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Reply to Professor Brewbaker

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Professor Brewbaker's thoughtful article[1] on physician price controls raises many issues, large and small. Some—such as the relative merits of the regulatory takings standard and the fair return standard—have been dealt with in my principal article[2] and I will not revisit them here. I will instead address four arguments advanced by Professor Brewbaker that are not anticipated in my article: (1) that the Constitution should not apply to physician price controls because physicians can fend for themselves in the political process; (2) that applying the Takings Clause to physician price controls would be tantamount to reviving the "economic liberty" doctrine of *Lochner v. New York*;[3] (3) that in assessing the effect of physician price controls one must consider the offsetting benefits physicians have received from other government action; and (4) that physicians (and hospitals) can make various "defensive maneuvers,"[4] primarily in the form of reducing the quality of patient care, that obviate the financial effect of price controls.

Although this Reply will offer a number of observations about these contentions, one theme stands out overall. Each of the criticisms leveled by Professor Brewbaker, even if valid, could also be made about the Supreme Court's decisions applying the Takings Clause to public utility ratemaking, or indeed to the most routine applications of the Takings Clause to exercises of the power of eminent domain. In effect, Professor Brewbaker's real quarrel is not with my conclusion that the Takings Clause imposes constitutional limits on physician price controls. Rather, it is with the Takings Clause itself, as that Clause has come to be understood by courts through decades of interpretation. Thus, however interesting many of his points may be

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1. William S. Brewbaker III, *Health Care Price Controls and the Takings Clause*, 21 HASTINGS CONST. L.Q. 669 (1994).

2. Thomas W. Merrill, *Constitutional Limits on Physician Price Controls*, 21 HASTINGS CONST. L.Q. 635, (1994).

3. 198 U.S. 45 (1905).

4. Brewbaker, *supra* note 1, at 694.

as a theoretical matter, they are unlikely to commend themselves to courts—or more importantly to legislators—who are asked to apply the Takings Clause to proposals for universal price controls on physician services.

I. Leave Them to the Political Process?

Professor Brewbaker's most far-reaching argument draws upon the famous footnote four from *Carolene Products*[5] and Professor John Ely's theory of judicial review,[6] and contends that courts should not step in to protect physicians from the effects of federal price controls because physicians are a powerful and well-organized minority that can take care of themselves in the legislative process. This is not the place to enter into an extended debate on the merits of process theory. For the benefit of the reader who has not kept up with these things, however, I note that recent commentary concludes that Professor Ely's process theory fails both as a description of "what the Court does when it decides cases,"[7] and as a supposedly value-neutral defense of judicial review to protect "discrete and insular" minorities.[8] Thus, Professor Brewbaker's version of process theory should not be taken for more than what it is: the invocation of a contested academic theory that has not been endorsed by the Supreme Court or, for that matter, by most scholars of constitutional law.

Even if one accepts the tenets of process theory, however, it is far from clear that one would reach the conclusion endorsed by Professor Brewbaker. Significantly, Ely himself saw the Takings Clause as being consistent with his claim that the Constitution is primarily concerned with assuring a fair political process.[9] He regarded the Takings Clause as

> yet another protection of the few against the many, "a limit on government's power to isolate particular individuals for sacrifice to the general good." Its point is to "spread the cost of operat-

5. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

6. JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

7. Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 722 (1991).

8. *Id.* at 727 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)); *see also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991) (defending Ely's process-protecting theory but admitting that Ely's endorsement of judicial review of legislation that reflects "prejudice" against discrete and insular minorities cannot be justified without introducing extraneous value judgments).

9. ELY, *supra* note 6, at 97 (citations omitted).

> ing the government apparatus throughout the society rather than imposing it upon some small segment of it."[10]

This description of the purposes of the Takings Clause would seem to apply with full force to proposals to reduce health care costs by imposing price controls on physicians. Rather than spreading the pain of cost reduction throughout the society—by reducing government subsidies for health care or imposing general taxes to provide additional benefits—the price control proposal would obtain the general benefit of cost reduction at the expense of one small segment of society—physicians and other health care providers. A proposal to impose price controls on only one segment of the economy in order to achieve general benefits for everyone else seems to describe exactly the sort of situation process theorists regard as triggering strict judicial scrutiny.[11]

Professor Brewbaker might agree with this if the proposal were to impose price controls on certain groups—those poorly organized and hence not capable of self-protection through the legislative process. But he insists, without much supporting analysis, that this does not describe physicians.[12] Implicit here is a premise that I think is highly dubious and must be rejected: that courts (or the legislature in trying to determine the scope of constitutional protection) should engage in a group-by-group analysis of "political clout"[13] in order to ascertain whether the protection of a particular clause of the Constitution applies. Surely one would not endorse this method for the interpreting the Free Speech Clause, with the result that flag burners and soap box orators are protected but not *The New York Times* or CBS. Nor would one want to suggest that the Free Exercise Clause applies only to small religious sects but not to the Catholic or the United Methodist Churches.

Two things in particular are wrong with the proposal to engage in a group-by-group analysis of "clout." One is that there are no judicially manageable standards for making these determinations. Political scientists have made some headway in identifying plausible factors

10. *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 463 (1978); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 75-76 (1964)).

11. Process theory might well suggest that a program of universal price controls—such as the one attempted in the early 1970s—should not be subject to close review under the Takings Clause. Universal price controls might sink the economy, but at least everyone would be on the ship together. A proposal to control prices in only one market, in contrast, suggests deliberate sacrifice of one group while all others remain afloat.

12. Professor Brewbaker claims that health care providers "continue to exercise influence well beyond their numbers." Brewbaker, *supra* note 1, at 681 n.46. The only evidence he cites in support of this assertion, however, is highly selective and anecdotal. *Id.*

13. *Id.* at 707.

that affect political influence, such as the size of the group, how well its interests are defined, how well it is organized, and the number of electoral districts in which it has a presence.[14] But we are a long way from translating these variables into precise benchmarks that courts could comfortably apply in differentiating between groups. For example, some might argue that African Americans constitute a group with significant influence under this type of analysis, with the resulting implication being that strict judicial scrutiny of racial classifications under the Equal Protection Clause is no longer required.[15] Others would strenuously disagree. Given our present incomplete understanding of these things, courts should stick to enforcing the Constitution as it has been interpreted rather than embarking on some uncharted exercise in process analysis.

A second and more fundamental problem with the case-by-case analysis of "clout" is that it misses the point of most constitutional protections. The Free Speech Clause does not exist simply to protect speakers without clout; it also assures a free flow of information beneficial to society generally. The Free Exercise Clause does not exist simply to protect small religious sects from persecution; it works more generally to keep potentially divisive religious controversy out of the political process altogether. Similarly, the Takings Clause functions not only to keep majorities from financing general governmental programs at the expense of minorities; it too serves to forestall acrimonious political disputes that would be engendered by allowing the government to take property without paying just compensation. As Professor Dan Farber has insightfully observed,[16] the victims of uncompensated takings would constitute a ready-made lobbying group with an intense shared interest. Such a group, if *not* constitutionally guaranteed just compensation in advance, would often use its political power to disrupt the adoption of worthy public programs. Thus, one reason we constitutionally guarantee just compensation is to make it easier for the government to move forward with projects for new forts, roads, or dams. This point is fully applicable to proposals for physician price controls, and reveals perhaps the deepest flaw in Pro-

14. *See, e.g.*, MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 135-65 (1965).

15. *Cf.* Klarman, *supra* note 8 (arguing that as long as equal access to the political process is guaranteed, close judicial scrutiny of racial segregation in public schools would not be necessary).

16. Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130-31 (1992).

fessor Brewbaker's analysis: even if it were true that physicians have political "clout," why threaten them with unfair and disproportionate sacrifices when this will only serve to guarantee their opposition to health reform?

The most basic problem with Professor Brewbaker's invocation of process theory, however, is that the points he makes are quite general and not in any sense limited to physician price controls. They would apply with equal force, for example, to price controls imposed on public utilities, railroads, and other common carriers. Certainly Professor Brewbaker would have to regard these entities as having political clout; why not then leave them to vagaries of the political process when public utility commissions set their rates at confiscatory levels? From the perspective of academic theory, arguably we should,[17] but this is not the path that the Supreme Court has charted. For that matter, why automatically provide compensation to landowners who have their property taken for a highway or dam? Surely many of those subject to the exercise of eminent domain authority have political clout, and could convince the legislature to issue a private bill providing them with compensation. Again, whether this suggestion makes any sense or not, it is clearly not the path that the Supreme Court has chosen. Professor Brewbaker's proposal is thus sharply at odds with our constitutional traditions.

II. Is This *Lochner*izing?

Professor Brewbaker also argues that applying the Takings Clause to physician price controls would "reviv[e] the *Lochner* problem" because the "economic interests that would be at stake in takings litigation based on health care price controls are indistinguishable from those the Court formerly protected under economic substantive due process analysis."[18] There are several problems with this contention.

First, the charge of "*Lochner*izing" is usually directed at constitutional doctrine that has no clear foundation in the text of the Constitution.[19] The *Lochner* Court rested its liberty of contract doctrine on the idea of substantive due process, aptly described as a constitutional

17. At least, this is argument advanced in Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police Political Institutions?*, 77 GEO. L.J. 2031, 2070-75 (1989).

18. Brewbaker, *supra* note 1, at 676.

19. *See, e.g.*, John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937 (1973).

oxymoron.[20] *Lochner*-style substantive due process thus suffers from severe problems of constitutional legitimacy. The constitutional pedigree for the argument that physician price controls are constrained by the Takings Clause is, by contrast, impeccable. The Takings Clause is contained in the Fifth Amendment, which is directly applicable to legislation enacted by Congress. And the argument for constitutional limits on federally imposed physician price controls proceeds directly from analysis of the words of the Takings Clause—"private property," "taken for public use" and "without just compensation"—without any intermediation from "due process of law," "liberty of contract," or anything else.

Professor Brewbaker, however, does not equate "*Lochner*izing" with applying a constitutional doctrine having a suspect foundation in the constitutional text. Instead, he appears to regard the error of *Lochner* as granting any significant constitutional protection to private property rights. This understanding of the lessons of *Lochner*, however, runs into grave legitimacy problems of its own. The Constitution contains several explicit guarantees of private property, including, of course, the Takings Clause, but also the Contracts Clause and the Due Process Clause. The Supreme Court has never suggested that these clauses were repealed by the demise of *Lochner*. Indeed, a theory that would read these clauses out of the Constitution because they involve protection of "economic" rights is just as suspect in terms of constitutional legitimacy as is a theory that says "due process of law" means "due substance of law."[21]

There is a further distinction between the substantive due process jurisprudence of *Lochner* and the protections afforded by the Takings Clause. Under the *Lochner* regime, a judicial determination that a regulation interfered with liberty of contract meant that it was absolutely prohibited by the Constitution. The Takings Clause does not carve out a zone of economic activity immune from regulation; it simply requires that the government pay just compensation when it regulates in such a way as to take private property. Thus, the Takings Clause permits all sorts of rearrangements of specific property rights; what it protects is the property owner's relative claim on the general wealth of society.

Perhaps in an effort to avoid this conclusion, Professor Brewbaker asserts that affording physicians the protection of the Tak-

20. ELY, *supra* note 6, at 14-18.

21. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (rejecting distinction between "property rights" and "personal rights").

ings Clause "would, for practical purposes, amount to the invalidation of health reform legislation."[22] But applying the fair return standard of the Takings Clause has not ended all regulation of public utility, railroad, and other common carrier rates. Similarly, there is no reason to believe that such a standard would stand as an insuperable barrier to health reform legislation, unless the politics of reform require expropriating the investment of physicians.

As this suggests, the most basic problem with Professor Brewbaker's sweeping equation of any protection of economic rights with *Lochner* is that it cannot be confined to issues involving physician price controls. If applying the Takings Clause to physician price controls is forbidden *Lochner*izing, then presumably the same holds for the longstanding doctrine that an opportunity public utilities be allowed to earn a fair return on their investment. And why stop there? The Supreme Court's regulatory takings doctrine, which has been repeatedly reaffirmed, would also have to go.[23] And indeed, Professor Brewbaker offers no reason why the most routine exercise of eminent domain authority to take a house or farm for a highway would not also have to be liberated from any constitutional constraints. The argument, in short, proves too much, and again suggests that Professor Brewbaker is prepared to engage in major reconstruction of constitutional law in order to save physician price controls from any judicial scrutiny.

III. Should Offsetting Benefits be Considered?

Professor Brewbaker also argues that the effect of government action on physicians "should be evaluated in the aggregate, rather than enactment by enactment."[24] He notes that government intervention in the medical market has arguably favored physicians in many ways:

> Government subsidies through Medicare and Medicaid have added to demand for physician services, raising physician incomes. Government tax policy has created incentives for workers to

22. Brewbaker, *supra* note 1, at 676.

23. Professor Brewbaker at one point misleadingly implies that all regulatory takings claims fail unless they fall within a per se category. Brewbaker, *supra* note 1, at 673 (quoting Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1621 (1988)). Whatever Professor Michelman may have had in mind in making the quoted statement, it is simply not true. Decisions invalidating federal and state action under the regulatory takings doctrine since 1978 but not relying on per se rules include: Hodel v. Irving, 481 U.S. 704 (1987); Ruckelshaus v. Monsanto Corp., 467 U.S. 986 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

24. Brewbaker, *supra* note 1, at 681.

> take compensation in the form of health insurance coverage rather than in cash, further decreasing the price sensitivity of consumers in the health care marketplace. Medical education and research enjoy heavy federal subsidies. States have protected physician interests through licensure restrictions and laws preventing the corporate practice of medicine.[25]

In the same vein, he argues that it is necessary to consider "both favorable and unfavorable features" of any health care reform legislation that is enacted.[26] For example, if reform legislation includes a guarantee of universal coverage, this could increase overall demand for physician services.[27] Similarly, if reform redirects demand for medical services away from specialists toward family practitioners, some physicians may benefit while others may lose.[28] Professor Brewbaker concludes from all this that "there is no apparent justification" for limiting judicial review to "a single piece of legislation." Instead, "a takings claimant must either demonstrate that government action, taken as a whole, has had a net adverse economic effect or explain why providers are constitutionally entitled to the continuance of market conditions resulting from health care policies the government presumably had no obligation to adopt in the first place."[29]

This criticism might have some validity if directed at a proposal to apply the ad hoc regulatory takings standard to a proposal for physician price controls considered in isolation. But although Professor Brewbaker does not realize it, his point actually provides powerful additional *support* for using the fair return standard advocated in my article. Part of the strength of the fair return approach is that it automatically picks up and incorporates all effects produced by past governmental action in determining whether price controls deprive physicians of an opportunity to earn a fair return on their original investment in violation of the Takings Clause. Thus, the fair return standard actually solves the very problem Professor Brewbaker decries.

The fair return standard basically compares two variables: expected revenues and expected costs. With respect to revenues, the standard seeks to determine the level of revenue that an individual physician (or a representative physician under group controls) is likely to earn under any given set of controlled prices. This inquiry neces-

25. *Id.* at 681-82 (citations omitted).
26. *Id.* at 682.
27. *See id.* at 685.
28. *See id.* at 686.
29. *Id.* at 694.

sarily requires an estimate of expected demand at different levels of pricing. And expected demand, in turn, automatically reflects all government policies that affect demand—including direct subsidies like Medicare and indirect subsidies through the tax system or mandates of universal coverage. With respect to costs, the standard looks in part to recurring or variable costs, which will pick up the effect of other government policies, like reduced (or increased) administrative costs caused by reform, and any reduction in malpractice insurance premiums caused by tort reform. Finally, insofar as past government subsidies have lowered the cost of medical education, this too will be picked up by reducing the amount of original investment on which a fair return must be earned. In short, the fair return standard functions like a true totality of the circumstances inquiry that overcomes the single-issue myopia that Professor Brewbaker thinks he detects in the suggestion that the Takings Clause should apply to physician price controls.[30]

Furthermore, if we take Professor Brewbaker's argument on its own terms—as a critique of the single issue nature of regulatory takings doctrine—then the same general response can be made as was made with respect to his other points: it proves too much. Some jurisdictions permit offsetting benefits to be taken into account in determining the *amount* of compensation an owner is entitled to for a taking.[31] And the Supreme Court has suggested that offsetting benefits from a *single* government action under review sometimes may be considered in determining whether that action constitutes a regulatory

30. In a somewhat related point made later in his article, Professor Brewbaker states: "There is no reason to assume *ex ante* that price regulation is a greater burden on a business than is nonprice regulation, and, accordingly, no reason to create separate constitutional standards for its review." Brewbaker, *supra* note 1, at 703-04. There is a two-part answer to this observation. First, only when prices are controlled does government regulation start to produce serious havoc (as implicitly acknowledged by Professor Brewbaker's discussion of the deterioration in the quality of health care services that we can expect if prices are controlled). Insofar as prices remain unregulated, the impact of most nonprice regulations can be minimized by price adjustments. This factor justifies paying less attention to nonprice regulation as long as prices are uncontrolled (although such regulations would always be open to challenge under the regulatory takings doctrine). Second, for the reasons explained in the text, once prices are controlled and the fair return standard kicks in, changes in revenues and costs produced by nonprice regulation are automatically accounted for by the fair return method. Thus, although the argument set forth in my original article would not give special scrutiny to nonprice regulation up to the point where prices are controlled, after that point both price and nonprice regulations would be taken into account.

31. 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8A.03 (3d rev. ed. 1991).

taking.[32] But the Court has never required that offsetting benefits derived by an owner from other statutes or government programs implemented at a different period of time be considered in determining whether a particular action is a taking.[33] For example, suppose the government builds a highway past a farm, greatly increasing the value of the land as a site for roadside facilities. Later, the government decides to widen the highway, and takes part of the land, now the location of motels and service stations. The government cannot argue that, in determining whether the second project represents a taking, all benefits the owner obtained from past government actions should first be offset against the present loss.

The reasons for ignoring past benefits are complex, and no doubt relate in large part to the need to preserve a judicially manageable inquiry. Everyone benefits from past government actions to some degree, if only "the advantage of living and doing business in a civilized community."[34] As Professor Brewbaker perceives, opening the inquiry to a full investigation of past benefits as well as present burdens would doom the enterprise from the start. This is of course what he wants to see happen. But that is precisely the point: the Court has not opened the inquiry in this fashion in other contexts for the very reason that it does not wish to doom the inquiry. Professor Brewbaker's argument therefore again reduces to a demand that, if generalized, would undermine any enforcement of the Takings Clause.

IV. Should "Defensive Maneuvers" Be Considered?

Without a doubt the most disturbing argument that Professor Brewbaker makes is the claim that the burdens of price controls should be overlooked because physicians and hospitals can engage in various "defensive maneuvers"[35] to mitigate the financial costs of such controls. With admirable if not astonishing candor, Professor Brewbaker suggests that physicians may respond to price controls by attempting "to increase the billable services, such as procedures and tests, they order for each patient."[36] Alternatively, physicians may seek to reduce inputs. For example they may "reduce office ameni-

32. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978) (transferable development rights).

33. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 522-25 (1986).

34. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

35. Brewbaker, *supra* note 1, at 694.

36. Brewbaker, *supra* note 1, at 683-84.

ties, spend less time with patients, or permit nurses or nurse practitioners to perform services physicians might otherwise have personally performed."[37] Similarly, hospitals are likely to reduce amenities and excess capacity, "delay investment in new technologies, hire relatively fewer skilled workers, discourage admissions, and discharge high-cost patients 'quicker and sicker.'"[38] Professor Brewbaker suggests that constitutional law should regard these "defensive maneuvers" as permissible mitigation of the effects of price controls, unless the deterioration in quality reaches the level of malpractice, or the padding of excess services constitutes fraud.[39]

This is, to say the least, a very odd defense of the constitutionality of price controls. In effect, Professor Brewbaker is saying that the government is entitled to require physicians to choose between earning a fair return on their investment and engaging in the ethical practice of medicine—and that the law should presume physicians will choose to sacrifice the ethical practice of medicine! It would be a tragic day for the country if its lawmakers ever consciously adopted such a policy. But even if such a policy were adopted, one can be sure that it would never be *defended*—either in the halls of Congress or in the courts—on the grounds suggested by Professor Brewbaker. Perhaps that is all that need be said: an argument that would never be publicly asserted by government lawyers in defense of a policy should not be credited in even the most private councils as a reason in support of the policy.

In the end, Professor Brewbaker's invocation of "defensive maneuvers" appears to be a further elaboration of his theme that all issues regarding price controls should be left to raw politics. If politicians try to expropriate physicians, physicians will respond by cutting the quality of patient care. Patients will then complain to politicians, who may then grant physicians temporary relief. Then the cycle will start all over again.

If the Constitution were silent, perhaps there would be no alternative but to endure the vision of endless partisan struggle that Professor Brewbaker conjures up. But there is reason to believe that the Takings Clause was designed precisely to forestall this kind of prospect. Again, the form of argument Professor Brewbaker adopts is generalizable far beyond physician price controls. Why should utility price controls be subject to Takings Clause scrutiny, when utilities can

37. *Id.* at 684.
38. *Id.* at 688 (quoting CHARLES E. PHELPS, HEALTH ECONOMICS 479 (1992)).
39. *Id.* at 684-85.

engage in "defensive maneuvers" by allowing service to deteriorate? After a couple long, hot summers of brownouts and blackouts, consumers will rise in anger and demand that the utility be given some rate relief. For that matter, why should we worry about judicial enforcement of just compensation for persons whose property is taken in eminent domain, given that failure to compensate will cause investment capital to flee to other countries and politicians will have to respond with promises of future protection in order to get it back? The exploitation-retaliation cycle is one way to handle these problems, but it is very costly, and can leave a lot of innocent bystanders injured in its wake. The Supreme Court has never felt compelled to leave eminent domain and public utility ratemaking to the political process, and there is no reason why any different response is appropriate with respect to physician price controls.

Conclusion

Professor Brewbaker's defense of the constitutionality of physician price controls is a puzzling one. He admits that price controls are "questionable policy"[40] and offers some vivid examples of why such a policy would harm patients and perhaps do little or nothing to control health care costs. The only explanation for his position appears to be the conviction that nothing could be worse than to involve the judiciary in the protection of "economic rights." Yet the longstanding and, on the whole, successful experience with judicial enforcement of the Takings Clause in the context of eminent domain and public utility ratemaking belies this concern. Indeed, so intent is Professor Brewbaker on knocking down any application of the Takings Clause to physician price controls he is forced to adopt arguments that would, if accepted, destroy any application of the Takings Clause in utility ratemaking and conventional eminent domain proceedings as well.

A far better approach is to build on the experience of the past, and ask whether a system of general federal controls on physician prices gives rise to the same concerns that have led to Takings Clause scrutiny of utility price controls. I have argued in my article that the cases are closely parallel, and that the Takings Clause and Due Process Clauses impose modest but important limits on the government's power to impose such sweeping controls. Professor Brewbaker's article stimulates broader speculations, but only reinforces the conviction that this conclusion is not just required by law; it is good policy too.

40. *Id.* at 671.