

## Epstein's Takings Doctrine and the Public-Goods Problem

TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN. By Richard A. Epstein.† Cambridge, Massachusetts: Harvard University Press, 1985. Pp. xi, 362. \$25.00.‡

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The academic world has experienced a remarkable revival of classical liberalism over the last few decades. Although centered in the traditional liberal stronghold of economics, this revival has carried its rejection of the modern State into nearly every other scholarly discipline.<sup>1</sup> With powerful and sophisticated new arguments, it has reanimated the traditional liberal concepts of the free market, private property, and limited government. Socialism is in full intellectual retreat, and once unquestioned State interventions such as the minimum wage, antitrust regulation, and social insurance are falling into disrepute.

Richard Epstein's *Takings* is part of this revival. It does not, however, simply apply the new arguments for classical liberalism to the law—that has been done by others.<sup>2</sup> Instead, like the distinguished works of John Rawls<sup>3</sup> and Robert Nozick,<sup>4</sup> it ambitiously presents a fully developed normative theory of the State.<sup>5</sup> It lays the philosophical found-

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1. Although this classical liberal revival is sometimes referred to as "conservative" and the two movements have some positions in common, the term "classical liberal" far more closely captures the historical roots of this revival and its current wide-ranging concern for liberty. Indeed, outside of the United States, the term "liberalism" never became associated with the advocacy of State intervention to the extent that it did in the United States during the twentieth century. Curiously, even though the classical liberal revival emanates from this country, the few overviews of its academic contours have appeared outside the United States. See, e.g., H. LEPAGE, *TOMORROW, CAPITALISM: THE ECONOMICS OF ECONOMIC FREEDOM* (1982); G. SAMPSON, *AN END TO ALLEGIANCE: INDIVIDUAL FREEDOM AND THE NEW POLITICS* (1984); Barry, *The New Liberalism*, 13 *BRIT. J. POL. SCI.* 93 (1983).

2. The pioneering work in this genre is, of course, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

3. J. RAWLS, *A THEORY OF JUSTICE* (1971).

4. R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

5. At one point, Epstein compares his theories with the rival theories of Rawls and Nozick. See pp. 334-44.

I should mention that by "the State" I mean government. I use the two terms interchangeably, unlike some political scientists who use the term "State" for the government *plus* its subjects or for

dation and constructs much of the legal framework of an ideal liberal polity. *Takings*, therefore, simultaneously draws upon and has consequences for current controversies in several disciplines including law, economics, political science, and philosophy. This makes it a difficult book for anyone to comprehend completely.

At first glance, the book appears most accessible to legal scholars. The bulk of it works out the detailed legal ramifications of its general principles. But this first impression is misleading because those general principles come from outside the field of law. One perplexed legal scholar has complained that "Professor Epstein never reveals the rules of the game by which he is playing. Or perhaps it would be more accurate to say that the game is one whose rules only he knows."<sup>6</sup> In fact, Epstein's rules are antecedent to his legal conclusions. The problem is that not all legal scholars will find his cryptic uses of the jargon of economics and political philosophy entirely illuminating.

Readers must avoid dismissing Epstein's book as merely an idiosyncratic interpretation of the eminent domain (or takings) clause of the United States Constitution. Constitutional interpretation provides Epstein with an integrating motif, but it is not his starting point. He actually builds his legal structure on the historical bedrock of classical liberal political philosophy—natural rights. Epstein rejects legal positivism with its central "idea that private property and personal liberty are solely creations of the state."<sup>7</sup> Rather, the State's proper function is "to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state."<sup>8</sup>

The best-known popular exposition of natural rights theory, of course, is the Declaration of Independence. In that form, however, natural rights theory displays a gaping hole. The theory holds that the State's sole function is to protect individual rights. But if, as Epstein points out, "the rights of groups [d]epend upon the rights of their members,"<sup>9</sup> then none of the State's actions can justifiably violate those rights. The State can only take those actions that private individuals have a right to do on their own. This can easily justify State coercion for defense, restitution, or retaliation against those who violate rights. But it cannot justify taxation and other State coercion imposed upon those the State protects. From the perspective of inviolable natural rights, a private individual

some vague intermediate entity. I capitalize the word "State" to distinguish it from constituent states within a federal system of government.

6. Sax, Book Review, 53 U. CHI. L. REV. 279, 280 (1986).

7. P. 5.

8. *Id.*

9. P. 13.

who taxes his neighbors, even for the purpose of financing their protection, commits nothing less than theft.

The answer of John Locke and other early natural rights theorists to this fatal proscription upon State intervention was the concept of a social contract. The State arises, they suggested, through a social contract in which all agree to be coerced for their own good.<sup>10</sup> In other words, the social contract tries to reconcile the State with natural rights by converting coerced taxation into a voluntary payment. Yet this answer involves a linguistic sleight of hand. "The formation of the state cannot be accounted for by actual consent," writes Epstein, "as there are too many parties for any such contract ever to occur in fact."<sup>11</sup> The early natural rights theorists were quite conscious that no social contract had ever received or could ever receive every citizen's express consent. Thus, they substituted tacit consent to avoid this historical and practical obstacle. But tacit consent is incompatible with a true contract. It makes the social contract a "contract" only in some vague, metaphorical sense, a "quasi-contract" in Epstein's words,<sup>12</sup> utterly insufficient to justify State coercion against those who have not violated another's rights.

Epstein's alternative to the social contract is to grant the State authority to do one thing that individuals have no natural right to do: force an exchange. Unlike private individuals, the State may take an individual's property—in Epstein's view—if the State satisfies two conditions: (1) it must compensate the individual, in cash or kind, for the full value of what it takes, and (2) it must divide the benefits of this forced exchange among all members of society in proportion to their existing wealth.<sup>13</sup> The result is "no contract as such, only a network of forced exchanges designed to leave everyone better off than before."<sup>14</sup>

Epstein's rationale for this special grant to the State comes from economic theory. Purely voluntary transactions would fail to produce many public goods, especially the most fundamental of those—protection of natural rights from aggression. Economists commonly define a public good as a good or service that cannot be provided to one consumer without simultaneously providing it to others. This type of good creates opportunities for free riders, who will pay for the public good only if

10. See J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d ed. 1698); J. GRAY, LIBERALISM 76-78 (1986).

11. P. 14. The still devastating, classic point-by-point refutation of the social contract in its literal form remains L. SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (1870 & photo. reprint 1966).

12. P. 14.

13. For an extended discussion of these two conditions, see pp. 162-66, 182-215.

14. P. 15.

doing so is absolutely necessary to receive it. Every potential consumer has an incentive to become a free rider, and if enough of them act on this incentive, the service will not be produced at all, or at least not in an optimal quantity. Public goods, therefore, must be funded through taxation or some other coercive taking.<sup>15</sup>

Although the State needs the power to coerce those whom it protects, it also must be prevented from using this power simply to steal from or exploit its citizens. Epstein's two simple restrictions would automatically confine the State to those coercive transactions in which the benefits exceed the costs. They would also remove any incentive for expensive struggles over the distribution of benefits. In the terminology of economists, State intervention would take place only if the market's allocation of resources were less than "Pareto-optimal"<sup>16</sup> and the State could correct this "market failure." The State would no longer provide an avenue for costly "rent-seeking" behavior.<sup>17</sup>

Epstein fortuitously discovers a clause of the Constitution that embodies this theory of the State. The fifth amendment to the Constitution provides: "nor shall private property be taken for public use without just

15. In addition to *nonexcludability*, which gives rise to the free-rider problem, the term "public good" has become associated with a second characteristic in the technical economic literature: *nonrival consumption*. Consumption is nonrival when one customer's consumption of a marginal unit of the good or service does not preclude another's consumption of the same unit, as for instance, two patron's enjoyment of the same movie in an uncrowded theater. Although these two characteristics frequently appear together, they need not. Nonexcludability, however, is clearly responsible for the more serious alleged "market failure." The greatest potential "market failure" from nonrival consumption alone is less than optimal consumption of the nonrival public good. The fact that even this failure dissipates if the market permits discriminatory pricing has led many economists to consider nonrival consumption merely a special instance of monopoly through economies of scale.

Although Epstein himself makes passing reference to other "market failures," nonexcludable public goods are his dominant, if not exclusive, concern. At one point he mentions a triumvirate of "transactions costs, holdout, and free-rider problems" as justifying the State. P. 5. But the most prominent transactions cost that Epstein believes the State must reduce is arranging a unanimous agreement among all the beneficiaries of a nonexcludable public good. Similarly, holdouts who refuse to sell, blocking the production of a good or service out of a *strategic* motive to gain a larger share of the return, behave analogously to free riders, who refuse to buy for the same reason. Epstein expands the proper objects of State concern beyond classic public goods to "common carriers" and other "common social institutions," see pp. 168-69, but his implicit justification again appears to be the holdout problem. The result is that the ubiquitous free rider provides the near-universal underpinning for all the State interventions that Epstein considers legitimate.

16. A transfer is "Pareto optimal" if it improves the economic position of at least one actor without hurting the economic position of any other actor. See N. MERCURO & T. RYAN, *LAW, ECONOMICS, AND PUBLIC POLICY* 7-9, 25-26, 45-47. Welfare economists have developed the "compensation test" as a variant on Pareto optimality. Under this test, a transfer that favors some people but harms others is pronounced a unanimous improvement in welfare if the gainers can compensate the losers so that they will accept the change. *Id.* at 8-9, 12 n.23.

17. "Rent seeking" occurs when one group expends resources in an effort to influence the political process so that the group receives an excess distribution of benefits. If benefits are distributed among all members of society in proportion to their existing wealth, then no group will find it cost-beneficial to engage in rent seeking. *Id.* at 208.

compensation."<sup>18</sup> With the support of natural rights theory, Epstein classifies even taxation as a partial taking of private property. Thus, the clause imposes the conditions of "just compensation" and "public use" on nearly all State interventions. The government is free of these conditions only when it does something that private individuals have a legal right to do under the existing body of private law.

The concrete implications of Epstein's interpretation of the eminent domain clause are breathtakingly sweeping. Taxes that pay for public goods are permissible because the public good provides the taxpayers with an implicit compensation in kind. Any government welfare or transfer payment, however, is unconstitutional because those taxed to finance it are uncompensated. Indeed, any redistributive tax, such as the graduated income tax, even if it pays for a public good, is also unconstitutional because its benefits are not divided proportionately among the taxpayers. Most zoning laws and all price controls become uncompensated takings as well. In short, Epstein's constitutional interpretation "invalidates much of the twentieth-century legislation."<sup>19</sup> That this runs counter to judicial interpretation of the past forty years leaves Epstein admirably undaunted.

With this proposed constitutional regime, Epstein is tackling the same structural problems that absorbed the attention of James M. Buchanan and Gordon Tullock in *The Calculus of Consent*.<sup>20</sup> Those two public-choice economists were among the first to explore new constitutional mechanisms that would better restrain the State. Although Buchanan and Gordon tackled the problem with the tools of economists, Epstein tackles it with the tools of a legal scholar. And whereas they primarily were interested in changing voting rules so that the legislature would have little incentive to pass economically inefficient laws, Epstein puts the burden on the courts. He offers his interpretation of the eminent domain clause as an unambiguous standard for judicial nullification of inefficient legislation.

Plainly, Epstein's theory is highly complex. It closely interweaves natural rights, economic efficiency, and constitutional interpretation into a seamless political tapestry. The three strands are mutually reinforcing. By itself, perhaps the most vulnerable of the three is Epstein's constitutional strand. He tentatively argues that his interpretation of the eminent domain clause is the only possible interpretation consistent with the

18. U.S. CONST. amend. V.

19. P. 281.

20. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

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inherent logic of the text. Epstein thus argues that his view should prevail despite any evidence that the framers of the clause thought differently.<sup>21</sup>

Even if we reject the notion that Epstein's constitutional interpretation is uniquely correct, this does not seriously compromise his accomplishment. Although the constitutional strand may be slightly frayed, the natural rights and economic efficiency strands will still hold Epstein's tapestry together. Showing that even one of many possible interpretations of the eminent domain clause generates unambiguous results consistent with both economic theory and natural rights is an impressive exercise. Especially in a period when exceptions to legal rules appear to have eclipsed general legal principles, it is refreshing to find a scholar who can intelligibly erect almost an entire legal edifice on the basis of a few consistent principles.

Unfortunately, the relentless success with which Epstein applies his principles to the hardest legal cases will interest only those who already share Epstein's classical liberal premises. Epstein manages to derive a legal system that forbids coercive redistribution, but permits interventions increasing wealth, because he programmed those preferences into the system at the outset. He does not independently defend them. Anyone who rejects both natural rights and economic efficiency as valid political standards will find Epstein's exercise purely academic.

For those, like this reviewer, who share some of Epstein's premises, the most dubious part of the resulting legal system is not the numerous State interventions it eliminates, but those it allows. To begin with, that the eminent domain clause refers only to private property, and not personal liberty, imparts a skewed conservative bias to the concrete applications of Epstein's principles. Government regulation of wages or hours, according to Epstein, is a taking from the perspective of the employer because it restricts "the power of the employer to dispose of property."<sup>22</sup> But it is not necessarily a taking from the perspective of the employee because "the restrictions are upon his right to dispose of his labor, not

21. Both Sax, *supra* note 6, and Note, *Richard Epstein on the Foundations of Taking Jurisprudence*, 99 HARV. L. REV. 791 (1986), sharply question Epstein's theory of constitutional interpretation. Scholarly research into the origins of the eminent domain clause is very limited. Madison appears to have put the clause into his proposed draft of the Bill of Rights on his own initiative; it is the only clause in the entire Bill of Rights that was not requested by at least one of the state conventions that ratified the Constitution, although the previous state constitutions of Vermont (1777) and Massachusetts (1780) had contained it. See E. DUMBAULD, *THE BILL OF RIGHTS: AND WHAT IT MEANS TODAY* 52-53, 162 (1957); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931).

22. P. 280.

property."<sup>23</sup>

This opens a potential Pandora's box that Epstein fails to address. He explicitly ignores what he calls "the 'morals' component of the police power," those restrictions "directed to gambling, drinking, prostitution, and the like."<sup>24</sup> Not only might these common invasions of personal liberty slip through the private property language of the eminent domain clause, but so might conscription, which Epstein never mentions. It is a peculiar political philosophy that severely hems in the power of taxation, but then gives free reign to the power of conscription. The unbridled freedom to dispose of your private property is of little use if the State can enslave you at its pleasure.

It is undoubtedly poor form to criticize a work as comprehensive as Epstein's for not covering everything. The question of personal liberty admittedly is somewhat beyond the scope of a book devoted to the eminent domain clause. But it is not beyond the scope of a book offering a fundamental reexamination of political theory. Epstein's work, as we have seen, is both, with the two aspects bolstering each other. Consequently, I think that it is quite fair to insist upon more than a cursory and indecisive acknowledgment of State "takings" of personal liberty.

A far more critical weakness of Epstein's constitutional regime is the difficulty of implementing it. The weakness is not simply Epstein's failure to discuss how his constitutional rules would be adopted. Rather, economic theory gives us good reason to expect that they cannot be adopted. The same public-goods problem that is such a vital prop to Epstein's legal framework also fatally undermines that framework.

At one time, economists unreflectively subscribed to what Harold Demsetz has called the "nirvana approach" to public policy.<sup>25</sup> These economists believed that merely demonstrating some "market failure" with respect to an abstract optimum justified State intervention. They assumed that the costless, omniscient, and benevolent State could simply and easily correct any failure.<sup>26</sup> Since then, economists have become more realistic. Most now subscribe to a comparative institutions approach to public policy. Demonstrating "market failure" is no longer sufficient. One must compare the market with the State, not as one wishes the State would behave in some ideal realm, but as it actually behaves in the real world. To justify State action, one must show that the

23. *Id.*

24. P. 109 n.4.

25. Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969).

26. See Kalt, *Public Goods and the Theory of Government*, 1 CATO J. 565 (1981).

State has both the *capacity* and the *incentive* to do a better job than the market.

Epstein is well aware that giving the State an incentive to provide public goods encounters formidable practical difficulties. His constitutional rules are cleverly designed to do just that—for the legislature. If adopted, not only would these rules eliminate the legislature's incentive to pass laws that benefit special interests at the expense of society, but they might even give the courts the capacity to evaluate empirically when the costs of particular government interventions exceed the benefits. This is their most striking and intriguing prospect posed by Epstein's theory.<sup>27</sup> But sadly, Epstein's constitutional rules give courts absolutely no incentive to enforce them rigorously.

True, judges that were disinterested gods could incorrigibly impose Epstein's wise rules. But in the real world, judges are just as much a human component of the State as legislators. Epstein implicitly assumes that the courts are somehow immune from the self-interested political influences that have made the legislature a willing instrument. Yet his explicit recounting of court decisions belies that pleasing assumption. Epstein has no more reason, beyond professional hubris, to expect one

27. It is still possible to quibble with the content of Epstein's constitutional rules. Moreover, I am unconvinced that they would resolve all the empirical difficulties. In particular, there appears to be an unfounded asymmetry between what constitutes a taking and what constitutes compensation under Epstein's criteria. Epstein strictly contends that without an actual invasion of rights, there has been no taking. Thus, Epstein offers the example of the government erecting "a large office building that blocks the view of a lake from a large luxury apartment complex, sharply cutting market rents." P. 198. This would not constitute a taking, but would be a *damnum absque injuria*, harm without legal injury. It would seem to follow that without an actual enhancement of rights, there has been no compensation. If the government were to demolish the same office building, the rise in market rents surely should not count as compensation toward some taking from the apartment owner. Analogously, at the private level, if I steal paint from my neighbor to improve the appearance of my house, any resulting rise in the market value of his home should not count toward restitution.

Yet Epstein appears to allow such amorphous compensation when he justifies taking at least some of a landowner's *ad coelum* air rights on the basis of benefits, "direct or indirect, from cheaper goods and services because of air transport." P. 235. (Epstein leaves open a better approach to this case—modification of the *ad coelum* doctrine—but that is a different issue.) Still more suspect is Epstein's inclusion as part of an employer's compensation the decrease in wages that might result from the taking involved in worker's compensation laws. See p. 250. (Even with this compensation, Epstein remains doubtful about the constitutionality of worker's compensation laws without the freedom to contract around them, but again that is a different issue.) Contrast these examples with Epstein's discussion of common pools, see pp. 216-23, in which the restriction upon the property rights of each user of the resource is compensated by the *right* to restrict other users similarly, or with Epstein's discussion of common carriers, see pp. 168-69, in which the public's *right* of access to the carrier is counted as compensation, not the change in the price of the carrier's service.

By counting changes in relative market prices as compensation for certain takings, Epstein imparts an ad hoc quality to what he calls "implicit in-kind compensation." P. 195. Even worse, the Coase theorem appears to suggest that this form of compensation might open the door to State transfers conferring no net social benefits. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

branch of the State to institute a benevolent reign of economic efficiency than another.

This incentive problem cuts to the heart of the public-goods justification for State coercion. Free riders afflict not only the market. As Mancur Olson has demonstrated, they just as surely afflict politics.<sup>28</sup> If individuals wish to obtain a public good from the State rather than the market, they still must organize to do so. But those who refuse to organize cannot be excluded from any resulting political benefits. This free-rider induced "political failure" theoretically explains why democratic States tend to enact policies that funnel costly benefits to small and well-organized special interests rather than policies that shower net benefits on society in general.<sup>29</sup> This observation exposes the internal contradiction of Epstein's theories.

The implementation of Epstein's constitutional regime is itself a public good. Because a citizen will receive its benefits whether or not he contributes anything toward its adoption, he has no incentive to contribute. If enough people act as that citizen does—and the free-rider problem suggests that they will—then Epstein's constitutional regime will never be adopted. Epstein never faces this reality. Consequently, he has consigned his exercise to the same sterile category that has fascinated Buchanan, Tullock, and other public-choice economists, who idly speculate about new constitutional voting rules without realizing that the achievement of their rules suffers from the very free-rider affliction that their rules promise to alleviate.<sup>30</sup>

This is not to say that the free-rider obstacle is decisive. We need not succumb to what Howard Margolis has aptly termed free-rider

28. This argument is developed in M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (2d ed. 1971). There remains one crucial difference between providing a nonexcludable public good through the market and doing so through the State. When a group successfully provides itself with a public good through the market, the resources it expends pay directly for the good. In contrast, when a group successfully provides itself with a public good through the State, the resources it expends only pay the overhead cost of influencing State policy. The State finances the public good through taxation or some other taking.

29. Paradoxically, economists continue to insist that the State is necessary to solve the free-rider problem, even though they have repeatedly demonstrated that it has no incentive to do so. Indeed, this is a basic thrust of the public-choice school of economists. One of the earliest public-choice works was A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). Other important contributions include A. BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* (1974); J. BUCHANAN & G. TULLOCK, *supra* note 20; W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); M. OLSON, *supra* note 28; Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

30. The latest economic abstraction falling into this category is the so-called demand-revealing voting process. See E. CLARKE, *DEMAND REVELATION AND THE PROVISION OF PUBLIC GOODS* (1980).

"overkill."<sup>31</sup> In reality, people often shun the free-rider incentive and provide themselves with public goods, both on the market and through politics. But if the free-rider obstacle is easily surmounted, then Epstein has no ground for granting the State the authority to make forced exchanges. No matter how strong the free-rider incentive is, it still leaves Epstein's political theory with an internal contradiction, just like the mythical social contract the theory is supposed to supersede. Either Epstein's minimal State is necessary and therefore unattainable, or it is attainable and therefore unnecessary.

In the final analysis, a consistent application of public-goods theory, to the political as well as the economic arena, gives us not the coercive State, but the taxless society of Robert Nozick, David Friedman, or Murray Rothbard.<sup>32</sup> Although these radical libertarians are at the outer intellectual fringes of the classical liberal revival, they are the only thinkers who have fully embraced the inexorable logic of natural rights. Boldly discarding any vestige of the internally contradictory social contract, they recognize that taxation *is* theft. Epstein presumes he can improve Nozick's society with the introduction of forced exchanges, but this improvement rests upon an institutional equivocation over the extent of the public-goods problem. Only in the radical libertarian political vision do natural rights and economic efficiency attain a compatible synthesis.

From the standpoint of current political policy, Epstein's *Takings* is at the vanguard of the classical liberal revival, offering a radical theory of the State that would dramatically slash away all social and economic legislation passed since the New Deal. But from the standpoint of classical liberal political theory, the book is a last-ditch intellectual effort to salvage the coercive State, original and brilliant in execution, but ultimately a failure.

31. H. MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE* 8 (1982).

32. See D. FRIEDMAN, *THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM* (1973); R. NOZICK, *supra* note 4; M. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* (2d ed. 1978). Nozick justifies what he calls the "minimal State" through an invisible-hand process, but it is not fully a State in the conventional sense. Although it has a *de facto* monopoly on protection services, it is voluntarily funded. Friedman and Rothbard openly defend anarcho-capitalism, in which voluntarily funded, private firms compete to provide all the State's current protection services. For a critical survey of libertarian thought, see S. NEWMAN, *LIBERALISM AT WITS' END: THE LIBERTARIAN REVOLT AGAINST THE MODERN STATE* (1984). Epstein offer his own critique of Nozick at pp. 334-38.

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