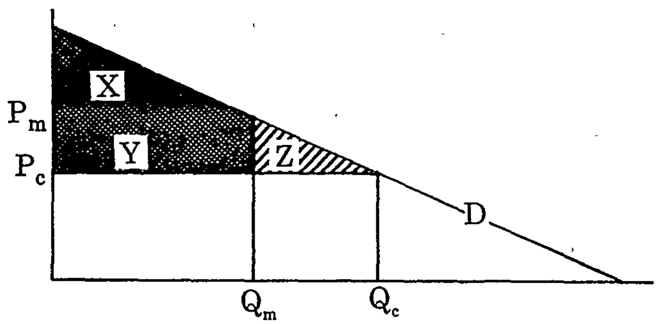

Figure 1

24. Epstein, *supra* note 1, at 16.

25. *See* Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975); Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. AND MANAGEMENT SCI. 1 (1971).

26. However, even nonproductive costs will be incurred if the actors believe they could be productive. Thus, it is knowledge of the competitive economy rather than the competitive economy itself which eliminates strategic bargaining. The importance of accurate information is captured by the game of chicken. In chicken, two players drive automobiles toward each other at high speed. The loser of the game is the player who swerves first. If both players insist on not swerving, they crash and both die. The payoff matrix of chicken can be represented as follows:

	Swerve	*Don't Swerve*
Swerve	0, 0	-5, 10
Don't Swerve	10, -5	-20, -20

The winning strategy in this game is for a player to break his steering wheel and throw it out the window. Once the opposing driver sees that a crash cannot be avoided unless he swerves—that is, chickens out—he will do so to avoid the accident fatal to both. This strategy works not simply by disabling one's vehicle but by advertising the disability to the opposing party.

27. For a similar discussion of the standard view of monopolies, *see* R. POSNER, *supra* note 15, § 9.3 at 254.

monopolist's good that would be charged in a fully competitive economy, and Pm is the price charged by the monopolist. Qc is the quantity demanded at price Pc, while Qm is the quantity demanded at price Pm.

Gains from trade arise from the increase in value of what one party receives in excess of the value that party gives up. For a consumer, such an excess will exist only if the consumer values the item received more than the market values the item. This excess, called "consumer surplus," alternatively can be defined as the value that each consumer places on the received good, as measured by the maximum amount that the consumer would pay for that good, in excess of the amount charged.[28] In a competitive economy, the consumer surplus equals the areas in Figure 1 identified as *X*, *Y* and *Z*. In the monopolistic economy, consumer surplus equals only area *X*.

The corresponding "producer surplus" is the excess of price charged over the cost of the good. In a competitive economy, no part of *X*, *Y* or *Z* in Figure 1 constitutes producer surplus. In a monopolistic économy, the producer surplus includes area *Y*.

The social loss resulting from a monopoly is represented by area *Z* in Figure 1. Area *Z* is that part of the consumer surplus in the competitive economy not captured by consumers *or* by the producer in the monopolistic economy. Area *Y* does not represent a social loss even though its value is lost by consumers because it is captured by the monopolist; that is, area *Y* represents value transferred from consumers to the producer as a result of the monopoly. Thus, the social loss from the monopoly—the excess of the consumer surplus in a competitive economy over the consumer plus producer surpluses in the monopolistic economy—is only area *Z*.[29]

It certainly is true that a monopoly may, under some circumstances, produce a social loss as that term is used by Professor Epstein.[30] Is that necessarily bad? If the shift from a monopoly to a competitive economy made consumers better off while not negatively impacting the monopolist, the competitive economy surely would be preferable to the monopoly. That is, the competitive economy would be Pareto superior to the monopoly.[31]

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28. *See* A. ALCHIAN & A. ALLEN, EXCHANGE & PRODUCTION 17-18 (3d ed. 1983); C. LINDSAY, APPLIED PRICE THEORY 288 (1984).

29. This lost consumer surplus assumes that the monopolist is unable to price-discriminate. If perfect discrimination is possible, there is no welfare loss attributable to monopoly. *See infra* note 36.

30. *Id.*

31. *See* Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-13 (1980). A Pareto efficient state of affairs is one in which no individual can be made better off without inflicting a loss on at least one other person. Thus, one situation is Pareto superior to another if all individuals are as well or better off in the first situation then they are in the second.

However, because a competitive economy includes the transformation of a producer surplus into a consumer surplus, it is *not* Pareto superior to a monopoly. That is, while a competitive economy makes consumers better off, it makes the monopolist worse off. Accordingly, a society that acts only on the basis of unanimous consent would not voluntarily replace the monopoly with a competitive economy.[32]

The only way that one could characterize the transition from a monopoly to a competitive economy as a net benefit would be by comparing the gain to consumers against the loss to the monopolist and holding that the gain is more. To be sure, the dollar magnitude of the consumers' gain exceeds the dollar magnitude of the monopolist's loss. Yet, that fact alone does not allow us to conclude that society as a whole is better off in the competitive economy than with the monopoly.[33]

Consider the following hypothetical experiment. Suppose on a certain isolated island the inhabitants consider coconuts to be especially valuable. One day a strange ship arrives and the captain of that ship makes the following offer to the natives on the island: if one particular native (say, *A*) willingly destroys one of his coconuts, the captain will give two coconuts to another native (say, *B*). However, *B* must agree not to give a coconut or anything else of value to *A*.

Should the natives agree to this transaction to improve their society overall? Surely *B* will support the transaction, for *B* obtains a direct benefit as a result. Furthermore, all the other natives (excluding *A*) presumably will favor the transaction because it increases the total supply of goods in the native economy, and they may share in that increased wealth. For example, *B* might increase his spending on luxury goods if he suddenly received two fresh coconuts, and the weavers on the island thus might share in the riches.

But is the society as a whole better off?[34] Surely *A* is not, since it

32. On the importance of the unanimity principle, *see, e.g.*, J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 85-96 (1965); D. MUELLER, PUBLIC CHOICE 19-27 (1979).

33. Moving from state A to state B is "Kaldor-Hicks" efficient if the winners from the move benefit more than the losers lose. *See* Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 671 n.2 (1980). Thus, a competitive economy is Kaldor-Hicks efficient. For a general criticism of the Kaldor-Hicks criterion, see Coleman, *supra* note 31, at 519-20, 532-39. Professor Sen has described the Kaldor-Hicks criterion (and similar extensions of Pareto optimality) as "either *unconvincing or redundant*." A. SEN, ON ETHICS & ECONOMICS 33 n.4 (1987).

34. Society is nothing but a collection of individuals, and for society to be better off, each member of that society must be at least no worse off. *See generally* J. BUCHANAN & G. TULLOCK, *supra* note 32, at 11-15.

is *A* who paid for the gains enjoyed by others. Some of *B*'s riches may trickle down to *A*, but in the absence of a direct transfer from *B* to *A* (strictly prohibited by the terms of the visiting captain), it is unlikely that *A* will recoup the entire coconut he has been forced to destroy. Society as a whole includes *A*, and since *A* is worse off, society as a whole is not better off. The best we can say is that some members of society are better off and some worse. The transaction increases the social pie, but that is no solace to anyone who fails to get a slice.

So, too, in going from a monopoly to a competitive economy, consumers become better off at the expense of the monopolist. Indeed, those who would share the monopolist's bounty—favorite suppliers, perhaps, or employees or relatives—also are worse off. We simply cannot assert that society as a whole benefits from the elimination of a monopoly unless we are prepared to value the monopolist's welfare less than that of consumers.

If a transition from one economic state to another increases the social pie, the winners might be able to compensate the losers so that everyone profits from the event. In the hypothetical coconut experiment, such compensation was explicitly prohibited by the terms of the experiment. Might it be the case in the real world that such compensation from winners to losers similarly is impossible?

Somewhat surprisingly, the answer is that, in some cases, it is actually impossible. Consider the monopoly. We have seen from Figure 1 that in going from a monopoly to a competitive economy, the monopolist loses *Y* while consumers gain *Y* and *Z*. Why don't consumers offer to pay the monopolist some amount between *Y* and $Y + Z$ to reduce his price to the competitive level?

Even assuming that consumers can act cohesively with zero transaction costs, they still will be unable to agree on a group plan to subsidize the monopolist. Suppose, for example, that the consumers were to agree to pay S1 dollars per unit to the monopolist to have him lower his price to the competitive level. In effect, the consumers will have agreed to pay Pc + S1 per unit.[35]

Not all consumers will go along with this agreement. For some consumers, the consumer surplus at price Pc is less than S1, meaning that for these consumers, the monopolist's product is not worth Pc + S1. Accordingly, these consumers will refuse to participate in the scheme and the burden of subsidizing the monopolist will fall on a smaller group.

Because the group is smaller, the amount per unit that each will have to pay to the monopolist must increase, say to S2. Now, some

35. This example is subject to the condition that $Y \leq NS1 \leq (Y+Z)$, where N is the number of consumers agreeing to make the additional payment.

consumers who would have been willing to pay Pc + S1 will refuse to pay Pc + S2. Thus, the group of consumers willing to subsidize the monopolist will further decrease and the necessary subsidy per unit will rise to S3. This process will continue until the subsidy equals Pm-Pc. That is, the effective unit price to the consumers will increase to Pm and the monopoly conditions will recur.[36] Were there a lower effective price at which the monopolist could sell his goods without losing any part of his monopoly profit, the monopolist would adopt that price unilaterally.

To be sure, it would seem that by netting gains to one group against losses to another, we ought to be able to arrive at a meaningful social statistic. Proponents of welfare economics have been doing just this for many years.[37] The theoretical arguments against the legitimacy of social welfare economics are well known and need not be belabored here.[38] For our purposes, it is sufficient to note that Pro-

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36. This example assumes that the consumers must divide the amount they pay to the monopolist in proportion to their consumption of the monopolist's output. If they could instead divide the total payment in proportion to each consumer's share of the consumer surplus, they could arrange to pay the monopolist an amount equal to area *Y* in return for the monopolist reducing his price to the competitive price. They would thereby regain the consumer surplus (area *Z* in Figure 1). However, this method of dividing the payment to the monopolist among the consumers is the precise equivalent of perfect price discrimination by the monopolist. It is well known that no social loss obtains despite the existence of a monopoly if the monopolist price discriminates. *See, e.g.*, A. ALCHIAN & W. ALLEN, *supra* note 28, at 354-57; C. LINDSAY, *supra* note 28, at 589-598; H. VARIAN, MICROECONOMIC ANALYSIS 84-85 (2d ed. 1984). Thus, consumers can eliminate the monopoly social loss only when the monopolist also could eliminate it through unilateral effort.

37. *See* C. LINDSAY, *supra* note 28, at 556-58.

38. *See, e.g.*, J. BUCHANAN & G. TULLOCK, *supra* note 32, at 92-93; C. LINDSAY, *supra* note 28, at 554-64; Coleman, *supra* note 31, at 532-39. The strongest criticisms come from the most technically sophisticated. *See, e.g.*, L. SAVAGE, THE FOUNDATIONS OF STATISTICS 95-97 (2d rev. ed. 1972). In his lecture on Ethics and Economics, Professor Sen makes the surprising comment that "[i]t is, of course, possible to argue that interpersonal comparisons of utility make no sense and are indeed totally meaningless—a position I find hard to defend." A SEN, *supra* note 33, at 30, n.2. What Professor Sen apparently means, however, is that modern economics has too rigidly accepted utilitarianism and its underlying notion that rational behavior must be self-interested. *See id.* at 33-34, 40-46. Professor Sen recognizes that modern economics treats "[p]areto optimality as the only criterion of judgment." *Id.* at 34.

Professor Sen's apparent willingness to embrace some form of interpersonal comparisons of utility can be traced to a mistake he made in his 1969 book, *Collective Choice and Social Welfare*. In that book, Professor Sen says:

> One way of giving meaning to [interpersonal comparisons] is to consider choices between being person A in social state X or being person B in social state Y. For example we could ask: "Would you prefer to be Mr. A, an unemployed laborer, in state X, or Mr. B, a well-paid employed engineer, in state Y?" While the answer to the question does involve interpersonal comparisons
> . . . .

fessor Epstein's characterization of monopolies as always socially undesirable would be supported by consumers and disputed by monopolists and potential monopolists. Thus, the monopoly welfare loss condemned by Professor Epstein is no more profound than any other factional dispute over division of the social pie. Moreover, in the context of systemic coercion, the monopolist is the government and thus indirectly society in general. Ignoring the surplus loss to the monopolist—and through it to society generally—is, thus, particularly inappropriate in this context.

Evidence of this flaw in Professor Epstein's treatment of monopolies appears in his analysis of conditions imposed on the right of foreign corporations to do business within a state.[39] For example, consider a state that forbids foreign corporations from doing business within the state unless the corporation waives its right to remove civil actions to the federal courts.[40] This condition is burdensome to foreign corporations, but if the profits from doing business within the state outweigh the burden, corporations will capitulate. The issue addressed by Professor Epstein is whether foreign corporations can constitutionally be put to such a choice in the first place.

Professor Epstein treats this situation as an instance of monopoly market failure because each state has plenary power to exclude or admit foreign corporations within its borders.[41] Local consumers both gain and lose from the condition: they gain to the extent that their civil actions cannot be removed to the federal courts (thereby enjoying some amount of forum shopping), and they lose to the extent that some foreign corporations refuse to do business within the state because of the condition. According to Professor Epstein, these gains and losses plausibly offset one another.[42] Similarly, local busi-

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A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 5 (1969).

Yet, in the situation posed by Professor Sen, there is no interpersonal comparison. One person (the reader) is asked to compare two possible states of the world. We can rephrase the choice offered by Sen as: would you prefer the bundle of goods associated with Mr. A's life or the bundle of goods associated with Mr. B's life? So long as one person makes that comparison, no interpersonal comparison of welfare is required.

There would be interpersonal comparisons if Professor Sen meant to compare A's life, as felt and enjoyed by A, with B's life, as felt and enjoyed by B. If the reader is asked to evaluate A's life from A's perspective—a perspective necessarily including A's memories rather than those of the reader—the reader has no way to make the evaluation because it must be made by someone with A's values, preferences and history. Indeed, the possibility that I might be magically transformed into someone else complete with his or her memories and lacking mine is epistemological nonsense properly excised by Occam's razor: if it happened, how would I or anyone else know? *See generally* R. NOZICK, PHILOSOPHICAL EXPLANATIONS 29-47 (1981).

39. Epstein, *supra* note 1, at 31-38.

40. *See* Terral v. Burke Construction Co., 257 U.S. 529 (1922), invalidating such a condition.

41. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). *See generally* Epstein, *supra* note 1, at 32-33.

42. Epstein, *supra* note 1, at 36.

nesses both gain and lose: they gain from the decrease in competition and they lose to the extent that competition among their suppliers is reduced. For foreign corporations, though, the condition imposes only a loss. To eliminate a net social loss—the costs imposed on the foreign corporation—Professor Epstein would prohibit imposition of the condition.[43]

Although the condition may actually be illegitimate, Professor Epstein's analysis is not helpful. If the benefits and burdens to local consumers and businesses fully offset one another, the condition would not be imposed.[44] The only rational explanation for the condition is that local consumers or businesses obtain some net benefit from it. That being the case, voiding the condition works a shift of value from local residents to foreign corporations. Professor Epstein's analysis of monopolies gives no justification for enforcing such a transfer.

Professor Epstein at least tacitly recognizes this criticism of his analysis when he states that "it becomes difficult to use a simple Pareto test" in this situation.[45] Yet difficulty exists only because Professor Epstein insists on expanding economic analysis beyond its legitimate scope. Because the two economic states are not Pareto comparable, neither state is preferable to the other absent an arbitrary social welfare calculus. However, rather than accepting the implications of this "difficulty," Professor Epstein argues:

> Now the object of the inquiry is to maximize the total cooperative surplus from the [government imposition of the condition]. Some effort must be made to compare the size of the gains obtained by each of the rival groups, and for this task one convenient approach is to accept only conditions that tend to advance the welfare of all groups pro rata, as opposed to those having a differential effect.[46]

Professor Epstein's effort is doomed to failure because there is no meaningful way to "compare the size of the gains obtained by each of the rival groups."[47] Furthermore, even if there were some sensible way to make such a comparison, favoring "only conditions that tend

43. *Id.* at 36-37.
44. Of course, public choice theory tells us that the condition might be imposed even if it imposes a net loss on local residents if some sufficiently focused subset of locals will benefit from the regulation. *See, e.g.*, M. OLSON, THE LOGIC OF COLLECTIVE ACTION 111-31 (1971).
45. Epstein, *supra* note 1, at 25.
46. *Id.*
47. While the dollar magnitude of the gains can be measured, that comparison lacks meaning. *See infra* p. 376 (discussion following Table II).

to advance the welfare of all groups pro rata" is totally arbitrary.[48] No justification for this arbitrariness is offered other than its "convenience."

This arbitrariness also appears in Professor Epstein's treatment of possible conditions imposed on the use of a public highway. A state might condition use of the highway in such a way as to favor one group over another (by, for example, imposing a use tax only on truckers or only on non-truckers), or it might impose only general conditions (such as weight limitations and general traffic rules) affecting all groups equally.[49]

"[T]he trick," according to Professor Epstein, "is to fashion a test that can distinguish good conditions from bad ones."[50] Two conditions he considers are (1) a requirement that all users of the highway agree to answer for their torts, and (2) a condition imposed only on commercial haulers that they agree to be bound by the restrictions applicable to common carriers.[51] Professor Epstein concludes that the former condition "seems to be [of] the benevolent kind,"[52] an unsurprising conclusion in light of his "convenient approach" favoring only conditions of general applicability.

The latter condition is condemned by Professor Epstein as "the type of condition that reduces the total size of the social surplus, by allowing it to be redistributed through factional intrigue."[53] Yet, it might be equally inoffensive. For example, it might be administratively unworkable to define "common carrier" more precisely than as including all commercial haulers. Or it might be the case that commercial haulers are less likely to obey general traffic rules because the size of their vehicles makes them less susceptible to injury. To encourage recognition of the rights of others, these haulers might be subject to more stringent liability such as that imposed on common carriers.[54]

Of course, the restriction might be nothing but the result of factional intrigue. Let us assume, arguendo, that if true, that would be

48. *Cf.* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 498-99 (1980) (arguing against Rawl's selection of the maximum criterion).

49. The characterization of these rules as "general," a characterization adopted by Professor Epstein, is itself value-laden. Would a decision to prohibit all public funding of sickle cell anemia research be general because it formally affects all citizens equally or should it be treated as targeted toward blacks because of its disproportionate impact? Is it true, as Professor Epstein apparently would assert, that a rule forbidding rich as well as poor from sleeping under park benches is completely general and does not discriminate on the basis of wealth? *See also* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304-14 (1984).

50. Epstein, *supra* note 1, at 25.

51. *Id.* at 47-54.

52. *Id.* at 25.

53. *Id.*

54. *See, e.g.*, S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 73-75 (1987).

sufficient to strike it down. The point then is that what invalidates the condition is not its effect but the motive behind its enactment. Unfortunately, no amount of economic analysis will tell us what motivates a piece of legislation.[55]

Motivational analysis is an obvious response to the systemic coercion problem. Motivational analysis accepts the basic logic of the greater-includes-the-lesser theory that the government may condition the receipt of benefits on the waiver of a constitutional right. But its response to the problem is that this power, like any other, may not be exercised to further some invidious purpose.[56] However, motivational analysis is fraught with difficulty. For example, consider a statute which disallows tax deductions for contributions to charitable organizations that engage in political lobbying. Such a statute might be an attempt by existing legislators to undermine organizations seeking political change. If so, presumably the statute should be invalidated.[57] On the other hand, the statute might represent a belief that the general taxing power should not be used to subsidize lobbying activities of narrow, special interests, presumably a legitimate goal of the legislative power.[58]

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55. For example, consider the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933). While the avowed purpose of the Act was to improve the stability of financial banks, its effect has been to profit investment bankers at the expense of the consuming public by reducing competition in the underwriting market. Yet, one cannot conclude from this alone that the Glass-Steagall Act was disingenuously intended from the outset to protect a narrow special interest: it might have been "a misguided, albeit benign, attempt to accomplish its formally articulated objectives." Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1, 16 (1984). Professor Macey ultimately concludes that "the Act is [not] simply a result of congressional error." *Id.* That conclusion rests in part on his observation that the articulated objectives of the Act could have been accomplished through less anti-competitive legislation. *Id.* However, that explanation cuts both for and against Professor Macey's conclusion.

The ultimate basis of Professor Macey's conclusion that the Glass-Steagall Act was intended to be special interest legislation seems to be that the Act benefits investment bankers—a small, focused group—at the expense of consumers—a large, diverse group. *Id.* at 19-20. To be sure, coalition theory predicts that small groups will exploit large groups. *See, e.g.*, M. OLSON, *supra* note 44, at 141-48. However, to move from that general prediction to the conclusion that the Glass-Steagall Act is an instance of such exploitation rather than a misguided legislative attempt to benefit the general public is a leap of faith rather than of logic.

56. Even Justice Holmes used motivational analysis to avoid the greater-includes-the-lesser line of reasoning. *See* Kreimer, *supra* note 49, at 1329, discussing Western Union Telegraph Co. v. Foster, 247 U.S. 105 (1918).

57. *Cf.* Williams v. Rhodes, 393 U.S. 23 (1960) (invalidating restrictions on minority party candidates).

58. *Cf.* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (upholding Hatch Act conditioning federal subsidies to state governments on state employ-

How should a court determine the motivation underlying the legislation?[59] Because the challenge is to the legislation as written rather than as applied, presumably it is the legislature's motivation that is relevant.[60] But just what is the motivation of a collective body? A court might be able to determine what motivated a particular legislator to vote a particular way,[61] but what would such a finding tell us? Is one impermissible motive enough to invalidate a law, or must a majority of legislators have harbored bad intentions?[62]

A court might forego true motivational analysis in favor of an objective proxy. If an avowed legislative purpose could be accomplished by a more narrowly tailored law, it is reasonable to treat the legislation as intended to accomplish its broader effect.[63] For example, consider a statute that denies unemployment benefits to individuals unavailable for gainful employment Monday through Saturday. For an individual whose religion forbids work on Saturday, this statute forces a choice between receipt of unemployment benefits and free exercise of religion. Should the statute be invalidated?[64]

The statute might be defended as a legitimate attempt to limit unemployment benefits to those individuals actively seeking employment. From this perspective, the statute's negative impact on some individual's exercise of religion is unintended and incidental.[65] However, the goal of limiting unemployment benefits to job-seeking applicants could be accomplished without burdening religious practices. For example, unemployment compensation might be limited to appli-

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ees' abstinence from politics).

59. The motivations advanced, and accepted, for suspect legislation defy credibility. For example, Justice Harlan accepted a prohibition against the payment of vested social security benefits to deported communists on the theory that the statute was not intended to punish communists for their political views but rather was intended to help this country's balance of trade. Flemming v. Nestor, 363 U.S. 603, 612 (1960). *See generally* Kreimer, *supra* note 49, at 1337-38.

60. An as-applied challenge to systemic coercion arises, for example, when a statute grants discretion to a public official who then exercises that discretion to induce the waiver of a constitutional right. For example, a judge might agree to sentence reduction if a criminal defendant pleads guilty. The systemic coercion challenge to such a practice is not that the granting of sentencing discretion to judges violates the constitution but rather that one judge has exercised that discretion improperly.

61. Although determining the motivation of an individual is never an easy task, special problems face a court trying to determine the motivation of a legislator. Can legislators be required to testify concerning their motivation? Or would such enforced testimony violate a separation-of-powers concern? Would a failure to testify warrant an inference of an impermissible motive or would such an inference impermissibly burden the legislators' right to be free from challenge for their legislative actions? *See* U.S. Const., art. I, § 6 (speech or debate clause); Kilbourn v. Thompson, 103 U.S. (13 Otto) 168, 204 (1880) (protecting all "things generally in a session of [Congress] by one of its members in relation to the business before it.").

62. *See* Kreimer, *supra* note 49, at 1335.

63. *See* Abrams, *supra* note 7, at 146-49.

64. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

65. *See* Kreimer, *supra* note 49, at 1339.

cants available for employment six days (or a set number of hours) per week. Because the statute's burden on the free exercise of religion is needless, it should be invalidated as if the burden were intended.[66]

Even assuming that legislative motivation can be defined and ascertained, courts are reluctant to invalidate a statute solely on motivational grounds. In theory, an insidious motivation ought to be sufficient justification for invalidating a statute. Even if the statute could be reenacted with purer legislative motives, it might not be, and invalidating the statute forces the legislature to face that question. Given the difficulties of proof, however, should a court void a statute "essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."[67] When faced with this question, the Supreme Court has consistently answered "no."[68]

Invalidating systemic coercion if improperly motivated also raises a question of remedies. If benefit *B* has been unconstitutionally conditioned on the waiver of right *R*, should the court rewrite the statute by deleting the waiver requirement or should the statute be voided *in toto*? For example, the federal kidnapping statute imposed the death penalty on a defendant only if the jury recommended it.[69] Accordingly, a defendant could ensure a maximum sentence of life imprisonment by pleading guilty, whereas exercising the right to jury trial risked imposition of a death sentence. If a court determines that the statute unfairly coerces the waiver of a constitutional right, what should it do? One possibility is to prohibit imposition of the death penalty regardless of the defendant's plea or jury recommendation,

66. Compare United States v. Jackson, 390 U.S. 570 (1968), where the Supreme Court invalidated that portion of the federal kidnaping statute which provided for the death penalty only if recommended by the jury. Because a jury could not be empaneled solely to determine punishment, the statute limited the possibility of death to those defendants who insisted on exercising on their right to trial by jury. The statute chilled a constitutional right unnecessarily and was therefore unconstitutional. *Id.* at 582.

67. United States v. O'Brien, 391 U.S. 467, 384 (1968).

68. *Id.* at 383-84 (1968); *accord*, Palmer v. Thompson, 403 U.S. 217, 224-25; Flemming v. Nestor, 363 U.S. 603, 617 (1960).

69. The statute read:

> Whoever knowingly transports . . . any person who has been unlawfully kidnapped . . . and held for ransom . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

18 U.S.C. § 1201(a) (1966), *amended by* Pub. L. No. 92-539, 86 Stat. 1072 (1972).

but an equally viable alternative is to permit imposition of the death penalty even in the absence of a jury recommendation. While the Supreme Court chose the former course, it gave no explanation for its rejection of the latter.[70]

An even more difficult case is posed by systemic coercion involving a financial benefit. For example, suppose a state offered $100 to every resident aged eighteen through twenty-one who agreed not to vote in a forthcoming senatorial election.[71] Presumably the statute is invalid, but in holding it invalid, must a court require the legislature to pay to all eighteen to twenty-one year-old residents $100, whether or not they vote? If so, what if the state legislature refuses to fund the program? Presumably the proper approach is to invalidate the statute and deny compensation to all.

Although Professor Epstein never explicitly embraces motivational analysis (presumably because it is intuitive rather than functional), he uses it when it suits his purpose to do so. Take his discussion of *Nollan v. California Coastal Commission.*[72] At issue in that case was a decision of the California Coastal Commission to condition a building permit on a grant by the landowner of an easement to the state. The land involved was beachfront property on which sat a dilapidated house. The owner sought permission to raze the house and build a larger one. The Commission conditionally approved the construction and required the landowner to grant to the state a lateral easement for the benefit of the public at large. Under conventional wisdom the police power would have allowed the Commission to reject the building permit unconditionally to protect the public viewing access to the ocean.[73]

Justice Scalia invalidated the condition, and Professor Epstein applauds the decision. Professor Epstein sees the transaction as an attempt by California to make an end run around the takings clause of the Constitution. According to Professor Epstein, a basic purpose of the takings clause is to ensure that an interest in private property is not taken by the government unless the government values the property more highly than does the property's owner.[74] The takings

70. *See* United States v. Jackson, 390 U.S. 570 (1968).

71. The benign justification for such a statute might be that the state feels individuals under age 21 are, in general, too immature to vote. Recognizing that citizens over age 18 cannot be denied the right to vote, the state is merely trying to buy that which its young citizens should be free to sell or retain. *Cf.* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 216, 29 N.E. 517, 517-18 (1892) ("There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.").

72. 483 U.S. 825 (1987).

73. The Court in *Nollan* assumed but did not decide that the Coastal Commission had the power to insist on a viewing easement without compensating the landowner. 483 U.S. at 835-36.

74. Professor Epstein actually says that a "basic social purpose" of the takings

clause, so Professor Epstein asserts, imposes a "constraint against resource misallocation."[75]

The short answer to this assertion is that the takings clause plays no such role. Note first that if the only function of the takings clause were to prevent Professor Epstein's "resource misallocation," then there is no reason why the state is forced to pay *the landowner* for the property taken; a payment to the federal government or anyone else would serve equally well.[76] More generally, payment under the takings clause does not ensure that the state values the property taken more highly than does the property owner. To see how Professor Epstein has erred on this point, we must determine precisely what conclusions can be drawn from exchanges generally and from exchanges based on the condemnation power in particular.

When two persons voluntarily engage in an exchange of property, each party profits in the sense that what is received is perceived to be more valuable than what is transferred. Thus, from a voluntary exchange we always can infer something about the way in which each of the two parties values the items exchanged. Can we also infer anything about the value one party places on *one* of the items exchanged as compared with the other party's valuation of the same item? Not necessarily. For example, suppose that *P* owns object *X* and the *Q* owns object *Y*. *P* and *Q* will exchange *X* and *Y* under either of the following two situations.

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clause is "to ensure that an interest in property will pass into government hands only if it is worth more to the government . . . than its market value in private hands." Epstein, *supra* note 1, at 62. However, he adds that "[i]deally, the state should be required to pay not the market value, but the subjective value that the individual attaches to the property." *Id.* at 62 n.167. It is this latter qualification that is treated in the text and in this Reply as Professor Epstein's assertion. He in fact asserts that his argument "does not depend on which standard of private valuation is used." *Id.* Further, when he comes to apply this interpretation of the takings clause in the context of *Nollan,* he condemns the case because it does not permit us to determine "whether the value of the lateral easement to the state is greater than its value *to the owner,*" *id.* at 62 (emphasis added), and at no time compares the state's value to the market value.

75. Epstein, *supra* note 1, at 62.

76. Payment to the landowner ensures that the few are not sacrificed to the many. L. TRIBE, *supra* note 2, § 9-6.

Table I

	X	Y
Situation One		
P's Value	5	9
Q's Value	6	6
Situation Two		
P's Value	5	9
Q's Value	4	1

In the first situation, each object ends up in the hands of the party valuing it most highly. In the second situation, though, object *X* ends up in *Q*'s hands with a value to *Q* of 4 even though it was worth 5 in *P*'s hands prior to the exchange. Thus, the exchange permits us to make no interpersonal comparisons of value. If we add a third party to the economy, our available inferences are reduced even further. In the two-person economy, the parties will engage in trade until no remaining trade can increase both welfares. However, consider the case of a three-person economy in which *P* owns object *X*, *Q* owns object *Y*, and *R* owns object *Z*. Assume further that each values the three objects as set out in the Table II.

Table II

	Most Valuable	*Second Most Valuable*	*Least Valuable*
P	*Z*	*X*	*Y*
Q	*X*	*Y*	*Z*
R	*Y*	*Z*	*X*

Each party ought to end up with their most preferred object. Yet, there is no set of two-party exchanges to obtain that result. For example, *P* will part with his initial endowment of *X* only to obtain more favored *Z*, but *Z* is owned by *R* who, because of the low value he places on *X*, will decline the exchange.[77] Thus, in the multi-party economy we are unable to infer from the absence of exchange that there are no opportunities for productive bargain.

If we introduce money into this economy, we can free it from its pairing difficulty. For example, *P* can sell object *X* for cash and then buy object *Z* from *R*. *R* can then use the cash to purchase object *Y* from *Q*, and *Q* will then complete the cycle by returning the cash to the market in exchange for object *X*.

Introducing money into the economy seems to offer the benefit of interpersonal comparisons of value in addition to its decoupling effect. Surely it is fair to conclude that individual *X* values Blackacre more than individual *Y* if *X* is willing to pay more for Blackacre than is *Y*. Unfortunately, however, even money in the economy does not permit interpersonal comparisons of value: *Y* might have a high

77. See M. SHUBIK, A GAME-THEORETIC APPROACH TO POLITICAL ECONOMY 4-5 (1984).

personal value for Blackacre that is masked by his poverty or by his other needs (perhaps *Y* needs an expensive, life saving operation). Indeed, a voluntary sale of Blackacre from *Y* to *X* tells us nothing about *Y*'s personal valuation of Backacre vis-a-vis *X* for precisely the same reasons.

Nevertheless, Professor Epstein mistakenly believes that a voluntary sale moves property to a higher value user,[78] and it is this nonexistent feature of a voluntary purchase for cash that enamors Professor Epstein with the takings clause. Yet, even if a voluntary exchange *did* move property to a higher value user, we could not conclude that the takings clause prevents resource misallocation. Because a condemnation proceeding does not involve a voluntary exchange, we are unable to draw the conclusion Professor Epstein desires. When the state exercises its power of eminent domain, it must compensate the property owner with the fair market value of the property taken. This tells us that the state values the property at least as highly as does the market, but it tells us nothing about the state's value vis-a-vis the property owner's.[79] Indeed, the mere fact that one owns a particular piece of property in preference to all others of equivalent market value suggests that one's subjective value of that property exceeds the market price.

For example, suppose *P* owns Blackacre with fair market value of $100,000, and suppose further that *P* is unwilling to sell Blackacre for less than $120,000. If the state condemns Blackacre and pays *P* $100,000 for it, we can make no statement about the relative worth of Blackacre to the state and to *P*. All we know is that the state values Blackacre at $100,000 or more; what we need to know is whether the state values Blackacre at $120,000 or more.

Return now to Professor Epstein's main argument. He says:

> If the losses that state regulation could inflict upon the owner are (as seems probable) far greater to the owner than the loss of a lateral easement, then there seems little prospect that the state's offer will be declined. . . . Once this sequence runs its course, therefore, all we know are the relative values that the landowner attaches to his two separate interests. We do not know whether the value of the lateral easement to the state is greater than its value to the owner, because no accountable political party has been forced to make that explicit judgment. One central allocative function of the eminent domain clause is effectively bypassed by allowing the state to couple

78. The problem is not that a voluntary exchange might move property to a lower value user but rather that, because interpersonal comparisons of value make no sense, there are no "higher" or "lower" value users. Of course, a voluntary exchange does produce a Pareto superior state (absent externalities), so that voluntary exchanges should be encouraged as beneficial to society.

79. *See* R. POSNER, *supra* note 15, § 3.5, at 42-43.

the lateral easement with the construction permit.[80]

We now see that "[w]e do not know whether the value of the lateral easement to the state is greater than its value to the owner" even if the easement is condemned and paid for, and so Professor Epstein's support of the opinion in *Nollan* lacks foundation.

If an economic analysis does not explain Professor Epstein's blessing of the majority opinion in *Nollan*, what does? One possibility is simply that the result (if not the opinion) in *Nollan* is consistent with a more limited view of the public's power to regulate land use, a view with which Professor Epstein has expressed strong agreement.[81] A second possibility is suggested by Professor Epstein's concluding comments in praise of the *Nollan* opinion:

> The [special interest] groups who are interested in lateral access may be far less interested in visual access, so that the coalition pressuring for visual access will disintegrate when the two issues are separated. Chances seem good that the "public" at large would not want this permit restriction in and of itself. The severance therefore *calls the bluff* of the Coastal Commission by preventing it from parlaying a threat of something that interest groups do not want into acquisition of something they do want—for free.[82]

In what sense is the Coastal Commission trying to get the lateral easement "for free"? The Coastal Commission has offered the landowner an exchange, and under the terms of that exchange the cost to the public of the lateral easement is the visual easement. Professor Epstein apparently has divined that the visual easement has no value to the Coastal Commission (or through it to the people of California), but, even if true, does that make it a one-sided exchange? After all, the landowner is getting precisely what he wants, demonstrating that what has some value to the Coastal Commission has substantial value to the landowner.

Professor Epstein's hostility to the Coastal Commission is based, I suspect, on his supposition that there is a "bluff" to be called. A "bluff" is a strategic misrepresentation, an action which would be legitimate were underlying facts otherwise. In this case, Professor Epstein suspects that if the Coastal Commission were prevented from conditioning a building permit on the grant of a lateral easement, the building permit would still be issued and the Commission would be unwilling to purchase the easement. Thus, the landowner would obtain the desired permit without payment of the easement.

Traditional contract doctrine tells us that foregoing a legal right is valid consideration without regard to whether the right otherwise would be exercised.[83] This rule, an application of the more general

80. Epstein, *supra* note 1, at 62.
81. *Id.* at 61; *see* Sax, Book Review, 53 U. CHI. L. REV. 279 (1986) (reviewing R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).
82. Epstein, *supra* note 1, at 63 (emphasis added).
83. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 81(1) (1979).

proposition that courts will inquire into the existence of consideration but not into its adequacy,[84] is firmly based on economic reasoning: so long as each party gets something that is more valuable to the party than the thing the party is giving up, the exchange is beneficial.[85] Accordingly, whether the Coastal Commission was bluffing should be, if Professor Epstein's economic analysis is correct, beside the matter.[86] What is significant about this bluffing hypothesis is that Professor Epstein's condemnation of the Coastal Commission's behavior apparently is based upon it. Thus, Professor Epstein's view of the legitimacy of the Commission's action ultimately turns on its motive and not just on its actions.

In addition to his failure to expressly consider motivation, Professor Epstein's analysis of monopolies fails to consider *incentive effects*. Super-competitive returns may be the only way to encourage investment in certain productive activities. For example, the statutory monopolies granted by patent and copyright laws are justified by their incentive effects.[87]

Professor Epstein uses the doctrine of "conditional privilege" to exemplify the problems of monopoly as well as some judicial solutions. Conditional privilege is the right of one in distress to intentionally invade the property of another. The property owner has no right to exclude but is entitled to compensation for any resulting damage. Professor Epstein interprets the doctrine of conditional privilege as maintaining the cooperative surplus that the exchange in a competitive market produces.[88] Yet, Professor Epstein's theory may result in

84. *E.g.*, Batsakis v. Demotsis, 226 S.W.2d 673 (Texas App. 1949).

85. *Cf.* R. POSNER, *supra* note 15, § 4.2, at 88 (To "ask whether the consideration is adequate would require the court to do what . . . it is less well equipped to do than the parties—decide whether the price (and other essential terms) specified in the contract are reasonable.").

86. Actually, the accuracy of Professor Epstein's characterization of the Coastal Commission's threat as a "bluff" becomes very relevant if we expand the analysis beyond that of market failures. If in fact the visual easement is of no value to the Coastal Commission, then the exchange of the visual easement for the desired lateral easement can be condemned as nonproductive. *See infra* note 102 and accompanying text.

87. *See, e.g.*, R. POSNER, *supra* note 15, § 3.2, at 36-37.

88. Professor Epstein writes: "The doctrines of 'conditional privilege,' developed at common law, are a response to bargaining problems created by the necessity situation [creating a bilateral monopoly]," citing Ploof v. Putnam, 81 Vt. 471, 71 A.188 (1908), Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910), and Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personalty*, 39 HARV. L. REV. 307 (1926). Epstein, *supra* note 1, at 18, n.34. Yet, neither of these cases nor Professor Bohlen's article purports to address "bargaining problems." Insofar as all remedies for intentional tort concern bargaining problems, the doctrine of conditional privilege fits Professor Epstein's description. Other than in this overbroad

fewer persons placing themselves in a position to come to the aid of the distressed and distraught. Thus, a limitation of the price that drug manufacturers may charge for orphan drugs reduces the availability of orphan drugs available at *any* price.[89]

In addition, Professor Epstein once again assumes that paying a property owner the market rental price for a temporary use of his property preserves the cooperative surplus of competitive exchange. Yet, a forced exchange at market prices provides no guarantee of consumer surplus. We simply cannot know whether the doctrine of conditional privilege produces any consumer surplus which is not offset by producer loss. After all, a risk-averse property owner might not be willing to accept the market price for his sloop during a storm. Further, courts applying the conditional privilege doctrine have never awarded market rent to the property owner, but rather only compensation for actual damage sustained. Consistent with this nonmarket approach to the remedy, courts have never justified the doctrine of conditional privilege in economic terms.

B. *Collective Action Market Failure*

The problems of collective action identified by Professor Epstein are the familiar sub-optimal outcomes possible in non-cooperative games typified by the tragedy of the commons and prisoner's dilemma.[90] For example, in the prisoner's dilemma two suspects are picked up by the police on suspicion of breaking and entering and committing murder. There is sufficient evidence to convict each of breaking and entering. If neither confesses, each will be sentenced to five years in prison for breaking and entering. If one suspect confesses and implicates the other, the confessor will be treated leniently while the other will be convicted of murder. Thus, the confessing suspect will receive a sentence of three years while the nonconfessing suspect will receive twenty years. However, if both confess, they will each be sentenced to ten years, less than a noncooperating witness but more than a cooperating witness whose testimony is essential to the state's case. Diagrammatically, these possible outcomes are summarized below. In each case, the first number is the sentence received by the suspect who adopts the row strategy while the second number is the sentence received by the suspects who adopts the column strategy.

sense, however, there is no support for Professor Epstein's characterization of the doctrine.

89. *See, e.g.*, C. Lindsay, *supra* note 28, at 591-97.

90. *See generally* P. Ordeshook, Game Theory and Political Theory 203-42 (1986); H. Margolis, Selfishness, Altruism & Rationality 19-21 (1982).

Table III

	Confess	*Do Not Confess*
Confess	10,10	3,20
Do Not Confess	20,3	5,5

What is counterintuitive about the prisoner's dilemma is that the optimum individual strategy for each suspect produces a nonoptimum joint outcome. To see this, consider the opportunity faced by the row suspect. If the column suspect does not confess, the row suspect should confess in order to receive the optimum individual sentence of 3 years. But even if the column suspect confesses, the row suspect should still confess. By confessing, the row suspect receives a sentence of ten years. The row suspect's failure to confess in this situation would result in the harshest sentence of twenty years. From the foregoing analysis, the row suspect should confess regardless of what he anticipates the column suspect will do. Because the game is perfectly symmetrical, the column suspect will go through an identical analysis to reach the same result. Thus, each suspect will confess and each will receive a sentence of ten years. Yet, both would be better off if neither confessed, for in that case each would serve only five years.

There is no reasonable way for the suspects to reach this desirable outcome. They may agree not to confess, but once in the interrogation room each serves his best interests by ignoring the agreement and confessing. If the suspects could make an enforceable agreement not to confess, they would in fact reach the optimum outcome, but in the absence of a binding mechanism, only irrational behavior on both their parts will reach the same result.

When, because of excessive transaction costs or otherwise, parties are unable to form binding, mutually advantageous agreements, the prisoner's dilemma problem can arise. However, if the parties can be forced to honor their agreements, the dilemma is avoided. One way to force parties to behave in their mutually advantageous way is to restrict their behavior by statute. Thus, legislative intervention in the bargaining process may be an effective mechanism for circumventing the prisoner's dilemma.

Unfortunately, Professor Epstein never identifies a case in which the problems of collective action have been or should have been the basis for resolving a systemic coercion problem. To be sure, the problems of collective action can raise concerns of constitutional dimensions. For example, a state could improve the welfare of its citizens by imposing a discriminatory tax on foreign corporations doing business within the state. While such a tax will not be without its costs to the state—some corporations will eschew doing business within the state rather than pay the tax—a properly framed tax can raise more in revenue than is lost through imposition of the tax.

If each state imposes such a discriminatory tax, no state obtains a net revenue increase, and citizens of each state suffer from the constriction in commerce. Yet, if it is difficult for the states to bind themselves to an agreement eliminating discriminatory taxes and other trade barriers (because of high transaction costs), each state will adopt its dominant strategy and, as the prisoner's dilemma suggests, economic balkanization will result. Professor Epstein treats such a tax as an impermissible exploitation by the state of its monopoly power to grant or deny foreign corporations permission to do business within state boundaries. Yet, we have seen that Professor Epstein's analysis of state monopolies is deficient.

The better answer to the problem of interstate trade wars is the interstate commerce clause of the Constitution. With few exceptions, that clause prohibits a state from erecting trade barriers around its perimeter. One way to avoid the sub-optimal outcome in a prisoner's dilemma is to provide a way for the prisoners to bind themselves to act for their *mutual* advantage. An alternate approach is to bind them without their consent, and the interstate commerce clause effectively adopts this latter approach. It is this clause—and not the doctrine of unconstitutional conditions—that responds to state problems of collective action.

C. Market Failure Externalities

Professor Epstein's discussion of externalities, the third market failure, is especially problematic. An externality is any cost borne by nonparties to an activity.[91] The existence of an externality completely undermines our ability to characterize a voluntary exchange as socially beneficial. Although both of the parties to the exchange benefit from the transaction, the entity bearing the external cost loses.[92]

An actor can be forced to internalize all relevant costs simply by giving all external cost bearers the right to prohibit the contemplated activity. In such circumstances the actor will be forced to purchase

91. *E.g.*, A. ALCHIAN & W. ALLEN, *supra* note 28, at 5. More generally, an externality (positive or negative) occurs whenever the actions of one agent affect the economic environment of another other than by affecting prices. H. VARIAN, *supra* note 36, at 259.

92. In theory, virtually every exchange will produce one or more externalities. For example, if I exchange my labor for my employer's cash, anyone who is jealous of my salary bears an externality cost of the exchange. Similarly, those who believe prostitution, alcohol consumption, or recreational drugs are immoral likely suffer whenever someone engages in these activities, and that suffering is an externality of the activity.

all relevant permissions, and the price paid for these permissions is precisely the internalization of what would otherwise be an externality. The advantage of forcing an actor to internalize all costs is that if the actively is then done, we know that society as a whole is better off as a result.

Because the touchstone of an externality is an uncompensated cost imposed on a nonparty, Professor Epstein's definition of an externality is confusing. Professor Epstein initially defines an exchange generating an externality as "[a]ny contract between *A* and *C* that allowed *A* to take *B*'s property," assuming that *A* is not entitled to take the property of *B* without *B*'s consent.[93] Such a definition of an externality is not correct because *B*'s property rights—that is, *B*'s rights protected by law—cannot be expropriated without compensation. Externalities—costs imposed on third parties—are of necessity *uncompensated* costs imposed on third parties.[94]

Having defined externalities to include far too many costs, Professor Epstein than ignores his definition in favor of one that is too restrictive. The excessive narrowness of Professor Epstein's operational definition of an "externality" is revealed in his discussion of *Snepp v. United States*.[95] In *Snepp*, the Supreme Court held that the CIA could hold a former agent to the letter of an agreement he had signed with the agency in which he promised not to disclose any information relating to the agency without prior approval. Professor Epstein supports the decision, writing:

> Any breach of the system of prior clearances creates the risk of improper disclosure, which can only undermine the ability of the CIA to obtain needed information from sources that rely on the review process for protection. . . . [I]t is difficult to see how the public is ill-served by ensuring confidentially of its intelligence agents.[96]

Professor Epstein's analysis of *Snepp* begins and ends with a consideration of monopoly: because the federal government employs only a small fraction of the labor pool, it cannot be said to have significant monopoly power.[97]

93. Epstein, *supra* note 1, at 21.
94. Of course, to the extent that compensation is less than full, a compensated third-party effect would be better characterized as partially a compensated and partially an uncompensated externality.
95. 444 U.S. 507 (1980) (per curiam).
96. Epstein, *supra* note 1, at 69. The excised material includes the assertion that "[t]he restriction in question is no doubt similar to ones private employers impose upon employees entrusted with sensitive information." It seems far from obvious that private employers regularly seek to impose a right of complete censorship for an indefinite time.
97. *Id.* at 68; *see also* Easterbrook, *supra* note 9, at 349.

Yet, even if *Snepp* does not involve a monopoly problem, it does involve an externality. The externality overlooked by Professor Epstein is the loss to the public through violation of Snepp's right to publish his story: loss of the public's right to read the story. Assuming *aguendo* that the CIA can be said to have bargained for the right to censor Snepp's book when it offered Snepp a job, that bargain should be subject to judicial scrutiny because of the loss it imposed on the public.

Once again, Professor Epstein falls back on divined legislative motivation. He asserts that any CIA pre-publication censorship based not on an attempt to protect classified information but instead on an attempt to stifle criticism of the agency "can be handled on a case-by-case basis . . . without disturbing the basic structure of the statute."[98] Unfortunately, that assertion simply is wrong; the statutory condition imposed on the agent as a condition of his employment was not limited to protection of classified information or other sensitive materials.[99] The CIA sought the right to censor as it saw fit.[100] This was the statutory choice forced on Snepp. Because Professor Epstein finds no constitutional impediment to the forced choice, unconstrained censorship is what Professor Epstein would allow. Indeed, as to the particular facts in *Snepp*, Professor Epstein concludes: "The bargain here does not seem to be a cloak for any hidden government abuse." A more cynical individual might wonder whether the CIA's attempted censorship might represent a bureaucratic attempt to hide blunders or abuses of power.

Professor Epstein's analysis to the contrary notwithstanding, *Snepp* is a case in which systemic coercion raises an externality problem. Because restriction of the first amendment right to free speech affects not only potential speakers but also potential listeners, the CIA's attempt to censor its agents' rights imposes an externality on the general public. That externality justifies judicial scrutiny of the bargain struck by the CIA and Snepp.[101]

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98. Epstein, *supra* note 1, at 69.

99. The government conceded that no information in Snepp's book was classified. 444 U.S. at 510 & n.4.

100. The contractual obligation of Snepp was to not publish any information concerning the CIA or its activities without prior approval. 444 U.S. at 507-08. The Court wrote that "[t]he government does not deny—as a general principle—Snepp's right to publish unclassified information." *Id.* at 511. Yet, as Justice Stevens made clear in dissent, that principle, if applied by the Court, would have resulted in a different outcome. *See id.* at 521 n.11 (Stevens, J., dissenting). Because the government conceded that Snepp's book contained no sensitive information, *id.* at 510, the case was distinguishable from United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972), in which the government claimed only that an agent had violated his agreement by publishing classified information.

101. The dissent did not challenge the CIA's right to protect sensitive information from exposure but rather argued that if, in fact, no sensitive information was published in Snepp's book, Snepp's breach of his duty to submit to pre-publication review caused

In an article cited with approval by Professor Epstein, Professor Easterbrook has argued nevertheless that *Snepp* was properly decided.[102] Professor Easterbrook concedes that the doctrine of unconstitutional conditions has a role to play in controlling externalities,[103] but he found no externality worth worrying about in the case. What about the public's right to listen to what Snepp had to say? Professor Easterbrook observes that individual constitutional rights can be sold and are sold all the time.[104] He then asserts that the public's right to know is "a mere by-product of the First Amendment right to speak."[105] From these two propositions he concludes that "a 'right to listen' is incomprehensible unless someone first possesses a right to speak and a desire to do so. Snepp had the desire after he quit the CIA, but he long ago surrendered his full right."[106]

Yet, the precise issue before the Court was whether Snepp had "long ago surrendered his full right" to speak freely. The economic argument in favor of Snepp is that we protect Snepp's First Amendment right to speak in order to protect the public's right to listen. Professor Easterbrook's reasoning becomes circular when he then rejects the public's right to listen on the ground that Snepp personally had no right to speak.[107]

Professor Easterbrook's analysis is more applicable to cases such as *McAuliffe v. Mayor of New Bedford*.[108] In that case, the Massachusetts Supreme Judicial Court faced a challenge to a municipal regulation forbidding police officers from soliciting funds for political purposes. While recognizing that the right to solicit funds for political purposes is protected by the First Amendment, the Court re-

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the government no damage. *See* 444 U.S. at 516-26 (Stevens, J., dissenting).

102. Easterbrook, *supra* note 9, at 339-52 (*cited in* Epstein, *supra* note 1, at 14 n.31 & 68 n.184).

103. Easterbrook, *supra* note 9, at 349.

104. *Id.* at 346-47.

105. *Id.* at 351.

106. *Id.* at 352 (footnote omitted).

107. Circular reasoning is a common charge in this area of the law. *See, e.g., id.* at 352. Probably the best explanation for Professor Easterbrook's support of the decision in *Snepp* is his failure to appreciate the true extent of the externality. Professor Easterbrook writes that the CIA's ability to censor Snepp under his agreement extended only to the protection of classified information. Yet, that was the position of the dissent in *Snepp*. The majority was willing to let the agency be the judge of what information should not be revealed by its agents. That the agency might try to conceal legitimate criticism is precisely what *Snepp* was about. *Cf.* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), in which the government sought pre-publication censorship of a magazine article describing how to construct a hydrogen bomb even though all information in the article was available in the public domain.

108. 155 Mass. 216, 29 N.E. 517 (1892).

jected application of the unconstitutional conditions doctrine, saying:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of the contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here.[109]

McAuliffe is similar to *Snepp* in that each cases involves a government employment contract requiring the waiver of a First Amendment right as a condition of employment. *McAuliffe*, though, presents no apparent externality: the general public has little interest in Officer McAuliffe ability to solicit funds for political purposes. Nevertheless, the Supreme Court in a series of cases has fully rejected the reasoning of Justice Holmes in *McAuliffe* despite the absence of any externality.

In *Garrity v. New Jersey*,[110] a police officer was asked to testify before an agency investigating police misconduct. Officer Garrity was informed of his privilege against self-incrimination but was told that his exercise of that right would result in automatic dismissal. Garrity choose to testify, and his testimony subsequently was used against him in a conspiracy prosecution.[111]

Officer Garrity challenged the use of his statements against him, saying that he had been forced to give up his right against self-incrimination. Although the state argued that the waiver was valid under Justice Holmes's "greater includes the lesser theory," the Court explicitly rejected this reasoning, saying "[t]he question. . .is not cognizable in those terms."[112] According to the Court, "[t]here are rights of constitutional stature whose exercise a State may not

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109. *Id.* at 220, 29 N.E. at 517-18; *accord*, Powell v. Pennsylvania, 127 U.S. 678 (1888). Professor Epstein characterizes Justice Holmes as "dismiss[ing] the entire doctrine of unconstitutional conditions as a logical and conceptual error." Epstein, *supra* note 1, at 8 n.10, citing Justice Holmes's dissenting opinion in Western Union Tel. Co. v. Kansas, 216 U.S. 1, at 53-55 (1909). To be sure, Justice Holmes applies the "greater includes the lesser" theory in a variety of contexts to reject unconstitutional conditions challenges. *See, e.g.*, Ferry v. Ramsey, 277 U.S. 88, 94 (1928). *See generally* Van Alstyne, *supra* note 2. Nonetheless, Justice Holmes had little difficulty ignoring the "greater includes the lesser" reasoning when it seemed appropriate to do so. *See* Silsbee v. Webber, 171 Mass. 378, 381, 50 N.E. 555, 556 (1898) ("When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat."). Surprisingly, Professor Epstein seems to agree that the right to do an act does not necessarily permit one to threaten the act to elicit a payment for refraining to act. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 558 n.7 (1983). *But see* Epstein, *Unconscionability: A Critical Appraisal*, 18 J. LAW & ECON. 293, 297 (1975).

110. 385 U.S. 493 (1967).

111. *Id.* at 495.

112. *Id.* at 499.

condition by the exaction of a price."[113]

Garrity and the several cases that followed it[114] are best understood as expressing equal protection concerns.[115] Exercise of constitutional rights should remain unburdened absent an important state interest.[116] Even when there is no direct public interest in the exercise of an individual's right, there is a general public interest in seeing constitutional rights enjoyed. The state has no legitimate interest in minimizing the exercise of constitutional rights. Systemic coercion will present true externality problems whenever the right involved is one whose individual exercise significantly affects the general public. For example, Snepp's First Amendment right to speak formed the basis of the public's right to know, so that the CIA's attempt to coerce Snepp's "waiver" threatened to impose significant costs on the general public.

A similar situation might arise if a state sought to interfere with the right to vote. Suppose that public housing is made available only on condition that recipients agree not to vote in statewide elections. Should this systemic coercion be upheld? The effect of this law presumably is to skew subsequent state elections in favor of current office holders. Because a waiver of the right to vote affects not only the government of the person who waives the right but also those who do not, the waiver imposes an externality on the general citizenry. Accordingly, the coercion should be invalidated absent some compelling justification for its existence.

II. RETHINKING UNCONSTITUTIONAL CONDITIONS

Professor Epstein's analysis of systemic coercion is premised on the mainstay of economic reasoning that a voluntary exchange between consenting individuals makes both parties better off. Furthermore, if there are no negative third party effects from the transaction, then we can conclude that the exchange makes society better off in the very strong Pareto sense. However, the societal and indi-

113. *Id.* at 500.

114. Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Lefkowitz v. Turley, 414 U.S. 70 (1973); Lefkowitz v. Cunningham, 431 U.S. 801 (1977); *see also* Spevak v. Klein, 385 U.S. 511 (1967) (plurality opinion). *See generally* Coffee, *Twisting Slowly in the Wind: A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, 216-17.

115. *See* Abrams, *supra* note 7, at 140-42.

116. *See, e.g.*, Rosenthal, *supra* note 14, at 1152-55; Sullivan, *supra* note 8, at 1503-05.

vidual benefits flowing from exchange only obtain if the exchange involves productive activity; if the exchange is nonproductive, the exchange will not lead to a Pareto-superior world.

For example, when I buy your product, I do so because your product is worth more to me than its cost. Similarly, when you buy my product, you do so because you value my product more than its cost. If we agree to exchange products, we each gain by the excess of the value received over the value given, where these valuations are subjective and individualistic. If we are forbidden from exchanging our products, we are both worse off. Thus, the exchange is productive in the sense that (assuming there are no negative externalities) the wealth of society is increased by the exchange.

Consider a very different type of exchange. Suppose *B* is aware of *V*'s sordid past and threatens to tell *T*, *V*'s fiancee, unless *V* pays *B* not to do so. That is, suppose that *B* blackmails *V*. Assuming that *B*'s silence is worth the blackmail price to *V*, is the payment of blackmail by *V* in exchange for *B*'s silence a productive activity?[117]

The exchange is mutually beneficial to *B* and to *V* in the sense that both are better off agreeing to it than in refusing it. That fact, standing alone, only tells us that, if permitted, the exchange should take place. To determine whether the exchange is truly productive, we must ask whether both parties are worse off if blackmail is prohibited.

What *B* is selling is his silence, and if blackmail is prohibited *V* will obtain *B*'s silence without paying for it. To be sure, even if blackmail is prohibited, *B* will have the right to reveal *V*'s past to *T*, but *B* will have no incentive to do so. Indeed, a blackmailer never has an incentive to reveal the victim's secrets, even if the demand for blackmail is refused, other than to give credibility to future demands for blackmail. Thus, so long as future blackmail is known to be prohibited with certainty, the blackmailer's threats can be rejected with impunity.[118]

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117. Professor Nozick first observed that blackmail is a nonproductive exchange. R. NOZICK, ANARCHY, STATE, AND UTOPIA 84-87 (1974). This view has recently come under attack. Block & Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein and Lindgren*, 19 LOY. L.A.L. REV. 37, 47-50 (1985). However, this attack seems to be premised on the assumption that the prohibition of blackmail would encourage the dissemination of *V*'s secrets. *See id.* at 49. *But see* M. ROTHBARD, THE ETHICS OF LIBERTY 242 (1982) (noting that the assumption seems to apply only to the pathological and to gossip mongers). *See supra* note 118.

118. I am excluding from consideration both those blackmailers who obtain some pathological enjoyment from hurting others as well as those, such as gossip columnists, for whom revealing secrets is an occupation. For these two groups, blackmail is a productive exchange because each side gives up something valuable in exchange for something even more valuable. As to these blackmailers, were the exchange prohibited the secrets would be revealed. For all other blackmailers, the threat behind blackmail is credible only as a response to what Professor Frank has called the "commitment problem." *See* R. FRANK, PASSIONS WITHIN REASON 1-3 & 4-5 (1988).

Because *B* has no incentive to reveal *V*'s secrets absent the possibility of collecting blackmail, *V* is better off if blackmail is prohibited than if it is allowed. That is not to say that *V* should necessarily reject the blackmail if offered by *B* and if it is permitted; paying blackmail certainly may be better than rejecting it. What we can say, though, is that even if paying blackmail makes *V* better off than rejecting it, the prohibition of blackmail makes *V* better still. The blackmail exchange is thus nonproductive in the sense that one of the two parties to the exchange would prefer that the exchange be prohibited ab initio. Because the threat underlying blackmail has no value to *B* independent of its threat potential, *V*'s paying to void *B*'s threat is nonproductive.[119]

At least in some circumstances, systemic coercion fits nicely into this blackmail mold.[120] For example, reconsider the approach taken by Professor Epstein in his analysis of the *Nollan* case. Recall that in *Nollan* the Coastal Commission offered to exchange a viewing easement for a lateral easement. Professor Epstein argued that the Coastal Commission had no interest in maintaining the public's right to a viewing easement of the ocean but, rather, threatened to insist on that easement only so that it could be exchanged for the lateral easement that the Commission truly desired. If in fact Professor Epstein is correct that the Commission had no interest in the viewing easement, then we can condemn the transaction as nonproductive because the viewing easement would be valuable to the Commission only as a threat to obtain the lateral easement.

This analogy to blackmail can be taken only so far. Unless we can say with certainty that the systemic coercion is based on a threat the government would not want to carry out, we cannot condemn the systemic coercion as unproductive. Professor Epstein was thus correct when he emphasized administrative motivation in his analysis of

119. Why is blackmail condemned? In the individual case, the payment of blackmail as exchange for silence is a wealth-maximizing transaction: the victim would rather pay than suffer exposure. The system as a whole is not profit-maximizing, however, because if the payment of blackmail is altogether prohibited, victims gain and blackmailers lose. A world with blackmail is thus neither Pareto-superior nor Pareto-inferior to one without blackmail, so that economics cannot tell us to prefer one to the other. Ultimately, we condemn blackmail because we do not wish to reward those whose profit-seeking activity is not socially productive. The touchstone of a socially-unproductive exchange is one in which one of the parties would prefer that the exchange by systematically prohibited.

120. *Cf.* Easterbrook, *supra* note 9, at 348 (doctrine of unconstitutional conditions may be understood as prohibiting a forced choice that leaves the recipient of the offer worse off than before).

Nollan. His only error was in failing to admit that administrative motivation was the linchpin of his condemnation, an admission that would have undercut his claim to a "functional, not intuitive" solution to the problem.

An alternative way to understand systemic coercion is to look at it from the perspective of the government rather than that of the victim. In this light, the doctrine of unconstitutional conditions is a response to a *monitoring* problem. A representative democracy, like a publicly-held corporation, is run by one group of individuals for the benefit of another group. And public officials, like corporate managers, have their own interests as well as those of their constituents in mind.

In the commercial context, the existence and magnitude of corporate profits allow shareholders to monitor manager behavior without serious difficulty. To be sure, the existence of a favorable corporate bottom line is no evidence that corporate managers have consciously acted solely or even predominantly on behalf of shareholder interests. It might be, for example, that the managers have sought to serve only their own interests but coincidentally those ends also serve the shareholders. Or it might be that manager and shareholder interests diverge but that selfish managers also turn out to be clumsy managers, and that in trying to serve their own ends the managers have actually benefited the shareholders.

The existence of corporate profits demonstrates that management's actions have benefited the shareholders. And so long as those profits are competitively high, that is all the shareholders demand. Because a corporation is formed to make money, success of the enterprise is judged by the amount of money it makes.

The success or failure of public officials is less easy to determine because the goals of the public enterprise are less well defined. There is no profit statement, no bottom line, to which voters may turn to measure the effectiveness of their representatives. Rather, each individual voter must measure the effectiveness of public officials on issues important to that voter. To some, the federal deficit may be most important; to others, local unemployment may be. For most voters a variety of issues will be important, and each voter will want to rank each official on each of these issues.

Furthermore, these individualistic litmus tests have no natural scale against which to measure results and no obvious way to combine different results into an overall average. Because there are hundreds or thousands of goals toward which government action might be directed, the success of public officials inevitably will be cloudy rather than all dark or all light. As a result, monitoring the behavior of public officials is time-consuming and expensive. Nevertheless, in theory, each voter should determine how successful each official has been as compared with available alternatives and then vote accordingly. Officials who put their own interests ahead of the interests of their constituents should eventually be put out of office unless they, like the lucky or clumsy corporate manager, accidentally happen to serve the public without trying. Thus, even in the absence of a bottom-line or other objective measure of government success, each voter can in theory monitor representative behavior by comparing what the representatives do with what the voter would prefer to have done.

While accountability to constituents serves to limit official misbehavior in a variety of ways,[121] it cannot help to enforce those limitations on official behavior intended to protect political minorities from majority tyranny. Legislators and other public officials hostile to constitutional rights may serve their constituents while retaining their hostility.[122] It falls to the judiciary to protect these rights from populist attack. Yet, because there is no objective standard by which to measure the performance of public officials, it is virtually impossible for judges to say with certainty that one action or another would be desired by various political minorities.[123]

For example, suppose a state passes a statute providing that probation for convicted criminals is available only to those who plead guilty. On the one hand, such a statute might be defended as an attempt to limit probation to those defendants who, by visibly accepting responsibility for their crimes, are less likely than others to repeat their offenses. On the other hand, the statute might reflect a basic legislative animosity toward the rights of criminal defendants and an attempt to do indirectly that which cannot be done directly. Should the legislation be invalidated?

Because the possible flaw with the legislation does not concern its reach or effect but rather its underlying motivation, no objective test can be determinative, and economic analysis can offer no guidance.

121. While the extraordinarily high reelection rate of the members of Congress may reflect a failure in the monitoring of public officials, that datum also is consistent with the opposite conclusion: it may be that members of Congress are so well policed by their constituents that they consistently avoid stepping over those bounds that are important to the voters.

122. *See* Epstein, *supra* note 1, at 54.

123. All things being equal, a direct payment to the members constituting a specific minority group ought to be desirable to that minority group, and a direct tax imposed only on the members of that minority group ought to be undesirable. Rarely though will the actions of a public official be so one dimensional. For example, the free distribution of clean needles to heroin addicts does not unambiguously help heroin addicts: it helps avoid AIDS, but may encourage continued drug dependency.

To be sure, economic analysis may have something to offer if we focus on objective proxies for motivation. Thus, if the avowed purpose of a piece of legislation can be achieved more efficiently or with greater regard for constitutional rights, it might be appropriate to strike down the legislation as unnecessarily invasive.[124] But if the focus of the decision really is motivation, economic analysis cannot be helpful. Even if the law appears to be an irrational attempt to accomplish legitimate goals, we cannot say for certain that the avowed purpose masks some malignant motivation—it might just be a lousy law written by incompetent legislators.

Unfortunately, legislative motivation is not only difficult to discover but difficult even to define.[125] To be sure, legislative histories sometimes shed light on the goals of a statute, but courts understandably have been reluctant to invalidate legislation simply because a legislator said the wrong thing or failed to say the right thing.[126] Further, it takes an extraordinary leap of faith to read the words of one legislator and treat them as the words of all. Indeed, a likely motivation behind the passage of many bills through Congress may be the desire to do a colleague a favor or even the desire to get home.

The problems of potential agent misfeasance are illustrated by the employment cases. Reconsider the *Snepp* case in which the CIA sought to enforce a right of pre-publication censorship agreed to by agent Snepp as part of the standard CIA employment contract.[127] While it is certainly true that Snepp agreed to the CIA's censorship when he joined the agency, it is at least reasonable to question why he was asked to do so.

Certainly the CIA has a legitimate interest in protecting classified information. A right in the agency of pre-publication review might be a legitimate way to protect that interest.[128] But in *Snepp* the agency sought more. It did not argue that any of the material published by Snepp was classified. Rather, it argued only that Snepp's actions subjected sensitive information to an unacceptable "risk of disclosure."[129]

Are we willing to accept the proposition that the CIA should have an unrestricted right to determine what constitutes sensitive material? Professor Epstein claims without support that the pre-publication review demanded of Snepp by the CIA "is no doubt similar to

124. *See* Abrams, *supra* note 7, at 147-49.
125. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).
126. *See* Abrams, *supra* note 7, at 144.
127. *See supra* note 95 and accompanying text.
128. Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).
129. *Id.* at 511.

ones private employers impose upon employees entrusted with sensitive information."[130] Presumably he is likening Snepp's case to those involving trade secrets or business opportunities improperly appropriated by company employees.[131]

The important distinction is that the typical trade secret case does not risk hiding information of official misconduct, information which the public has a vital interest to know. Would an employment agreement be upheld if it prohibited a corporate employee from informing shareholders of officer or director misconduct? That, at least, is a possible interpretation of the CIA's employment agreement with Snepp, and the Court's holding in *Snepp* deprives the beneficial owners of such information (the general public) of the right to obtain it.

III. CONCLUSION

We have seen that problems of systemic coercion inevitably turn on legislative and administrative motivation. Condemning some proffered exchange of a government benefit for the waiver of a constitutional right is appropriate only after a court somehow determines that the avowed purpose of the condition is either a ruse or is insufficient to justify burdening a constitutional right. How a court reaches or rejects this conclusion is difficult to predict. Professor Kreimer suggests, but ultimately rejects, "anthropomorphiz[ing] the governmental entity in question, treating it as an individual and applying to it the common sense tests by which courts interpret the purposes of persons."[132] While objective guideposts exist,[133] surely most determinations of motivation will turn on judicial hunches and intuition.

Having failed to find Professor Epstein's "functional, not intuitive" solution, have we also failed to understand systemic coercion and the unconstitutional conditions doctrine established to restrict it? Not necessarily. Failure is defined as much by what we hope for as by what we achieve. Professor Epstein's search for mechanical certainty—in particular, his search for certainty via economic analysis—may itself be misguided.[134] Almost seventy years ago, Justice Cardozo wrote of his search for certainty in the law:

130. Epstein, *supra* note 1, at 69.

131. Professor Easterbrook treated *Snepp* in precisely this light. *See* Easterbrook, *supra* note 9.

132. Kreimer, *supra* note 49, at 1335.

133. *See, e.g.*, Abrams, *supra* note 7, at 146-55.

134. *Cf.* Rosenthal, *supra* note 14, at 1161 ("As with most difficult, and therefore interesting legal questions, the answer is not 'always' or 'never', but 'sometimes' or 'it depends.' ").

> I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, and part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.[135]

Economic analysis as we know it today, though often useful and occasionally almost insistent, is no more a panacea, no more stable, no more close to eternal truth than was Mr. Herbert Spencer's Social Statics[136] or the luminiferous ether.[137]

135. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (1921).
136. *See* Lochner v. New York, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting).
137. *See, e.g.*, P. BERGMAN, INTRODUCTION TO THE THEORY OF RELATIVITY 26-27 (Dover ed. 1975).