Beyond the Rule of Law: Civic Virtue and Constitutional Structure

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

Beyond the Rule of Law: Civic Virtue and Constitutional Structure

Richard A. Epstein*

I. The Rule of Law: Necessary but not Sufficient

The "rule of law" is an ancient and honorable theme in both political theory and American constitutional law. It is widely praised, especially when it is set in opposition to the "rule of men," and for good reason. To attack the rule of law is to risk condemning ourselves to the arbitrary power of other individuals, who may be bound by nothing more than their own endless capacity for self-interest and personal gratification. The downward cycle of Hobbes's *Leviathan*, captured so well in the phrase "the war of all against all," may overstate the disarray and chaos that will emerge when the rule of law is systematically ignored. But if Hobbes is wrong, it is only as a matter of degree. When two opposing forces are equal, the defense normally has an advantage over the offense — which is why mutual deterrence has worked, however fitfully, in the age of nuclear arms dominated by two superpowers, the United States and Russia. It is therefore possible that the state of war of all against all could settle down from time to time into the guarded truce that characterizes so much of international relations where there is no common sovereign to resolve disputes between nations. But the peace is always uneasy, and the resources, so massively consumed to

* James Parker Hall Professor of Law, The University of Chicago. Much of the thinking about this Article developed out of a National Endowment for the Humanities seminar, "The Genius of the Constitution," that I co-led this summer with Professor Timothy Fuller of Colorado College. Michael McConnell and Cass Sunstein provided instructive criticism on an earlier draft of this Article. Andrew Josef and Sean Smith provided valuable research assistance.

November 1987 Vol. 56 No. 1


149
ensure that self-defense remains a credible threat, are necessarily deflected from other productive activities.

It is just this international impasse that ordinary civil society is able to avoid. The basic idea of the social contract — stripped of its excessive reliance upon the idea of individual and tacit consent — is that each person surrenders (or, more accurately, is made to surrender) his right to use force (and fraud) in exchange for protection from the force (and fraud) of other individuals. The security thus gained will exceed in value the liberty that is surrendered, and everyone (or almost everyone)\(^1\) will be better off because of the great social exchange into which they all have been made to enter simultaneously.

There is of course no real grand social alliance. Still the hypothetical contract retains its intellectual allure notwithstanding efforts to banish it from political discourse. The sheer number of human beings, with their very different attitudes and preferences, cannot be expected to reach any agreement on any subject, let alone one so fundamental. Precisely because of these difficulties, the Hobbesian problem remains, if anything, more intractable. The best we can do therefore is develop a logical construct that explains how, if the conditions for voluntary contracting — such as simultaneity and low transaction costs — could be satisfied, all individuals would find themselves rationally impelled to join into political association and would agree to be bound by its terms. That task in turn requires that one explain the anticipated returns that individuals will have, first, if they choose to stay outside some social contract, and, second, if they choose to join it. The enterprise is unambiguously successful only if it can demonstrate that everyone’s individual returns from joining will necessarily dominate their returns from remaining outside society in all states of the world. The great contribution of Hobbes is to paint so grim a picture of unorganized political life that the general claim becomes credible even to the most stubborn in our ranks. The logic of his position drives everyone toward political association, and through it toward the rule of law — a body of gen-

---

\(^1\) This last caveat could lead to a learned dispute about the various criteria of social welfare that might be used to evaluate the hypothetical move from natural to civil society. If indeed every person were better off within civil society than outside it, then there would be a strong justification for the political order that corresponds to the Pareto standards of social welfare, that is, where each person in state 2 (civil society) is at least as well off as he is in state 1 (nature). If that condition were indeed satisfied, then the case for collective governance is clear. But it may well be that there is some person or small group of persons who are better off without government than with it. If so, then political order can be justified only by the somewhat weaker Kaldor-Hicks criterion which stipulates that state 2 is better than state 1 if and only if the winners in state 2 can afford to compensate the losers fully and still remain better off themselves.

John Rawls’s use of the “veil of ignorance” marks an effort to collapse the two tests. If no one knows his place in nature then he will opt for that social order that will leave the single hypothetical chooser better off than any other. The point behind the method is that it allows the analyst to escape the hold-out problem that otherwise exists when unanimous consent is needed to form a civil society. Yet by the same token it ignores the very real differences in tastes and attitudes that surely exist in the world at large, and it provides no reliable guide as to what formal function identifies the ideal single person from the welter of individuals in the world at large.
eral and formal principles that public officials exercising sovereign authority can use both to resolve disputes between citizens and to justify the use of force.

The formal elements of the rule of law are well captured in the famous definition provided by A.V. Dicey in *The Law of the Constitution*.

In Dicey's view the rule of law was closely associated with the virtues of the English Constitution — Dicey was quite suspicious of written constitutions, like ours, with grand statements of theory. But his position has implications that clearly extend beyond it. The first component of the rule of law is quite general. Speaking of the rule of law, he says: "It means, the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government." Dicey then adds two further conditions, "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts," which he then takes to exclude broad administrative law, especially as it had developed on the continent in his own day. And last that "with us [under] the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts."

In an instructive turn of history, Dicey's definition has been picked up by Friedrich Hayek, where it serves as the basis for Hayek's attack on socialist planning, whose broad discretion is inconsistent with the need for "formal rules" that the rule of law requires. As Hayek writes:

The distinction we have just used between formal law or justice and substantive rules is very important and at the same time most difficult to draw precisely in practice. Yet the general principle involved is simple enough. The difference between the two kinds of rules is the same as that between laying down a Rule of the Road, as in the Highway Code, and ordering people where to go; or, better still, between providing signposts and commanding people which road to take. The formal rules tell people in advance what action the state will take in certain types of situation, defined in general terms, without reference to time and place or

---


3. *Id.* at 198.

4. *See id.*

5. *Id.* at 199. In a sense therefore Dicey seems to count as a friend of judicial review, but not because he liked written constitutions.


7. *See id.* at 73.
There is no question that the rule of law is a necessary condition for a sane and just society. The fear of discretion that is shared by both Dicey and Hayek is well grounded by the more explicit modern treatment of property rights, which shows that ill-defined property rights lead to legislative intrigue, political favoritism, and massive uncertainty, all of which tend to reduce the levels of both liberty and utility. But if the rule of law, as defined, is necessary for a just and sound society, it is a very different question to ask whether it is sufficient to achieve that result. In one sense it would be desirable that the answer were yes, for then it would be possible to make judgments about sound social arrangements solely by noting some easily observable marks of formal laws. Nonetheless I think that Dicey and (the early) Hayek were too optimistic in thinking that the rule of law in and of itself offered sufficient protection for the just social order. Some rule of law is better than no rule of law. But the choice of the best, even the best achievable, form of political organization demands more than faithful adherence to the rule of law can provide.

There are many, wholly different, legal systems that have all the marks of the rule of law. It is very easy to tell which commands are indeed those of the sovereign and which are bogus. The rules themselves may well be very general in both form and content. The principles used to organize Nazi Germany (an issue that rightly obsessed Hayek) met in some formal sense the requirements of the rule of law. The citizen could easily figure out that they were authored by the sovereign and written with a high degree of generalization. A rule that says that all Jews must wear a yellow star has the same generality and clarity as one that says that all Jews are entitled to exemption from military service on the Sabbath. But there the simi-

8. Id. at 74. Note too that Hayek also condemned the broad discretion conferred upon English administrative agencies. See id. at 62-63. This same theme was at issue in the United States at the same time. Contrast with Hayek the following excerpts from a Frankfurter Court opinion in National Broadcasting Co. v. United States, 319 U.S. 190 (1943):

The [Federal Communications] Act itself establishes that the [Federal Communications] Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission. Id. at 215-16. Justice Felix Frankfurter then went on to hold that the "'public convenience, interest, or necessity'" standard of the act furnished the Commission with sufficient guidance for its task. Id. at 216 (quoting 47 U.S.C. § 303 (1940)). It is a striking confirmation of Hayek's thesis that the licensing program of the Federal Communications Commission proved a total failure once it moved beyond its traffic-cop function. The seminal criticism (in this small world) was by R.H. Coase, who noted that scarcity was not a reason for government allocation, but for governments to define property rights so that private (and public) parties could bid for the frequencies in a market system. See Coase, The Federal Communications Commission, 2 J.L. & Econ. 1, 14 (1959).
larity ends. The hard questions of social organization involve more than generality and clarity. And if it be thought that the reference to Jews makes the law one that deals with "particular persons," the problem still does not go away. Most good statutes do not govern the entire population equally. And even those that do can be troublesome in the extreme. A rule that says "all persons over eighteen may marry" has no greater generality than one that says "no persons over eighteen may marry." Yet while the former is an essential component of our civil liberties, the latter is totalitarian excess, made all the more dangerous by its uncompromising clarity and generality.

The limitations of formality and generality as tests of good laws are reinforced by the lessons of modern constitutional adjudication. Everyone today agrees that rules that single out special classes for explicitly different treatment are likely to run afoul of the rule of law. It is for that reason that modern lawyers are justly suspicious of rules that use race, sex, or religion as the explicit grounds for the classification of individuals. A deep suspicion, however, is sufficient only to give rise to a rebuttable presumption against the law's fairness, but not a conclusive one. There are certain rules that distinguish between men and women that many individuals would consider just because they work to the long term advantage of members of both sexes. A rule that calls for separate men's and women's tennis teams is one such example. There are other such rules, however, that seem to have precisely the opposite effect, such as a rule that excludes women from the practice of the learned professions, or that imposes upon women special, so-called protective conditions not applicable to men.

Similarly there are many rules today that are neutral on their faces, but which have disparate impacts upon men and women, or blacks and whites. The modern literature on regulation has as one of its central themes implicit transfers through regulation. Central to this literature is the way in which a single rule, neutral on its face, may disadvantage one group at the expense of another. Thus rules that require fixed expenditures from large and small firms will often discriminate against small firms because they will have fewer units of production over which to spread fixed costs. Taxes on labor may well provide an advantage to firms taxed over their rivals if the former firms are capital intensive in their operations and the latter are labor intensive. Minimum wage or maximum hour laws have disparate impacts that are disruptive to the very competitive order that Hayek wished to defend, even though they conform to the rule of

9. See Doernberg & McChesney, On the Accelerating Rate and Decreasing Durability of Tax Reform, 71 MINN. L. REV. 913, 927 (1987) (stating that "[a] tax can be beneficial to some private producers if it strikes their competitors even harder").
law. Yet note what Hayek wrote: "To prohibit the use of certain poisonous substances, to limit working hours or to require certain sanitary arrangements, is fully compatible with the preservation of competition." Yet the risks that so-called neutral health laws have upon competition were a threat well understood at the time of *Lochner v. New York*, and they have been documented extensively in the modern regulatory work dealing with agencies such as OSHA.

There is therefore a clear need to go beyond the form of a law to decide whether it is just or wise, and a normative theory of human behavior and political institutions is needed to explain why Dicey's and Hayek's intuitions about markets and government power, for example, are correct. There are no shortcuts in the process. Too much weight therefore is placed upon the rule of law to filter out good from bad legal rules. Hayek may have wished to contrast the rule of law with substantive rules, but his distinction does not hold true. All laws, general and specific, have an irreducible substantive component. A rule of law that allows the sovereign, be it king or legislature, to generate any clear command that it likes is not a very attractive system, even if it is, as Hobbes argues, better than one in which all forms of individual license are subject to no external constraint. The harder question therefore is how does one choose among different types of legal orders, all of which satisfy the formal requirements of the rule of law. The answer to that question again drives us beyond the rule of law, to the foundations of political theory and modern constitutionalism.

II. Beyond the Rule of Law

It should be of little surprise that the modern developments of political theory rest heavily upon the work of Hobbes. Subsequent writers may reject the absolutism implicit in Hobbes. But Hobbes's absolutism did not rest upon a theory of the divine right of kings or the mere assertion of naked power. Instead it rested upon the consent of the governed, the identical ground used (if not overused) by

10. F. HAYEK, supra note 6, at 37.
11. 198 U.S. 45 (1905). The precise issue in *Lochner* was whether New York's maximum hour statute was "labor" or "health" regulation. The intuition behind the distinction is that labor statutes have anticompetitive purposes, and health statutes do not. The *Lochner* Court was right on the first point and probably oversimplified on the second, as there can be enormous implicit transfers through regulation by health and safety statutes. See infra note 12.

Among the direct effects of OSHA are improvements in safety for workers and increases in manufacturing costs that decrease profits and wages. Alongside these direct effects, however, are the general equilibrium "indirect effects"—the competitive advantages that arise from the asymmetrical impacts of regulation among different groups of firms and workers. . . . It is extremely important to recognize that, for many firms and workers, the indirect effects of regulation can outweigh the direct effects in economic importance. If the competitive advantage gained through indirect effects is sufficiently large, it can more than offset any direct costs, producing a net benefit for the regulated firm and its workers[.]

*id.* at 3, and, I might add, substantial losses for everyone else.
subsequent democratic theorists who have rejected the case for his
undivided, absolutist sovereign. These theorists have sought to find
ways to recognize the need for the sovereign to maintain a system of
“ordered liberty,” one that simultaneously skirts the risks of the
war of all against all and the alternative risks of vesting absolute
power in a monolithic, possibly despotic, Hobbesian sovereign.

The concern with Hobbes’s own alternative rests with the very
sensible objection that although many absolute sovereigns may be
well-intentioned rulers, some will not. As a rough empirical gener-
alization, the prosperity and tranquility that good rulers can afford
will not normally be sufficient to compensate for the reign of terror
that bad despot can impose. A bull market on the New York Stock
Exchange does not compensate for terror, imprisonment and death.

The issue then is what kinds of devices can be used to counteract
the authority of the sovereign once we move into civil society. In
our political literature two devices have been proposed, and these
explain the title of this Article. The first of these is some idea of
civic virtue, and the second is structural safeguards against the con-
centration of power. I shall talk about each briefly.

The idea of civic virtue is an elusive one, and I for one am not
quite sure I understand the complex constellation of ideas that lurks
beneath its surface. But whatever its precise contours, civic virtue
surely was an important concern in political theory both before and
during the framing of our constitution, and it has had a sudden re-
turn to prominence in modern academic circles. The modern dis-
cussions of civic virtue have directed renewed attention to the work
of James Harrington, who, writing in response to Hobbes, found
in civic virtue an antidote, imperfect perhaps, to unrestrained greed
and self-interest. Individuals must be raised in a civil society where
they are taught to understand that their own individual wills and
desires must be subordinated to those of the larger society. If many
individuals learn to behave in this way, then they can develop into a
sufficient critical mass, which will form an effective counterweight to
the arbitrary power of wayward government officials. Closely akin
to civic virtue therefore is the idea of extensive general “participa-

13. The phrase is Justice Benjamin Cardozo’s in Palko v. Connecticut, 302 U.S. 319,
325 (1937), but the problem both precedes and survives his efforts to resolve it.
14. See Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4 (1986);
15. Harrington lived from 1611 to 1677, and his most famous work, The Common-
wealth of Oceana, was written in 1656, five years after the appearance of Hobbes’s Levi-
than. Oceana was Harrington’s mythical name for England. For a selection of
Harrington’s writings, see J. HARRINGTON, THE POLITICAL WRITINGS OF JAMES HARRING-
TON: REPRESENTATIVE SELECTIONS (G. Blitzer ed. 1955) [hereinafter HARRINGTON, WRIT-
INGS]. For an exhaustive compilation of Harrington’s work, see J. HARRINGTON, THE
POLITICAL WORKS OF JAMES HARRINGTON (J. Pocock ed. 1977) [hereinafter HARRINGTON,
WORKS].
tion” in public governance by individuals drawn from all orders of society, with the idea that they will in turn (by “rotation”) be part of the ruling body, and part of the general citizenry that will keep an eye on the rulers that govern them. The notion of civic virtue did not in its early days carry with it the implication that all individuals had the same capacity, temperament, or training for governance. Quite the opposite, civic virtue went hand in hand with the view that there was a natural aristocracy, recognizable to all men, the members of which were endowed with more of the right stuff than others.

The appeal to civic virtue, moreover, was hardly libertarian in its orientation. Condemnations of luxury, sloth, and excess were very much a part of the tradition, for men who had grown soft with self-indulgence would lack the character necessary to enable them to participate in public affairs and the defense of the commonwealth. The country was preferred to the court, just as it appears that the regimentation of Sparta was preferred to the laxity of Athens.

Military service was an essential duty of citizenship. The authoritarian and elitist elements of the position are plain, and not easily ignored.

In order to preserve civic virtue, more than exhortation was required. Certain structures were necessary, at least for Harrington. These concerned both the general structure of society and the particular forms of governance. As regards the first, Harrington, for example, was not an egalitarian, for such would have been inconsistent with his own belief in distinct social classes, each with its own


17. Harrington himself makes the pungent observation that:

Id. at 74. The emphasis upon the military is no accident, for participation in military life was one key obligation of the citizen. The issue of standing armies and the militia bulked very large in The Federalist Papers.

18. “For, in the way of parliaments, which was the government of this realm [that is, Oceana, or England], men of country lives have been still entrusted with the greatest affairs, and the people have constantly had an aversion from the ways of the court . . . .” Id. at 37.

19. “Whereas commonwealths upon which the city life has had the stronger influence, as Athens, have seldom or never been quiet, but at best are found to have injured their own business by overdoing it.” Id.

20. “Moreover, elements of traditional republican thought are quite unattractive — especially its militarism and its acceptance of class hierarchies, manifested by the limited classes of people entitled to wield political influence.” Sunstein, supra note 14, at 30 n.8.
unique function. Nonetheless, his concern for "overbalance" led him to believe that there should be a sufficient dispersion of wealth and property, so that no small group of individuals would be sufficient to overpower the rest.\(^2\) Toward that end he proposed, in a way that sharply distinguishes him from Locke, to place restrictions on both the inheritance, and, especially, the acquisition of additional lands\(^2\) — but these restrictions fall short of requiring the complete equality of wealth across all citizens.

More to our point here, Harrington’s concern did not center solely on the relationship between broad social structures and the ideal system of political sovereignty. In addition, Harrington was concerned at a more concrete level with developing a set of institutional structures that could allow an escape from the Hobbesian solution of undivided sovereignty.\(^2\) In his own formulation, "[a]n equal commonwealth... is a government established upon an equal Agrarian, arising into the superstructures or three orders: the senate debating and proposing, the people resolving, and the magistracy executing by equal rotation through the suffrage of the people given by the ballot."\(^2\)

What is important to note is that these structural reforms are in fact themselves independent of the conception of civic virtue, which, however important it is, is not sufficient to counteract the constant threat that individual self-interest poses to the common good. Thus there are many passages in Harrington that echo the grim assessment of human nature that is found in Hobbes. Harrington writes: "For be the interest of popular government right reason, a man does not look upon reason as it is right or wrong in itself, but as it makes for him or against him."\(^2\) And again: "The wisdom of the few may be the light of mankind, but the interest of the few is not the profit of mankind, nor of a commonwealth."\(^2\)

This preoccupation with self-interest as a threat to the body politic becomes especially clear from the decisive illustration that Harrington uses to derive the structural division between the senate proposing and the people resolving. His basic analogy is to the

\(^{21}\) "An equal Agrarian is a perpetual law establishing and preserving the balance of dominion by such a distribution that no one man or number of men within the compass of the few or aristocracy can come to overpower the whole people by their possessions in lands." Harrington, Writings, supra note 15, at 71.

\(^{22}\) The restrictions included those that prevented a person who had land valued in excess of 2,000 pounds both from leaving it to a single son where division among sons was possible and from acquiring new lands, except by inheritance, valued in excess of that same sum. See Harrington, Works, supra note 15, at 62-63.

\(^{23}\) He unmercifully criticizes Hobbes, who had published Leviathan just five years before, for his monarchical tendencies and his willingness to place the sovereign above the law. See Harrington, Writings, supra note 15, at 60-61, 67, 69.

\(^{24}\) Id. at 71-72. This sentence links together both Harrington’s broad social concerns and his insistence upon structure.

\(^{25}\) Id. at 57.

\(^{26}\) Id. at 60.
common game "known even to girls."\textsuperscript{27}

For example, two of them have a cake yet undivided which was given between them that each of them therefore may have that which is due. "Divide," says one to the other, "and I will choose, or let me divide, and you shall choose." If this be but once agreed upon, it is enough, for the divider dividing unequally loses in regard that the other takes the better half. Wherefore, she divides equally and so both have right.\textsuperscript{28}

In this passage Harrington appears not as the champion of civic virtue, but as the precursor of the modern public choice theorists. His cake game is a way to harness the demands of self-interest to the achievement of a social objective. The object here is the equal division of the cake. If the same person who cut, chose, then self-interest would lead to an unequal division, if there were any division at all. But making one divide and allowing the other to choose, subject to caveats to be mentioned, ensures an equal division of the cake, for the first girl only maximizes her share by the equal division, given her knowledge that the other girl will choose the larger part if the cake is not divided in equal halves. The self-interest of each side is now made to operate under a set of constraints that dictates movement toward the socially desirable outcome.\textsuperscript{29}

There is not only the rule of law, but there is also the right rule of law. Yet note that there are substantial difficulties that lurk in the use of this game for understanding divided sovereignty. In the first instance the game need not always yield the right result. Assume, for example, that some error is possible both in the cutting of the cake and the judging of the size of the pieces. The first alone means that the two pieces are not of equal size, so that the imperfect ability to execute a mechanical task will in part frustrate the ideal of equal division, self-interest notwithstanding. In addition, given the presence of error costs, it now makes a difference whether a given person goes first or second. Here we can assume, empirically, that it is harder to cut than to judge, just as it is harder to play the piano than to compare the talents of two pianists. It follows therefore that each of the two participants in the game has a clear incentive to do the judging and not the cutting. It is highly likely both that the two pieces will not be of equal size and that the second girl will be able to spot the difference and choose accordingly. The easy benevolence of Harrington's dialogue will not survive the rigors of the world. Indeed if the game is a one-shot affair, some inequality will have to be accepted, even if lot is used to determine which girl goes.

\textsuperscript{27} \textit{Id.} at 58.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} J.G.A. Pocock says this game "ensures that neither has an interest in behaving unjustly, with the consequence that each girl helps the other maintain the supremacy of reason over passion. Each not only gets her fair share of the cake, but receives the greater good of having acted virtuously." \textsc{Harrington, Works, supra} note 15, at 65. Pocock's formulation places too much emphasis upon virtue and reason. The point of the game is to make sure that self-interested players get the right result even when they act out of passion and not virtue. The virtue belongs to the person who designed the game, not to the girls who play it.
first. Ironically, however, if the game is repeated, then the girls can take turns going first, so that on analogy by Harrington’s own principle of rotation they can approach equality in the long term. The lesson is important, for with imperfect information, the perfect incentive-compatible rule (that is, the first player in the exercise of his own self-interest does that action that advances the social interest)\(^{30}\) does not yield the ideal result. But lest we despair, this rule is still clearly superior to alternatives that might be put into its place.

The second point is that the simple example does not easily generalize to games that involve more than two people. Thus suppose one wants to use the rule to divide a cake into three equal slices. The only way that this can be achieved is to have one player make all the cuts, and then to allow the other players, in an order chosen at random, to select their pieces, leaving to the cutter the last piece. If there are no side agreements among the players, the first player knows that if any one piece is smaller than the rest, she will get it, so the incentive is to keep all pieces the same size. This procedure is subject to all the caveats about error costs raised above, and has in addition the odd feature that only one person can do the cutting if the game is to work at all.

The moment two or more players are allowed to cut, the possibilities of strategic misbehavior are clearly introduced. Take a game with three players and three slices of cake, in which the first to cut is the last to pick, the second to cut is the second to pick, and the third player does not cut, but picks first. If the first player cuts the perfect third, then the second player (who will pick second) is undisciplined in the way in which she wields the knife. She can cut unequal slices if she so chooses, knowing that she can always take the one-third already cut, leaving to the last player (who will pick first) the largest slice of the cake. The expanded game therefore severs authority from the consequences of authority and always places the first player at the mercy of the second — the very result Harrington feared.

This difficulty cannot be forestalled by having the first player cut a slice either greater or less than the perfect third. If the slice is cut larger, then the third player will pick it unless the second division is so unequal that it yields a still larger piece. If the first player cuts a slice smaller than a third, then the even division of the uncut portion will yield both the second and third players larger shares than the first. These possibilities of strategic behavior multiply when the game goes from 3 to \(n\) players. The only rule that tends toward equal slices is one that directs the first player to cut all of the slices.

---

30. For a further elaboration of the role of this principle in the general law of takings, especially as it applies to the disproportionate impact tests, see R. Epstein, Takings: Private Property and the Power of Eminent Domain ch. 14 (1985).
Politics of course is far more complicated than a game that simply divides a given cake. Harrington’s game, for example, presupposed that the undivided cake “was given between them that each of them therefore may have that which is due.” 31 The word “given” requires special attention because it implies that some previous owner of the cake set the goal of equal division before the game began. That goal was not internal to the game itself. The theory of divine rights in politics can be understood in part as an effort to insert a universal donor into all discussions of property rights 32—a perspective easily lost sight of in a secular age.

The object of the true political game therefore can never be set for the players by an outsider who owns the cake that is to be divided. Instead the objective must be set by the players collectively, as part of the game. Now insisting upon the equal division of wealth among all persons, regardless of their level of social contribution, raises so many manifest difficulties—perverse incentive on production and massive centralized planning are two—that, even with serious qualification, such equality cannot be regarded as the object of the game. Instead the goals of the social game are far more difficult to articulate when the cake is not “given,” but instead must be created by human endeavors.

Harrington eschews any systematic effort to establish the relationship between the economics of production and those of redistribution. The want of any clear substantive vision (which is what makes him a lesser thinker than Locke) drives Harrington away from substantive rights to administrative procedures. 33 Knowing full well of the complexity of politics, Harrington accordingly develops his more complex governance structure with the senate proposing and the people resolving. Yet here we do not have any simple two-party game, for this new structure raises a whole host of problems, unanswered by Harrington and difficult to answer today. Thus the division within the senate presupposes that it must have some internal decision rule (for example, majority rule) before it can propose, and the same is true of the people before they can resolve. It follows therefore that Harrington oversimplifies when he treats the cake game as though it sets the model for deliberative politics.

The senate then having divided, who shall choose? Ask the girls. For if she that divided must have chosen also, it had been little

31. Harrington, Writings, supra note 15, at 58.
32. “The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator.” 2 W. Blackstone, Commentaries *3.
33. The same pattern can be found in modern administrative law, where dominance of the New Deal view has meant that there are no vested property rights that are immune from comprehensive social regulation. That having been decided, the emphasis then shifts to the administrative procedures that might be introduced to constrain the behavior of the legislators and administrators who operate within the capacious confines of the majority will. But in general these efforts will fail precisely because they are not animated by any substantive vision of what the just society looks like. For the most comprehensive effort to rationalize the difficulties in modern administrative law, see Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).
worse for the other in case she had not divided at all but kept the whole cake to herself, in regard that, being to choose too, she divided accordingly. Wherefore if the senate have any further power than to divide, the commonwealth can never be equal. 34

The contrast between this structure and the two-party cake game is stark and complete. The cake game was designed to be immune from all possibility of strategic behavior and achieves just that result if the cake can be cut precisely in two. The division between the senate and the people opens up vast horizons on which indeterminate political struggles — bilateral monopoly problems again — can take place, even on Harrington's own relatively simple model in which twenty representatives divide themselves (it is never clear how) into six senators and fourteen representatives for the people. Initially there can be disagreement among the senators over what to propose or among the people over what to accept. Even in the unlikely event that both the senate and the people are unanimous in their separate views, there could be serious struggles between them, as each has a blocking position against the other. In the cake game there is a clear advantage to being the chooser and not the cutter. Yet it is unclear whether the people have greater power than the senate, and probably it is likely that the reverse is true, given that the people, even if unanimous, will not reject a senate proposal if their own costs in getting a better proposal adopted exceed any advantage that they hope to achieve from jockeying. 35 Harrington's probable implication from the cake game — that an asymmetrical division of power between two branches of a legislature can work as smoothly, or even nearly as smoothly, as the cake game — is wholly incorrect. Yet here, as everywhere in political life, the best cannot be the enemy of the good. Any criticism of Harrington's analogy between cakes and governments does not show that the division of sovereign power is unwise or unattainable. Indeed we know from

34. Harrington, Writings, supra note 15, at 59-60.
35. Thus take a game in which there is an array of different canned goods. One player can break them into two piles and the second player picks the pile of his choice. Is it better to divide or to pick? Here, if the first player knows the subjective preferences of the second it is better to divide. The winning strategy exploits the difference between market and subjective value. Thus the first player creates two piles. One pile may have a market value of 45, a subjective value of 40 to that first player, and a subjective value of 60 to the second player. The second pile may have a market value of 55, a subjective value of 70 to the first player, and a subjective value of 55 to the second player. If we rule out the possibility of trade after the division, then the second player will take that package with the higher subjective value to her (60 to 55), that is, the first pile, even though the first player then is left better off than the second (70 to 60). If there is the possibility of trade after the division, then the second player may take the other pile and then hold out to secure the goods she desires most. Note also that in the limiting case where the subjective values of the two players are identical, the first player cannot win. Yet in practice the difference between the objective and subjective values is likely to be large. If two patrons of a supermarket each spend fifty dollars on groceries, neither will be pleased if she takes home the groceries of the other by mistake.
the structure of churches, condominiums, and corporations that purely private associations, founded on unanimous consent, will invest heavily on complex governance structures. And governments, which bind without unanimous original consent, are faced with far more exacting tasks because the greater dispersion of tastes among their citizens increases the risk that the holders of public office will misuse their positions for private ends. Given that governments are formed without unanimous consent of the governed, they require even more stringent procedural safeguards than any analogous private organizations — which is one more reason why their functions should be limited as sharply as possible. Concern with the rule of law may drive us toward some division of power, but in and of itself it does not indicate which division of power is ideal.

### III. Constitutional Republicanism

Both these strands of Harrington’s republicanism — civic virtue and constitutional structuralism — have been incorporated into the analysis of American constitutional law. Again, their relationship raises the same hard issues that it did for the earlier writers. The efforts, partial and incomplete, to resolve the apparent tensions are well apparent in the most famous of The Federalist Papers — number 10, where Madison addresses the problem of “factions,” whether of minorities or majorities, that besets any system of representative government. Initially it is important to stress why factions are a problem, for it brings to the fore an element that is largely suppressed in Harrington’s analysis of republicanism. For Madison, factions were a threat to the liberty and property that all governments are designed to protect. In reaching this conclusion Madison clearly was heavily influenced by the Lockean conception of the proper ends of government. Equally important, his view on this question of ends does not differ from that of his opponents, the Anti-Federalists, who believed that the government should serve these same ends. In modern terms, both the Federalists and the

36. Thus in The Federalist No. 1 Hamilton sets out the aim of the series of papers:

*The conformity of the proposed constitution to the true principles of republican government — Its analogy to your own state constitution — and lastly, The additional security, which its adoption will afford to the preservation of that species of government, to liberty, and to property.*

The Federalist No. 1, at 7 (A. Hamilton) (J. Cooke ed. 1961). Hamilton returns to this same theme in The Federalist No. 85, where he states the proposition as “the additional security which [the Constitution]’s adoption will afford to republican government, to liberty, and to property.” The Federalist No. 85, at 587 (A. Hamilton) (J. Cooke ed. 1961). Similarly when Madison argues against a small pure democracy in The Federalist No. 10, he notes the risks of majoritarian pressures: “Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives as they have been violent in their deaths.” The Federalist No. 10, at 61 (A. Hamilton) (J. Cooke ed. 1961).

37. The Anti-Federalist defense of the small republic also was in service of Lockean ends. Herbert Storing, the master historian of the Anti-Federalists, quotes Luther Martin at Philadelphia:

At the separation from the British Empire, the people of America preferred the Establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one: to these they look up for the security
Anti-Federalists were far, far closer to the nightwatchman than to the welfare state.

The difference between the two sides is largely, if not purely, instrumental. Madison wrote after a long tradition that spoke about the risk that "corruption" posed to the operation of all political institutions. Madison's task, as he saw it, was to show that the union proposed by the Constitution was able to withstand this corruption and the ravages of time better than could any alternative constitution. This proposition could be maintained only by a showing that the extended federated republic better protects property and liberty from factions than do the small republics — that is, the states, which then had charge of this function. His arguments therefore are of necessity directed toward a set of practical and concrete issues that were nowhere addressed by the earlier political writers. Hobbes, Harrington, and Locke are as one in their abstract deliberations on the emergence of government from the state of nature. None of them considered how the ideas of social contract applied to sovereign states that sought to form a national government.

In order to make the case for his extended republic, Madison then

---

of their lives, liberties, & properties: to these they must look up — The federal Govt. they formed, to defend the whole agst. foreign nations, in case of war, and to defend the lesser States agst. the ambition of the larger. H. Storing, What the Anti-Federalists Were For 15 (1981). Martin's reference to "lives, liberties, & properties" is vintage Locke, whose formulation referred to "their lives, liberties and estates, which I call by the general name — property." J. Locke, Of Civil Government, second treatise, ch. 9, ¶ 123 (W. Carpenter ed. 1924).

38. Storing makes just this point when he observes that when he began his study of the Anti-Federalists he expected to find that they embraced a view of "republicanism" as:

a secularized Puritanism aimed at securing a sacrifice of individual interest to the common good. One of my own reasons for turning to the study of the Anti-Federalists was the expectation that they defended some such tradition; the Anti-Federalists seemed to be of interest as defenders of at least residual principles of premodern, preindustrial, preliberal worlds. Yet, without here taking up the more complex question of how far such principles may in fact have been involved in Revolutionary republicanism, they are strikingly absent from Anti-Federalist thought. The Anti-Federalists are liberals — reluctant and traditional, indeed — in the decisive sense that they see the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good. The security of liberty does require, in the Anti-Federalist view, the promotion of civic virtue and the subordination (not, in the usual case, "sacrifice") of individual interest to common good; but virtue and the common good are instrumental to individual liberty, and the resemblance to preliberal thought is superficial. H. Storing, supra note 37, at 83 n.7 (citation omitted). In short, little of Harrington's conception of civic virtue survived into the ratification debates over the Constitution.

39. "Does this advantage [of a republic over a democracy] consist in the substitution of Representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice? It will not be denied, that the Representation of the Union will be most likely to possess these requisite endowments." The Federalist No. 10, at 64 (J. Madison) (J. Cooke ed. 1961). Note that Madison's use of the phrase "most likely" indicates he understands that he is playing the odds.
talks about the two strains from Harrington, civic virtue and structural restraints. Sensibly enough he is not prepared to rely upon one to the exclusion of the other. On civic virtue he first expresses the hope that a system of distance and indirect election will increase the likelihood of selecting legislators who will be able to place the common good over the special interests of factions. Thus the rules for the election of the senators, with their long terms and appointment by state legislators, certainly are designed to keep the members of one house of Congress insulated from the popular pressures of the day. Yet the fear of self-interest that moved Harrington (and Locke) troubled Madison as well, for he knew full well that "[e]nlightened statesmen will not always be at the helm."40 Civic virtue is nice when you can get it, and in the long run a nation that places a succession of fools and knaves in high places will not be able to survive unscathed regardless of its constitutional structure. But politics, as a game of playing the odds, is devoid of certainties. The true test of government is how well, and how long, its institutions will be able to withstand the misdeeds of bad leaders in difficult times. Here Madison's hunch is the assertion that his "extended republic" will be at a sufficient distance from the people that it will be able to avoid the vices of excessive familiarity while not being wholly aloof and uninformed about the needs and desires of the public that it is obliged to protect.

In one sense Madison is very much like Hobbes. His basic account of the problem of factions is far more persuasive than his proposed cure, just as Hobbes's account of the state of nature is more powerful than his monolithic solution. Madison may be right that, over the full array of possible cases, distance is better than no distance. But this superiority translates itself only into the unhappy conclusion that it takes the extended republic little more time to decline into the popular despotism that he so fears. The gist of Madison's difficulty is that the formal constraints of his extended republic — complex representative government, working at a distance — are simply unequal to the challenge of the incessant pounding of self-interest. In a sense he probably knew the point as well as anyone else, for so much of the rest of The Federalist Papers is directed to identifying and justifying other limitations that the Constitution imposes upon the federal government.

I too am unable to propose a set of foolproof institutional arrangements, so I shall content myself with pointing out the real shortcomings in Madison's conception, treating for the moment The Federalist No. 10 as a self-contained essay, and not as a constituent part of a larger work. In making these remarks, I should not be understood as being critical of any effort to decentralize power by placing it in the hands of many different sovereigns as federalism requires.41 Even though important mistakes in allocation can and

40. *Id.* at 60.
41. I discuss some of these points in far greater depth in Epstein, *The Proper Scope of the Commerce Clause*, 73 Va. L. Rev 1387 (1987).
will be made, on balance I believe that the fragmentation of power under federalism is worth pursuing. (State governments, for example, are effectively limited in their taxing policies because of the fear that heavily taxed individuals will move to other states.) But all that said, it is still useful to explain why in *The Federalist No.* 10 Madison underestimates the strength of the obstacles that any viable system of government, even an extended and complex republic, must overcome.

One problem is that it is extremely difficult in the abstract to make, once and for all, intelligent across-the-board judgments as to which size of government will be the most resistant to the pressures of factions and self-interest. In order to choose between national and state governments, it is probably essential to have some detailed knowledge of the social agenda and the relative strength of the interest groups as they operate at both the national and state levels.

Local governments do terribly on zoning issues, for example, because parochial interests do not register the preferences or welfare of nonvoters who would like to become part of the system. One typical zoning situation pits the owners of developed land against the owners of undeveloped land. Owing to the mismatch between property holdings and political power, the undeveloped land often is kept in that condition by local rules, imposing capital losses on its owners and the loss of contractual opportunities upon its potential purchasers. Although local governments know most about land use questions, they are most likely to misuse the information they have.

By the same token national regulation of agriculture and labor is more dangerous than local regulation because it is capable of cartelizing the relevant markets in a way that state regulation cannot. Although local regulation avoids the cartel problem, it may well set in motion large pressures to subsidize those industries that are faced with extensive competition from without, and only a detailed knowledge of the local political alliances can predict whether these efforts to obtain subsidies will succeed or fail. The problem, stated succinctly, is that the capacity to do good by legislation, say, zoning, depends upon the same control and knowledge that impart to government the power to do evil — making it difficult, if not impossible, in the abstract to identify which level of government promises the greatest net gain.

Second, the choice of the correct level of government is likely to be sensitive to the highly variable distribution of voting strength at state and federal levels. It may well be that members of a certain race or religion have sufficient clout to protect themselves at a local level, but find their strength diluted when issues are voted on at the national level. The most obvious illustrations here come from modern labor law, where there is no a priori judgment (independent,
say, of the knowledge of the composition of the labor force) whether a large or small bargaining unit will favor management or labor.\textsuperscript{42} Neither side can make the appropriate judgment until it can make intelligent estimates of its strength as it moves from smaller to larger bargaining units. A small unit may give one side a clear majority; a larger unit may place it at greater risk but promise it greater benefits if successful. Which to choose is no easy issue.\textsuperscript{43}

So too in politics the very variation in the political constituencies often leaves the issue radically underdetermined. Anticommunist zealots may fare better at the national level while religious zealots may fare better at the state level. McCarthyism was a federal phenomenon and segregation was a state, or regional, phenomenon.

How should one expect otherwise? Madison does not talk in the language of cost and benefit congenial to modern analysis. Nonetheless the formation of coalitions depends largely on whether the anticipated cost of their organization is less, or greater, than the private gains that they are able to generate for their members. On that question, geography and the logic of the extended republic play some role, but a relatively secondary one whose importance has diminished over time, in ways that Madison could not possibly have foreseen, with improved transportation and communication.

The second weakness in Madison’s formulation is that he ignores the “unravelling problem.” Even under the best of circumstances all members of the legislature will not be virtuous. The law of large numbers alone precludes such a result, and the vagaries of collective decisionmaking vastly increase the attendant risks. It will therefore often arise that measures will be proposed that respond to the self-interests of minorities that may be able to pull the wool over the eyes of some neutral, less-informed legislators. Now virtuous legislators are faced with an unpleasant, “second best” choice. Given that other legislators have misbehaved, what should they do? One alternative is to imitate Socrates and remain firm in the face of temptation, at which point the gains that the bad legislators achieve will remain unchallenged. Some might take this heroic stance, but others clearly will not. Instead they will say: “We’re willing to believe in tit for tat. We played the game fairly at first. But if they are going to cheat, then we have to take measures to protect our own constituents, if only in self-defense. Besides, if we do nothing in response, they will learn that crime pays and try to outmaneuver us again sometime in the future.”

The moment some people say this, there is a destructive race to the bottom, for others who are prepared to play it straight when there are only a small number of defections will find themselves

\textsuperscript{42} See generally Leslie, Labor Bargaining Units, 70 Va. L. Rev. 353 (1984) (exploring the criteria used by the National Labor Relations Board in determining what constitutes an appropriate bargaining unit and proposing a “framework” for future analyses of bargaining unit policy).

\textsuperscript{43} For a discussion, see Freed, Polsby & Spitzer, Unions, Fairness, and the Conundrums of Collective Choice, 56 S. Cal. L. Rev. 461 (1982).
drawn into the factional fray once the number of defections increases. The best any system of politics can generate is a world in which some legislators will seek factional gains regardless of what others do, where others seek factional gains only if some people have done so first, where still others will do so only if many others have done so before them, and so forth. Yet given that all too plausible distribution, it should take only a little time before each legislator has to act out of narrow self-interest to keep up with his rivals. Because each legislator has to determine for himself whether others have misbehaved, it is quite unlikely that all legislators will hew to the virtuous line.

Legislatures are quite unlike ordinary product markets. There the shifty player will be excluded over time as other traders will look elsewhere for honest partners. But in politics no one can be ignored because simple two-party contracts do not pass laws. Instead laws are common pool assets whose stability is as fragile as that of the common pools in oil and gas and water rights. The pressures on virtuous legislators in a system of majority rule over time should prove very strong indeed. Complex systems of voting at a distance, then, suffer the same fate as the rule of law. They clearly are indispensable in any system of government, but they are hardly sufficient to control the array of pressures that modern political markets can generate. The pessimism of the dogged Hobbesian is not displaced by Madison's institutional arrangements.

**IV. Controlling the Factions**

The question then arises: what other elements are needed to improve the situation? Here it is puzzling that Madison in his effort to defend the extended republic did not mention in *The Federalist No. 10* a number of features found in our Constitution that help to dampen the influence of factions. Thus in the original Constitution there was the indirect election of senators on staggered six-year terms, which could work to weaken the connection between popular sentiment and senatorial behavior. The sentiments of a given moment could never allow the electorate at a single time to constitute a majority of one house of Congress. Yet by the same token the constant reelection of the House of Representatives means that no legislation can pass unless it has also the support of legislators just recently elected. The need to go through two filters, both the Senate and the House, can only slow down legislation, a sensible rule when the risk of too much legislation is thought greater than
the risk of too little.\textsuperscript{45}

Our constitutional checks against legislative majorities are further strengthened by the legislative veto vested in the president, without whose agreement simple majorities in both houses cannot pass a law. Here the constraint is even more powerful than it looks at first instance, because the electoral incentives for choosing a president are not the same as those for choosing a senator or a representative. One might choose the senator or representative in the hope that he can play the political game in ways that help his own constituents. If there is a political pie to be divided, the good senator sees that his constituents get at least their fair share, and perhaps a little more. Senators (even before direct elections) and congressmen therefore are not chosen for their skill in putting brakes on the total level of federal spending and regulation. But citizens who want a favorable division of the political pie may also want to have a smaller pie to divide in the first place, and therefore they could also vote for a president who is more conservative (that is, who believes in a smaller federal government). If senators and representatives are chosen because they play the factional game well, presidents could be chosen because they reduce the stakes for which the game is played. The same voters therefore, often will have different preference functions for different offices, which makes it more difficult for factions to operate.

The system of enumerated powers, also not discussed by Madison in \textsl{The Federalist No. 10}, worked in the same direction until it was overrun by the extravagant interpretations given to the commerce clause by the decisions of the post-1937 New Deal Court.\textsuperscript{46} But faithfully enforced, it is an important part of the total political equation. The power of factions to operate depends upon the gains that faction members can hope to achieve through political action. Where structural devices limit the returns to factional behavior, we should expect to see fewer factions form. Where certain objects are kept from the political process at the federal level, legislators have fewer degrees of freedom over which they can deal. Just as the complex voting rules raise the costs of forming a coalition, so too the respect for enumerated powers tends to limit the gains that any successful coalition can achieve.

These safeguards against factions are hardly perfect. Indeed as

\textsuperscript{45.} Again the intuition here is quite strong. If there are certain public-interest-type statutes that benefit everyone, for example, statutes of limitation, they will pass under very stringent voting rules. Factional legislation will not command such broad support, so that the additional constraints are more likely to trap it than public interest statutes.

\textsuperscript{46.} \textit{See}, e.g., \textsl{Wickard v. Filburn}, 317 U.S. 111 (1942) (stating that farm products produced for home consumption are subject to federal regulation where they affect the quantity of goods in interstate commerce); \textsl{United States v. Darby}, 312 U.S. 100 (1941) (upholding regulation by Congress of the production of goods that manufacturers intend or expect to move in interstate commerce, regardless of whether those goods are actually shipped in interstate commerce); \textsl{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937) (holding that the National Labor Relations Board was justified in controlling industrial employee/employer relationships in order to prevent a burden on or obstruction of interstate commerce).
the administrative power of the state grows, the benefits of coalition increase, for, as noted, the greater ease of communication and travel may well reduce the costs of forming coalitions. The political process, with its jurisdictional limitations, can help meet the question of factions. But it cannot curb it entirely.

In this context, the most striking feature of *The Federalist No. 10* is that nowhere does it discuss judicial review, which surely acts as a bulwark against factional behavior. Short of judicial review, the only recourse that disappointed citizens have against legislative excesses is what Locke called the "appeal to heaven" and we call "the streets." Yet often desperate gambles will fail, so that they will not be taken at all, as individuals who have lost on one important issue will suffer their losses in silence rather than risk the greater losses of armed resistance.

Judicial review offers a way to reduce this risk by providing a forum in which the citizen can challenge a single bad decision of the state without having to place at risk all the benefits of citizenship, personal and economic, under the social contract. The possibility that judicial nullification will strike down certain unjust laws reduces the likelihood of their passage in the first place because again it reduces the expected return from political behavior. The system therefore has another round of defenses against bad legislation built into it from the outset.

But lest one extravagantly praise judicial review as the highest manifestation of the rule of law, much depends upon the substantive rights that are protected under the Constitution. Here we are fortunate that the Bill of Rights, whatever its imperfections, does better on this score than an immense mass of constitutions that we could easily conceive. As there is no space to address the full range of provisions, let me close with just a few words about the one protection to which I have given the greatest attention, the clause of the Fifth Amendment that provides: "nor shall private property be taken for public use, without just compensation." The one point that I want to mention about this clause is the pressure that it places upon legislators when they wish to take property for public use. In a world in which legislators had perfect knowledge and perfect public spirit, there would be little reason to have a compensation requirement built into a constitution. Virtuous legislators with perfect

47. J. Locke, supra note 97, second treatise, ch. 19.
knowledge would take property only where they believed that the
gain to the rest of society would exceed the losses to the individual
property owner. That person in turn could protect himself against
unanticipated loss, if he so desired, by the purchase of insurance in
the private market. The state would be spared the onerous task of
valuation, and this cost saving would redound to all.

The just compensation provision has long been thought to be one
of those principles of "natural justice" that no sound constitution
can do without. But it also has more pragmatic roots. If one recalls
the risks of self-interest and the imperfect information that moti-
vated the cake game in Harrington, the explanation is not hard to
find. In many situations it is difficult to get good information about
the relative costs and benefits of various government activities. The
state that is required to compensate when it takes will have to an-
swer to its political majorities when the property it condemns is
worth less than the cash it hands over to acquire it. Yet if it is re-
quired only to conduct some administrative hearing to determine
that the property condemned is worth more than it has paid, then it
will have a good deal more leeway before members of the public will
be upset about the condemnation decisions that leave them a net
winner (and force the losses upon the hapless individuals made to
bear the brunt of majority government action). It is just here that
the hostility that defenders of the rule of law have toward adminis-
trative discretion has its greatest intellectual and moral force, for the
persons asked to bear the brunt of government action will not be
chosen at random. There is always some degree of discretion where
a government builds a fort or a road. If no compensation is re-
quired, then clever legislators can combine personal revenge with
the provision of public goods by choosing the land of a political en-
emy as the site for the new fort or the new road. Once they are
required to pay just compensation that threat, although never fully
removed, is surely diminished. The constitutional requirement of
just compensation thus tries to make the taking of property for pub-
lic use look less like the political struggle, and more like Harring-
ton's cake game in which the party who cuts is not allowed, as it
were, to choose. That is the force of the disproportionate impact
test, as articulated by Justice Hugo Black: "The Fifth Amendment's
guarantee that private property shall not be taken for public use
without just compensation was designed to bar the government
from forcing some people alone to bear the burdens which, in all
fairness and justice, should be borne by the public as a whole."

Whether we use the metaphor of Harrington or the modern re-
formulation of Justice Black, the moral is the same. It is easy to
conceive systems of condemnation that do not require just compen-

50. Armstrong v. United States, 364 U.S. 40, 49 (1960). The disproportionate im-
 pact test introduces the same incentive-compatible decision procedure found in Har-
rington's cake game. For a discussion of the test and its linkages to the "just
compensation" language of the Constitution, see R. Epstein, supra note 30, ch. 14, 204-

170
sation and yet conform to the requirements of a system of rule of law. But once the question becomes, is this the best we can do, then the rule of law is only a necessary and not a sufficient condition for the just social state. So long as that one conclusion is kept firmly in mind, we can recognize the achievements of any political system in which the rule of law protects us from the ravages of arbitrary power, without forgetting the enormous amount of substantive work that has to be done even after the rule of law is firmly entrenched and universally accepted.