Eminent Domain, Police Power, and Business Regulation: Economic Liberty and the Constitution

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# EMINENT DOMAIN, POLICE POWER, AND BUSINESS REGULATION: ECONOMIC LIBERTY AND THE CONSTITUTION

Philip P. Houle*

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The preservation of property . . . is a primary object of the social compact . . . . Where is the inviolability of property, if the legislature . . . can take land from one citizen . . . and vest it in another? . . . . It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so . . . dangerous and enormous a power . . . .

_Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310-12 (1795)._

The fundamental maxims of a free government . . . require that the right[] of . . . property . . . be held sacred.

_Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J., for the Court)._

[Remember] always that generosity is not a virtue when dealing with the property of others.

_Cashion v. Western Union Telegraph Co., 123 N.C. 267, 273 (1898)._

A close and literal construction deprives [constitutional guarantees] of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

_Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)._

[The most enlightened judicial policy is to let people manage their own business in their own way . . . .

_Dr. Niles Medical Co. v. Park & Sons, 220 U.S. 373, 411 (1911) (Holmes, J., dissenting)._

I. INTRODUCTION AND OVERVIEW

For too long a time, it has been fashionable, if not a mark of insight and achievement, among much of academia and the intelligentsia to denigrate entrepreneurs, businessmen, and private economic liberties. But as the American philosopher H. L. Menchen wryly observed: "When I hear artists and authors making fun of businessmen I think of a regiment in which the band makes fun of the cooks." Those who endorse the quasi-religious pleas from the Enlightened Left to feed more and more of the nation's resources to the modern Omnivorous State for purportedly noble ends, ignore Justice Holmes' warning that: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."
In light of the importance of economic liberties to any democratic system, one would expect the judiciary to be a jealous guardian of all our constitutional freedoms, including economic liberty. Instead, the courts have decreed that much of the Constitution and the original understanding of the nature of economic liberty is now a dead letter. Economic liberty may be regulated nearly to the point of extinction so long as government’s basis is not patently foolish or irrational. With no textual support in the Constitution, courts have relegated economic liberty to second- or third-class status, holding that it is not sufficiently worthy to be included among the pantheon of fundamental or “preferred” freedoms.

Far more often than not, the average citizen or ordinary worker, consumer, owner, and taxpayer [hereinafter the “little guy”] bears the brunt of the “beneficent government” referred to by Justice Holmes that all too often is a “misguided misfire.” As a result, the “little guy” likely feels that with friends like that, who need enemies? While the judiciary did serve for many years as a bulwark against infringement of economic liberties, more recently it has nearly eviscerated those freedoms. For example, onerous and seemingly crushingly unfair government regulation of very small business (perhaps motivated by big business’ wish to eliminate competitors) has been routinely upheld on the least scintilla of “reasonableness.”

Making matters worse, the courts have not required Congress or state legislatures to place express time limits or sunset clauses on economic experiments so that meaningful judicial review could eventually be had. Instead, these experiments have been allowed to continue in perpetuity without facing an ultimate day-of-reckoning. Without meaningful judicial review as to the merits of local economic experiments which often directly or indirectly harm the “little guy” worker, consumer, or property-owner, the other branches of government are subject to the constant influence of special-interests unless or until the situation finally produces a long train of abuses which arouses protracted focused dissent among the general citizenry.

In eminent domain, the judiciary has adopted a similar supine posture. Courts now define public use so all-encompassingly that property may be taken from one private individual and given to
another. Nor is severe economic loss in the form of inverse condemnation from regulatory restriction held to be worthy of just compensation even though an owner may have lost over ninety percent of the value of his or her property. Additionally, the property owner’s journey from a taking or regulatory loss to just compensation may well be described as a legal-minefield.³

The present situation contrasts starkly with the framers’ strongly held view of the importance of economic liberty and the readiness with which just compensation should be forthcoming for any taking or regulatory overreaching. The current woeful legal status of economic liberties contrasts sharply with the preferential treatment given personal freedoms, which are deemed to be a branch of constitutional guarantees somehow more noble and worthy than mundane economic liberties. While government can reduce the value of private property to all but a tiny fraction of its preexisting value with impunity, it must show a compelling interest to infringe on a personal freedom in any way. Constitutional history and the need to adhere to a written constitution aside, the Supreme Court aptly noted that: “Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any . . . may lessen or extinguish the value of the other three.”⁴ Yet this common-sense approach has been sorely lacking in judicial decisions on economic liberties over the last 55 years.

3. The Federal Circuit, in Yuba Goldfields, Inc. v. United States, said: [T]he law of just compensation is hardly a model of clarity . . . [It is] ‘largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric.’ [It is] ‘liberally salted with paradox’ and . . . ‘jarring outcomes’ that are ‘surprising to the uninitiated.’ 723 F.2d 884, 887 (Fed. Cir. 1983) (citations omitted) (quoting Van Alstyne, Taking or Damaging by Police Powers: The Search for Inverse Condemnation Criteria, 44 S.C.L. Rev. 1, 2 (1970); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1169-70 (1967)).


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There is clearly a need to reexamine anew the status of economic liberties under the Constitution and to restore them to their rightful place. As Justice Holmes noted in this regard: "It is one of the misfortunes of the law that ideas become encysted in [verbiage] and therefore for a long time cease to provoke further analysis." Thus, recent precedent should not prevent this reexamination because case-law may not preempt the Constitution itself. This is especially true when individual rights would be strengthened, rather than reduced, by a reversal or correction of well-meaning but erroneous judicial pronouncements.

Honoring the framers' intent is not "conservative judicial activism" but is instead a return to the meaning of our written Constitution. If its meaning has been irrevocably lost, a constitutional convention should be held to restore an ascertainable meaning to the Constitution—or openly admit that judges are now freed from the vestiges of judicial restraint in adjudicating constitutional law and can now openly impose their own personal or class predilections in the guise of discerning the entrails of current mores. Leaving to judges, rather than to elected legislators, the authority to discern public mores is farcical and would abrogate any meaningful concept of constitutional law as a system of ordered liberty. It is, after all, a written Constitution that we are interpreting, not a delphic-riddle requiring a judicial priesthood to render it intelligible. It should not be forgotten by the legal profession that is perhaps too often caught up in the intricacies of a now highly-developed, judicially-crafted constitutional jurisprudence, that the Constitution was written for, by, and to the people.6

5. Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting). Justice Felix Frankfurter observed "a tendency ... whereby phrases are made to do service for critical analysis by being turned into dogma." Pennekamp v. Florida, 328 U.S. 331, 352 (1946). See also Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech."); Allegheny College v. National Chataqua Co. Bank, 246 N.Y. 369, 373, 159 N.E. 173, 174 (1927) (Cardozo, C.J., for the court) ("The half truths of one generation tend ... to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, once taken for granted, are disregarded or forgotten."). Verbiage should never be allowed to hinder determination of its underlying legislative intent. "One of the inadequacies of language is that sooner or later, the thing is confused with the symbol for that thing," Gaines v. Bader, 253 S.W.2d 1014, 1015 (Tex. Civ. App. 1952).

6. President Woodrow Wilson noted that the "Constitution of the United States is not a mere lawyers' document ... ." W. Wilson, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908).
The alternative to interpreting the Constitution as originally written and intended would be to reduce our legal system to one of ideologically-warring factions of men and women (rather than of law) who intermittently take control of the ship-of-state and judicial appointment process and thus feel vindicated in imposing personal (although strongly held) views to off-set the perceived errors and excesses of a predecessor group. Constitutional adjudication would thus become little more than ideological plunder for the latest political winners in a revised version of the “spoils” system. In the absence of a transcendent body of principles undergirding constitutional law, a cycle of judicial retaliation might then be perpetuated, not unlike the seemingly constant cycle of Middle East infighting.

Law is reason and thus ideas sooner or later manifest themselves as law. Today western civilization seems to be trapped between two opposing ideologies which affect life in general and economic liberties in particular: collectivism and individual freedom. Although these opposing ideologies have been debated since the time of Plato and Aristotle, they are especially urgent today. Western civilization has been living off of the accumulated moral capital of the last three or four centuries which is dangerously close to depletion. As a result, we may foist on ourselves a radical system from either end of the ideological spectrum and be headed to a very dark future indeed.

The free market is the only real way in which individual moral choice can be encouraged or even allowed in an open pluralistic society that knows no orthodoxy or civil religion. Without a free market, government will inevitably chill the exercise of personal freedoms by increasingly controlling individuals’ livelihoods. Historically, this has been the case whenever a monarchy, republic, or politburo has reordered an economy’s workings, necessitating greater and greater control in an attempt to achieve an ever-elusive goal. An open society thus dies from internal ideological pressure as a radical despotic “civil religion” attempts to fill the void left by abandoned older principles by claiming to give meaning to life and is imposed on a nation no longer capable of democratic self-government.

The free market, especially when supported by constitutional guarantees, restricts government’s historic tendency to control more
and more of life. The free market gives moral worth to individual decisions by freeing us from government coercion. After all, one cannot legislate morality, a truth frequently forgotten when dealing with this branch of constitutional rights. Thus, one's actions have no moral worth even in a just society (assuming we could permanently escape humanity's limited capacity for perfection and create a truly just society) when coerced by law.

The free market does not require humanity to first become better than it is in order to further the greater good. Likewise, the free market does not require establishment of an elite to manage our lives until the rest of us are someday, somehow sufficiently enlightened to do the job ourselves. Instead, a free market provides a self-enforcing motive by which one who satisfies society's wants and needs simultaneously improves his or her own lot.

However, current legal thought has abandoned reliance on those principles. Instead, it has attempted to use a standardless or unprincipled ad hoc method, groping along on a case-by-case basis. This often results in jarringly unfair and unexpected results. As the Supreme Court admitted in 1978, eminent domain issues involve "essentially ad hoc ... inquiries ..." The refusal to rely on permanent principles in this or any other area of constitutional law (even, or especially, in the name of modernity) is ominous. Historically, governments before and after the American Revolution have refused to limit themselves to any such fixed standards. Thus, those governments effectively usurped absolute power by retaining the ability to continually redefine rights anew, using a case-by-case method in which everything is always up-for-grabs and the potential for corruption and influence-peddling is increased considerably.

This ad hoc method of adjudicating economic liberty issues has been derided when applied to personal freedoms such as the right to own and publish pornography. Justice Potter Stewart's now-famous formulation that while he could not define pornography, he certainly knew it when he saw it, has been blindly applied in reviewing economic liberty questions. Although Justice Stewart's for-

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mulation has never been adopted by a majority of the Court in the area of pornography because of its unworkability, subjectivity, and standardlessness, under the prevailing case-by-case methodology, trial judges and hearings examiners are presumed to "know" when the state has gone too far in economic matters even though no meaningful definition or standard exists by which to guide and inform such decisions.

Thus, the real point of the American Revolution has been largely forgotten. At the founding of our nation, we as individuals did not simply receive a handful of permitted or enumerated rights from the government in a moment of corporate kindness. Rather, we held all rights and, instead, vested government with limited power, as the ninth amendment attests. The rarity (and indeed fragility) of a bona fide constitutional republic in the annals of an almost uniformly despotic human history should not be underestimated. Utopian-like criticism of our constitutional government's failure to reach its ideals, stated in absolute terms, must be tempered with the realization of our nation's unique status as an unparalleled effort at institutionalizing wide-spread freedom: government by law rather than men is a daring experiment barely two centuries old (and much less than that in most nations where attempts at establishing or maintaining constitutional republics are underway). No one knows yet whether a truly republican form of government can be permanently established or whether it will inevitably dissolve into despotism of one type or another that has, until now, been the overwhelming, prevailing norm throughout 6,000 years of recorded human history.9

9. Ayn Rand captured the essence of this concept when she noted that: Every political system is based on some code of ethics. The dominant ethics of mankind's history were variants of the altruist-collectivist doctrine which subordinated the individual to some higher authority, either mystical or social. Consequently, most political systems were [and are] variants of the same statist tyranny . . . [with] [s]ociety . . . placed outside the moral law, as its . . . source or exclusive interpreter . . . .

The most profoundly revolutionary achievement of the United States . . . was the subordination of society to moral law.

. . . .

All previous [governments] regarded man as a sacrificial means to the ends of others, and society as an end in itself. The United States regarded man as an end in himself, and
In this light, the judiciary's tragically unwise virtual abandonment of meaningful review of legislative or executive economic regulation has recently borne rather bitter fruit which adversely affects the "little guy" much more often than big business. For example, in 1976, the Supreme Court upheld a New Orleans ordinance that outlawed all food push-cart vendors from selling food in the French Quarter who had not been in business at least eight-years prior to its effective date, forcing a woman who had been selling food there for only two-years out of business and leaving just two vendors remaining. The Supreme Court's view of its role and the issues at stake was surprisingly modest, given its treatment of personal freedoms:

[T]he judiciary may not . . . judge the wisdom or desirability of legislative . . . determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the . . . economic sphere, it is only the . . . wholly arbitrary-act, which cannot [satisfy] . . . the Fourteenth Amendment. 11

In 1981, the Supreme Court of Michigan upheld the use of eminent domain to convert a "tightly knit residential enclave of first- and second-generation Americans, for many of whom their home was their single most valuable and cherished asset" to build a privately-owned auto-assembly plant. 12 In 1982, the Supreme Court of Cal-

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More recently, columnist Jack Anderson noted that "all those other constitutions said, 'We the government' grant you, the people, the following rights. Our constitution says, 'We the people' grant the following powers to the government and the government can have no others except those we have listed herein." Anderson, A Difference in Constitutions, The Wash. Post, Sept. 21, 1986, at C7, col. 4. (favorably quoting President Reagan's comparison of the United States' and Soviet Union's constitutions).

10. City of New Orleans v. Dukes, 427 U.S. 297 (1976). See also Wickard v. Filburn, 317 U.S. 111 (1942) (upholding a law limiting the amount of wheat that owners of land could grow for their own personal consumption on the basis that it would lessen commerce by reducing the amount of food that land owners otherwise would have to buy from retailers).


The reverberating clang of [this decision's] economic, sociological, political and jurisprudential impact [on public use] is likely to be felt for generations. By its decision, the Court has altered the law of eminent domain . . . jeopardiz[ing] the security of all private property ownership [by allowing government to take private property for use by a private corporation].

Id. at 645, 304 N.W.2d at 464-65.
ifornia upheld a city’s use of eminent domain to acquire a professional football franchise. In 1984, the Supreme Court upheld Hawaii’s use of eminent domain to transfer land from large owners to individual single-family home buyers. And in 1985, California upheld an ordinance prohibiting an owner whose apartment building was under rent-control from converting it to a non-residential use.

Commentators have criticized this trend, noting the considerable distance the judiciary has traveled from the intent of the framers of the Bill of Rights that “private property [not] be taken for public use without just compensation,” as stated in the fifth amendment. As a result, the public use limitation has been effectively declared a nullity, much like the privileges and immunities clause. Forgotten is the truth that personal freedoms are only as secure as and flourish only in proportion to economic liberties. Justice Antonin Scalia has criticized the present judicial approach to economic liberties:

[C]ontrasting economic affairs with human affairs as though economics is a science developed for the benefit of dogs or trees, something that has nothing to

13. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835 (1982). Chief Justice Rose Bird, concurring, noted that she was “forced by the current state of the law to agree with the result reached by the majority” but that it constituted “creeping statism.” Id. at 76, 646 P.2d at 845 (Bird, C.J., concurring). See also Comment, Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation, 32 EMORY L.J. 857 (1983).
17. Absent constitutional amendment, the validity of the judiciary’s declaring any constitutional provision to be a dead-letter is highly questionable. See Ullmann v. United States, 350 U.S. 422, 428 (1956) (“Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.”); Posner, The Constitution as an Economic Document, 56 GEO. WASH. L. REV. 4, 25 (1987) (“Constitutional provisions protecting personal liberties are no more emphatic or broadly worded than those protecting economic liberties.”). Judge Posner cited F. McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958), as an able refutation of Charles Beard’s thesis that “the purpose of the Constitution was to redistribute wealth from the poor[] ... to the upper class. ...” Posner, supra, at 4.
do with human beings, with their welfare, aspirations, or freedoms... is a
pernicous notion, ... that characterizes much American political thought. It leads
to the conclusion that economic rights and liberties are qualitatively distinct from,
and fundamentally inferior to other noble human values called civil rights, about
which we should be more generous... Few of us, I suspect, would have much
difficulty choosing between the right to own property and the right to receive a
Miranda warning....

Human liberties of various types are dependent on one another, and it may well
be that the most humble of them is indispensable to the others—the firmament
... upon which the high spires of the most exalted freedoms ultimately rest....
[In] no society, in any era of history ... [have] high degrees of intellectual and
political freedom ... flourished side by side with a high degree of state control
over... economic life.... As a practical matter, he who controls my economic
destiny controls ... my life as well."

Other respected commentators have chronicled the parallel develop-
ment of economic liberties and personal freedoms, concluding that
personal freedoms are only as strong in a nation as its economic
liberties. Thus, both the wisdom and rationale for relegateing eco-
nomic liberties to second-class status compared with personal free-
doms is suspect.

The important status that the framers gave and intended that we
should give to economic liberties must not be ignored or minimized.
If we continue to fail to do so, we may likely rediscover the truth
that "[i]n both time and space, democracy fills a very small corner"

18. Scalia, Economic Affairs as Human Affairs, 4 Cato J. 703, 703-04 (1985). For a good
outline on property's importance to both free enterprise and Marxism, see Pilon, Property Rights,

19. The direct correlation between economic liberties and "personal freedoms" was documented
in a survey comparing the status of personal and economic freedoms and economic systems in 165
nations, virtually the entire world. Lay Commission on Catholic Social Teaching and the U.S.
(citing Wright, A Survey of Economic Freedoms, 64 Freedom at Issue 15 (1982)). See generally Free
Trade: The Necessary Foundation for World Peace (1985) (concluding that free trade is a pre-
requisite for lasting world peace). See also Pool, How Powerful is Business?, Does Big Business
World's Political-Economic Systems 5 (1977)) ("Liberal democracy has arisen only in nations that
are market-oriented.").

Harvard Government Professor James Q. Wilson noted that "[t]hough not all market-oriented
systems are democratic, every democratic system is also market-oriented." Wilson, Democracy and
the Corporation. Wall St. J., Jan. 11, 1978, at 14, col. 4. Even Professor Lawrence Tribe acknowledges
that "people bound under the weight of poverty [or loss of economic liberty] are unlikely to stand
of world history and "may . . . turn out to have been . . . a brief parenthesis that is closing before our very eyes." After all, "[t]he free [market] economy is relatively youthful, and back beyond the eighteenth century one finds only the grim reality of static subsistence economies" and human misery. Government-controlled economies are not the wave of the future but the curse of a discredited past, not a Brave New World but the Same Old Story.

II. PUBLIC USE

Originally, the Supreme Court stoutly defended the right to prevent the involuntary transfer by eminent domain of one's private property to another individual, a concept which was honored until relatively recently. However, as time passed, the Supreme Court began to assume a less protective posture regarding public use issues, and the Court has not invalidated a taking on public use grounds since 1937.

While "the question of what is a public use is [technically] a judicial one," the Supreme Court will uphold any statute authorizing eminent domain "unless its invalidity is plain and apparent . . . ." Thus, the Court maintains the view that questions as to "the necessity and expediency of . . . taking . . . property for public use 'are legislative questions,' " regardless which administrative


21. Beckwith, What Should Lawyers Do?: An Essay on Lawyers, the Free Economy, Redistribution, and Democratic Legitimacy, 16 N.C. Cent. L.J. 1, 2 (1986). Socialism's scarcity, not the free market's usual abundance, produces totalitarianism. Ladd, Secular and Religious America in Unsecular America 24 (R. Neuhaus, ed. 1986) ("Only when there is . . . no possibility of most people living beyond bare subsistence will the majority . . . consent to [a] . . . privileged elite. The rule of an aristocracy is tenable only in scarcity-bound societies.").


agency has been redelegated with authority to make that decision.²⁶

In 1923, the Supreme Court, noted that this modern approach gave public use an expansive definition:

It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [that it] constitute a public use . . . . Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment.²⁷

Thus, public use was defined to include virtually any activity involving a governmental agency, regardless of how few members of the public would actually benefit therefrom.

This trend accelerated in 1954 when the Supreme Court upheld the District of Columbia’s taking, as part of an urban renewal program, a commercial building that met local health and safety codes and conveying it to a private developer.²⁸ Writing for the Court, Justice Douglas said that the legislature and administrative agencies acting on the legislature’s behalf, rather than the judiciary, are the main guardians of public needs because a determination of public interest is essentially conclusive whenever a legislature or administrative agency has spoken.²⁹ Thus, he opined that the judiciary has an extremely narrow role in determining whether the power being exercised is for a public purpose.³⁰ He underscored this point by noting that the uses for which government may condemn property are virtually limitless:

The concept of the public welfare [public use] is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of legislature to determine that the community should be beautiful as well as clean, well-balanced as well as carefully patrolled . . . . If those who govern the District of Columbia decide that the Nation’s Capital should be

²⁶. North Laramie Land Co. v. Hoffman, 268 U.S. 276, 284 (1925) (quoting Bragg v. Weaver, 251 U.S. 57, 58 (1919)). One exception to the "political question" rule occurs when the legislative or administrative determination of exigency or need "involve[s] an impossibility." Welch, 327 U.S. at 552.
²⁹. Id. at 32. However, Berman has brought mixed blessings. See Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ("aesthetics" cited to uphold multifamily exclusionary zoning ordinance).
³⁰. Berman, 348 U.S. at 32.
beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. 31

Despite the misplaced optimism of Justice Douglas' hopeful view on government's capacity to encourage benevolent and nurturing change, the reality is usually less sanguine. Experience shows that "lawmakers and bureaucrats design statutes and regulations to benefit private, divisible groups ... commonly called interest groups, and that the cost of these statutes and regulations ordinarily ... fall on the population in general." 32 While this may seem harsh or cynical, one need only reflect momentarily to recall the framers' view of humanity's limited capacity for perfection and the need to guard against natural human frailty by means of constant checks-and-balances—and read the newspaper regularly—to confirm this. 33 Government regulation almost always has fallen and continues to fall hardest on the "little guy" worker, consumer, or property-owner.

In 1946, the Supreme Court noted that "[n]o case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws." 34 This unfortunate trend continued unabated in the 1984 Supreme Court holding in Hawaii Housing Authority v. Midkiff. 35 Midkiff involved rather unique circumstances. As originally settled by the Polynesians, Hawaii's "economy [included] ... a feudal land tenure system .... [with] no private ownership of land." 36 As of the mid-1960's, the state and federal governments owned about 49% of Hawaii's land and only 72 private

31. Id. at 33. (citation omitted) (citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952)).
34. Tennessee Valley Authority v. Welch, 327 U.S. at 551 (quoting Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908)).
36. Id. at 232.
owners held another 47% (including 22 owners who held 72.5% of that privately-held portion). As a result, the Hawaii "legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and the public tranquility and welfare." The landowners "claimed that the federal tax laws [on capital gains] were the primary reason[s] they previously had chosen to lease, ... [rather than to] sell, their lands." However, "[b]y condemning the land in question, ... [Hawaii made] the federal tax consequences less severe while still facilitating the redistribution of fees simple."

Although the Supreme Court could have limited its public use analysis and the scope of this decision to Hawaii's unique history, it chose instead to frame its opinion broadly. Reiterating the narrow role it must play in reviewing a legislative determination of public use, the Court stated that it "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" The Supreme Court added that an eminent domain statute would be upheld unless, on its face, the means authorized could not possibly achieve its stated goal despite its practical effects:

Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether in fact the provision will accomplish its objectives is not the question: the [Constitution] is satisfied if ... the ... [state] ... rationally could have believed that the [Act] would promote its objective.' When the legislature's purpose is legitimate and its means are not irrational, ... empirical ... debates over the wisdom of other kinds of socioeconomic legislation ... are not to be carried out in the federal courts. Redistribution of fees simple to correct

37. Id. This fact, which likely played an important part in the decision, may have as-yet unforeseen consequences on American Indian land claims, especially those which would place large portions of a State's land mass in a few hands. If Hawaii could claim that divestiture was a public use, such reasoning may well be extended to deny American Indian claims for specific performance under existing treaties or return of lands allegedly wrongfully taken decades ago, leaving them with monetary claims only. See also Block v. Hirsh, 256 U.S. 135, 156 (1921) (upholding war-time rent-control while noting that ownership was "monopolized in comparatively few hands").
38. Midkiff, 467 U.S. at 232.
39. Id. at 233.
40. Id.
41. Id. at 241 (citation omitted) (quoting United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896)).
deficiencies in the market . . . is a rational exercise of the eminent domain power.42

That statement has vast implications, given the expansive mass of "socioeconomic legislation" and the extensive government reorganization of the economy implicitly approved thereby. In concluding this point, the Supreme Court stated that government's public use transfer of private property from one individual to another is permissible even though only a tiny segment of the population is benefited:

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose . . . 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.' '[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class to a public affair.' . . . In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose and not its mechanics that must pass scrutiny under the Public Use Clause.43

42. Id. at 242-43 (citations omitted) (quoting Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 671-72 (1981)) (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Vance v. Bradley, 440 U.S. 93 (1979)). In an earlier case, the Court stated, "[r]egardless of the ultimate economic efficacy of the statute, . . . it bears a reasonable relation to the State's legitimate purpose . . . ." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1978). However, the Supreme Court in Midkiff did not mention Agins v. City of Tiburon, 447 U.S. 255 (1980), where the Court had earlier noted that "[t]he application of a general zoning law to [a] particular property effects a taking if the ordinance does not substantially advance legitimate state interests," Id. at 260. Thus, Agins should require government to make more than a minimal showing that a particular law was rational but instead prove that the action "substantially advanced legitimate state interests." See United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985) (citing Agins, 477 U.S. 255); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (citing Agins, 477 U.S. 255). In Midkiff, the Supreme Court noted the possibility that less deference would be given when government does not intend to effect a taking than where it does. 467 U.S. at 241 ("the 'order in question was not, and was not claimed to be, . . . a taking of private property for a public use under . . . eminent domain' ") (quoting and distinguishing Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416 (1896)). Writing for the Ninth Circuit, Judge Alex Kozinski stated that:

It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking. In the former case, the court is validating the will of the legislature; in the latter, it may be thwarting the legislative will by ordering compensation where the legislature had no intention of engaging in [a] compensable transaction.

Hall v. City of Santa Barbara, 797 F.2d 1493, 1503 n.25 (9th Cir. 1986).

43. Midkiff, 467 U.S. at 243-44 (citation omitted) (emphasis added) (quoting Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923); Block v. Hirsh, 256 U.S. 135, 155 (1921)).
The Supreme Court ended by noting that takings by states and municipalities were subject to no greater standard of review than those by federal agencies because “[s]tate legislatures are as capable as Congress of making such determinations within their respective spheres of authority.” In a footnote, the Supreme Court added that it was “worth noting that the Fourteenth Amendment does not . . . contain an independent ‘public use’ requirement” so that “[i]t would be ironic to find that state legislation is subject to greater scrutiny” than federal takings. That attitude of strict or pro-government construction of the fourteenth amendment’s cryptic due process and equal protection clauses as applied to economic liberties contrasts sharply with the Supreme Court’s usually expansive reading of the very same constitutional guarantees in the context of personal freedoms.

One respected commentator, reviewing Midkiff, concluded that “the Court was actually saying . . . that the floodgates are now open, that almost any statute having a [colorably] reasonable relation to the ‘public interest’ will be sustained—even if it sanctions what amounts to a private taking.” Thus, current case-law holds that eminent domain takings are, in effect, non-justiciable, absent obvious fraud or abuse and that state and local governmental takings will be subjected to no greater (and possibly to less) scrutiny than those by federal agencies.

III. EMINENT DOMAIN AND THE POLICE POWER: WHEN DOES REGULATION BECOME A TAKING?

In Midkiff, the Supreme Court stated: “The ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police

44. Id. at 244.
45. Id. at 244 n.7. See also Maier v. City of New Orleans, 516 F.2d 1051, 1059 n.39 (5th Cir. 1975), cert. denied, 423 U.S. 1049 (1975) (“Local ordinances are accorded the same Fifth Amendment due process and ‘taking’ analysis as state statutes.”) (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-94 (1962)). Elsewhere, the Supreme Court said that absent “fraud or abuse”, it “must accept” a state agency’s empirical or judgmental decision to exercise eminent domain. Morris v. Duby, 274 U.S. 135, 144 (1927). See also Boom Co. v. Patterson. 98 U.S. 403, 406 (1881) (state power of eminent domain is an inherent attribute of its sovereignty and may be exercised without *federal approval); Pollard’s Lessee v. Hagan, 44 U.S. (3 How.) 212, 220 (1845); Kohl v. United States, 91 U.S. 367, 372-73 (1875); Robinson v. Transcontinental Gas Pipe Line Corp., 421 F.2d 1397, 1398 (5th Cir. 1970), cert. denied, 398 U.S. 905 (1970).
powers."\textsuperscript{47} That statement unintentionally may have worsened the situation, given current confused thinking on the matter. The mere statement that B begins where A ends does not define adequately the size of their respective dimensions.

Further, any such formula injects a strong element of uncertainty and an unhealthy dose of virtually absolute government discretion. The effect of abandoning unvarying principles of economic liberties for a standardless ad hoc or case-by-case method of adjudication not only seriously dilutes individual rights in any area but also reduces economic planning and litigation to a virtual crap-shoot in which the outcome is extremely difficult to predict due to the variety of potential ways in which any single judge or hearing examiner might weigh the facts. While this may be inherent to some degree in any system of justice, the express abandonment of fixed principles for a standardless case-by-case method vests the decision-maker, administrative or judicial, with nigh absolute power. Further, it presents an unhealthy potential for corruption while chilling the exercise of other freedoms.

That problem is further compounded by the fact that eminent domain and the police power are "difficult to distinguish consistently . . . so that they are sometimes confused . . . [but are] quite distinct, although analogous[:]."\textsuperscript{48}

Briefly, eminent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest; and the police power, although it may take property, does not, as a general rule, appropriate it to another use, but destroys the property, while . . . eminent domain [takes] property . . . from the owner and transfer[s] [it] to a public agency to be enjoyed . . . as its own.\textsuperscript{49}

However, "[t]here is no set formula [determining] where [police power] regulation ends and taking begins . . . [T]he question de-

\textsuperscript{47} Midkiff, 467 U.S. at 240.

\textsuperscript{48} 29A C.J.S. Eminent Domain § 6 (1965). See also 16A Am. Jur. 2d Constitutional Law § 365 (1979). While, strictly speaking, it may be said that the United States lacks police power, it nonetheless has similar equally potent powers. See 91 C.J.S. United States § 5 (1965); 77 Am. Jur. 2d United States § 30 (1979).

\textsuperscript{49} 29A C.J.S. Eminent Domain § 6 (1965).
pends on the particular facts and the necessities of each case.” 50 In 1980, the Supreme Court stated flatly that regulation became a taking when it “‘denie[d] an owner economically viable use of his land.’” 51 As it said years ago, “[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . . [T]his is considered to be a question of degree and . . . cannot be disposed of by general propositions.” 52 But, in 1982, the Court said that “whether public action works a taking is ordinarily an ad hoc inquiry.” 53

An obvious example of non-compensable police power action is the destruction of private property in the course of fighting a fire or containing an epidemic. 54 The clear cases of non-compensated, non-possessory regulation involve basic restrictions on use of property such as zoning. Whether regulation goes too far is considered to be a factual issue of degree. 55 “Although a comparison of values before and after [regulation] is relevant [to this factual determination], it is by no means conclusive . . . .” 56 In fact, the Supreme Court has upheld a police power regulation that diminished a property’s value from $800,000 to $60,000 (about 7% of its pre-regulation value). 57

The fact that an owner’s property is not the only one affected by a regulation may result in a denial of any compensation since the owner is deemed to “share with other owners the benefits and burdens of [government’s] exercise of its police power” without compensation rather than bear its burdens alone. 58 Thus, wide-spread

52. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922). The Supreme Court has historically indicated that questions relating to the abuse of legislative regulatory powers were “political, not judicial.” Munn v. Illinois, 94 U.S. 113, 134 (1878); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428, 431 (1819).
56. Goldblatt, 369 U.S. at 594 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
58. Agins, 447 U.S. at 262.
“prohibition of the most profitable or beneficial use of . . . property [may well facilitate] a finding that [no] taking has occurred.”59 According to the Second Circuit:

[A] taking is less likely to be found when the challenged interference with a property interest ‘arises from some public program adjusting the benefits and burdens of economic life to promote the common good,’ than when the interference entails a physical invasion . . . by the government.60

Further, the Federal Circuit stated that determining whether the United States “acted in a proprietary or governmental—sovereign capacity is of little, if any, use in Fifth Amendment just compensation analysis.”61 As to non-possessory governmental activity, the Supreme Court accords particular significance to the following three factors: (1) the economic impact of the regulation on the claimant and, particularly, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the government action.62

However, “deprivation of the right to use and obtain a profit . . . is not . . . sufficient to . . . [support] a taking [claim].”63 The United States District Court for the Southern District of New York recently stated that neither “the fact that . . . [an owner] might have to sell [his or her] property because of [resulting] financial hardship . . . nor the fact that . . . [he or she] might be unable to recoup [his or her] costs required a finding that a taking . . . occurred.”64 So, as might be suspected, harm to future speculative opportunities

60. Id. at 317 (citation omitted) (quoting Penn Central, 438 U.S. at 124).
61. Yuba Goldfields, 723 F.2d at 889 (citing Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)).
63. Loretto, 458 U.S. at 436.
64. Sadowsky, 732 F.2d at 318. Two commentators have recently argued well that “one must abandon abstract calculations which obfuscate the problem . . . [and] [i]nstead . . . examine the [particular] hardship[.] placed on individuals by such actions,” much as tort law requires that defendants take plaintiffs as they find them, not as they would like them to have been (in good health and able to withstand the injury inflicted). Berger & Kanner, Thoughts on The White River Junction Manifesto: A Reply to the “Gang of Five’s” View on Just Compensation for Regulatory Taking of Property, 19 Loyola L.A. L. Rev. 685, 744 (1986).
and potential profit is not compensable. 65 "The crucial inquiry, is not whether the regulation permits plaintiffs to use the property in a 'profitable' manner, but whether the ... use allowed by the regulation is sufficiently desirable to permit property owners to 'sell the property to someone for that ... [remaining use]'" even if hardship results. 66 As stated by the Seventh Circuit: "A property owner must establish that the right lost was 'so essential to the use or economic value of [the] property that state-authorized limitation of it amounted to a "taking."' ... [Thus, t]he fact that an owner has suffered a serious hardship begins rather than ends the analysis." 67

Similarly, the Eighth Circuit upheld a Minnesota statute establishing maximum rates that private nursing-homes with Medicare patients could charge other non-Medicare private patients. In distinguishing nursing home owners from public utilities whose owner must remain in business, the court of appeals said: "Minnesota nursing homes, unlike public utilities, have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed ... on the return they obtain for [their] investment ... in nursing home operations." 68 Presumably, owners could convert nursing homes to other uses, not simply sell them. However, as noted earlier, California recently denied owners the chance to convert their property to another, more profitable (or perhaps merely profitable) use when it upheld an ordinance which required apartment owners to maintain the residential nature of their respective properties, which were subject to rent control. 69


66. Park Avenue Tower Assocs. v. City of New York, 746 F.2d 135, 139 (2nd Cir. 1984). See also Shaw v. United States, 740 F.2d 932, 939 (Fed. Cir. 1984) (use regulation not invalid "merely because the result may diminish the value of the property and prevent its most beneficial use"). If profitability were the test, efficient enterprises would be penalized unfairly.


68. Minnesota Ass'n of Health Care v. Minnesota Dep't of Pub. Welfare, 742 F.2d 442, 446 (8th Cir. 1984) (citing In re Permian Basin Area Rate Cases, 390 U.S. 747, 772-73 (1968)).

69. Nash, 688 F.2d at 896.
Thus, diminution in value of property due to government action—whether through overly restrictive regulation or through public programs which place undesirable uses nearby—is not compensable.\textsuperscript{70} The First Circuit summarized this point well in 1977:

[A] long line of Supreme Court cases establish that . . . substantial economic loss and significant diminution in value alone do not establish compensable takings. Government hardly could go on [at least as it has] if it could not execute programs that adversely affect property values without paying for every such change, and the Court has held . . . that governmental actions destroying recognized economic interests do not constitute a taking. [T]he frustration of speculative expectations . . . [is] not . . . compensable. The recent cases . . . suggest that . . . takings exist only when the diminution in values amounts to the total destruction of the value of . . . [the property].\textsuperscript{71}

In 1978, the Supreme Court again stated that it had and would uphold "land-use regulations that destroyed . . . recognized . . . property interests" while leaving some residual value.\textsuperscript{72} The Court also said that the fact that a regulation "has a more severe impact on some landowners than others, . . . does not mean that the law effects a 'taking.'"\textsuperscript{73}

Thus, while "damages are recoverable for inverse condemnation,"\textsuperscript{74} it appears that a regulatory inverse condemnation is simply another way of saying that government regulation must completely destroy the value of property to constitute a compensable taking.\textsuperscript{75}

\textsuperscript{70} See Florida East Coast Prop. v. Metropolitan Dade County, 572 F.2d 1108, 1111 (5th Cir. 1978), cert. denied, 439 U.S. 894 (1978) (diminution in value due to establishing prison work-release center nearby was not compensable).

\textsuperscript{71} Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91, 100 (1st Cir. 1977) (emphasis added) (citing Armstrong v. United States, 364 U.S 40, 48 (1960) on the "total destruction of the value" test).

\textsuperscript{72} Penn Central, 438 U.S. at 125. Apparently this is another way of saying that as long as the owner is able to sell property for any use, however humble, no "taking" has occurred.

\textsuperscript{73} Id. at 133.

\textsuperscript{74} Martino v. Santa Clara Water Dist., 703 F.2d 1141, 1148 (9th Cir. 1983) (emphasis added).

\textsuperscript{75} See Park Avenue Tower, 746 F.2d at 140 ("the suggestion that the city may not cause the loss of a reasonable return is merely another way of arguing that it may not impair the value of . . . property") (citing William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117, 1120-21 (9th Cir. 1979). cert. denied, 445 U.S. 928 (1980)). See also Yuba Goldfields, 723 F.2d at 887 ("payment of just compensation is equally attributable to . . . 'inverse condemnation' "); id. at 889 ("What counts is not what the government said it was doing . . . or what its intent was . . . What counts is what the government did.") (citing Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)).
Accordingly, a municipality’s temporarily freezing or phasing-in new real estate development is not compensable.\textsuperscript{76}

In concluding this point, it should be asked what the courts mean in saying that lost “speculative” value in property need not be compensated. If by “speculative” the courts mean to include sudden, unpredictable increases in value due to unforeseen events, the fairness of that position seems clear. However, if the courts mean that owners may not recoup clearly foreseeable and anticipated future gain that would quite probably have accrued in the absence of governmental intervention, that is another matter. Granted that our ability to predict the future or estimate future appreciation is finite, it, nonetheless, seems that an owner should be able to collect for loss to \textit{probable} expected future gain. After all, a probability test as to future worth or earnings is used constantly in personal injury tort actions, among other types of actions, and should be used here as well.

\textbf{A. Threatened Exercise of Eminent Domain}

Normally, the government is not liable for diminution in value resulting from its public contemplation of the exercise of eminent


This is in keeping with the rule that "the government . . . [is not] required to pay the enhanced value [or diminution] which its demand alone has created." Compensation should, however, be available for such diminished value once condemnation occurs if government unreasonably prolongs the deliberation process. This is especially true after the government has publicized its consideration of taking specific eminent domain action.

B. Physical Occupations and Invasions

Minor permanent physical occupations are compensable. In 1978, the Supreme Court invalidated a New York statute which required apartment building owners to permit placement, without compensation, of cable television equipment on their rental property in order for their tenants to receive cable service, despite the fact that the equipment was only the size of a bread box. The Court held that a "permanent physical occupation authorized by government is a taking without regard to the public interest it may serve . . . ."

Thus, the character of the government action was the determining factor in resolving whether the action constituted a taking. The Court found that compensation was due in cases involving a permanent physical invasion "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

A temporary physical invasion, on the other hand, may be non-possessory and non-compensable under eminent domain theory (although actionable as a tort for trespass, nuisance, or negligence), depending on its nature, extent, and duration. As the Supreme Court noted in the cable television case cited above, "[t]his Court has
consistently distinguished between . . . cases involving a permanent physical occupation . . . or government action outside the owner’s property that causes consequential damages . . . A taking has been found only in the former situation.”83 One noted commentator has surmised that “an interference . . . for more than a momentary period . . . [constitutes] taking of property in the constitutional sense, whether there has been any formal condemnation or not.”84 However, occasional, intermittent invasions, which do not constitute takings, nevertheless should be actionable in tort.85 Thus, the wise practitioner may wish to file eminent domain and tort actions simultaneously because eminent domain actions “do not involve a tort, and are not . . . strictly speaking, civil actions or suits.”86

IV. PROCEDURAL ASPECTS OF CONDEMNATION

A. Pre-Condemnation Hearing

Often, if not almost always, the only real issue to be adjudicated in an eminent domain action is the amount of compensation due. After all, the government may, due to the exigency of a situation, summarily take property and give the owner a hearing later.87 However, it appears that the owner must be provided a hearing before

83. Loretto, 458 U.S. at 428. Of course, government’s war powers might well permit uncompensated action akin to an “occupation.” See United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (upholding war-time closing of gold mine so that workers and equipment could be used to mine minerals needed in war effort).

“The one incontestable case for compensation . . . occur[s] when the government . . . ‘regularly’ use[s], or ‘permanently’ occup[ies], space or a thing which theretofore was understood to be under private ownership.” Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law, 80 HARV. L. REV. 1165, 1184 (1967) (footnote omitted). The Supreme Court has quoted Professor Michelman’s article with approval in Loretto, 458 U.S. at 427 n.5.


85. As to an owner’s right to sue under non- eminent domain tort theories, see 30 C.J.S. Eminent Domain §§ 394, 400 n.36 (citing City of Grand Prairie v. AT&T, 405 F.2d 1144, 1146-48 (5th Cir. 1969); Cheatham v. Carter County, 363 F.2d 582, 586 (6th Cir. 1966)).

86. 29A C.J.S. Eminent Domain § 209 (1965).

the government destroys "property of great value" pursuant to the police power. 88

B. Just Compensation

As noted earlier, the amount of compensation due is not affected by a rise in value related to the government's urgent need for the property or goods taken. 89 In general, just compensation is "what a willing buyer would pay in cash to a willing seller [under normal conditions]." 90 Accordingly, "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner." 91

C. Exhaustion of Administrative Remedies

Absent a statutory requirement, an owner need not exhaust administrative remedies if he or she is only seeking compensation (rather than questioning the validity of the use of eminent domain on other grounds). 92 But a legislature may, if it chooses, properly "insist[] on [an owner's] exhausting administrative proceedings for a determination of the validity of those claims." 93

D. Standing

"Only the owner . . . at the time of the . . . taking has standing" to sue for just compensation, absent a valid assignment. 94

88. Lawton v. Steele, 152 U.S. 133, 140-41 (1894) (distinguishing "property . . . of great value" from "property of . . . trifling value"). In Lawton, the Supreme Court rejected a nuisance-per-se test as to the type of property that could be summarily destroyed, saying that "[m]any articles . . . are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases . . . may be summarily destroyed." Id. at 142. Perhaps the dollar amount used in criminal statutes in distinguishing between petty and grand larceny could serve as a ready determination of "great value," at least if a statute had been amended recently to adjust for inflation.


90. Id. at 35.


E. Injunctive Relief

Injunctive relief is usually unavailable in eminent domain actions because just compensation is deemed to be an adequate remedy at law for purposes of equitable jurisdiction. The owner may obtain injunctive relief, however, where there is a “question of the unlawful or improper [bad faith] exercise of the power of eminent domain,” where there is an “attempted misuse of the power delegated,” or where the statutory authority to condemn or the condemnation proceeding itself is void for any reason.

In 1984, the District of Columbia Circuit summed up this rule by stating that equitable relief is available “when [a condemnation is] ... wholly outside the scope of the power granted ... by statute or constitutional provision.” The court noted that the fifth amendment’s requirement of “just compensation ... defines the govern-

95. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) (citations omitted) (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n.18 (1949); Hurley v. Kincaid, 285 U.S. 95 (1932)): Equitable relief is not available to enjoin an alleged taking of private property for a public use ... when a suit for compensation can be brought against the sovereign subsequent to the taking. The Fifth Amendment does not require that compensation precede the taking. Generally, an individual claiming that the United States has taken his property can seek compensation under the Tucker Act, 28 U.S.C. § 1491 [before the Claims Court]. See also Georgia v. City of Chattanooga, 264 U.S. 472, 483 (1924) (“The taking is a legislative and not a judicial function, and an opportunity to be heard in advance need not be given.”); Ackerman & Yanich, supra note 87, at 1.

96. 27 Am. Jur. 2d Eminent Domain § 485 n.16 (citing United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)). See also 30 C.I.S. Eminent Domain § 401-09 (1965).


ment's . . . powers of eminent domain [but] . . . does not embody a remedial principle in equity that . . . damages are fully adequate . . . ." The court continued:

From the earliest times, courts in equity have considered an injury to real property to be irreparable at law. The uniqueness of land typically makes damages an inadequate remedy. Equity will not hesitate to enjoin an unconstitutional taking and even a repeated trespass or other nuisance to land.100

It also listed loss of a going business as "another category of injuries that equity considers irremedial at law."101

F. Statutory Construction

Unlike most statutes granting governmental authority, a statute authorizing use of eminent domain should be strictly construed.102 Furthermore, a statute which authorizes the public taking of private property must be construed to implicitly provide for just compensation whenever possible.103 While compensation is usually made in cash, there seems to be no federal constitutional prohibition of payment by means of an investment-worthy security with a readily-determined value, in the absence of some contrary statutory provision.104

G. Judicial Review

As noted earlier, the issue of public exigency or the need to condemn all or part of a particular property is generally a political

99. Id. at 1527 n.116 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949)).
100. Id. at 1527-28 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Erhardt v. Boaro, 113 U.S. 537 (1885)).
101. Id. at 1528 (citing Semmes Motors Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2nd Cir. 1970) (loss of automobile dealer franchise)).
102. See 29A C.J.S. Eminent Domain § 214 & nn.11-12 (1965).
103. Id. §§ 98 n.92, 99 n.99, 100 n.2.
104. See Blanchette v. Connecticut General Ins. Corps., 419 U.S. 102, 151 (1974) ("The implication of other decisions is that consideration other than cash . . . may be counted in the determination of just compensation . . . ."). But see Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (1795) ("No . . . compensation can be made except in money . . . . It . . . is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property."). The author believes that the latter description of "compensation" would easily apply to stable over-the-counter government securities, but not widely-fluctuating, "junk" or difficult-to-sell bonds or notes with a limited market. The wise practitioner should specify in a settlement agreement the exact type of non-money compensation to be paid, if any, or that payment be in cash.
or legislative question which is not subject to judicial review. On the other hand, the issue as to what constitutes public use or just compensation is subject to judicial review, however limited. Although the initial determination of just compensation may be made administratively, it is likewise subject to limited judicial review. But it is the owner challenging the validity of any taking or compensation award who has the burden of proving that the administrative determination was clearly erroneous.

V. EMINENT DOMAIN AND THE STATES

A state's eminent domain authority does not hinge on federal permission to exercise it or require that it be delegated to state or local agencies. As might be suspected, state delegations of eminent domain authority to municipalities seldom present questions of federal law. However, the fifth amendment's limits on eminent domain apply to the states through the fourteenth amendment.

A discussion of eminent domain as applied to the states would not be complete without at least mentioning state Mill Act rules. Under these acts, many states held that riparian land owners were constitutionally permitted to dam rivers and streams for mill purposes, provided that they paid compensation to the upper riparian owners whose land was consequently flooded without their con-

106. Minkel, 467 U.S. at 240.
107. See Bragg v. Weaver, 251 U.S. 57, 59 (1919) ("[I]t is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard.").
108. Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898) ("It is within the power of the States to provide that the amount [of compensation] shall be determined in the first instance by [administrative] commissioners, subject to an appeal to the courts for trial in the ordinary way . . . .") See also Behm v. Division of Admin., 383 So. 2d 216, 218 (Fla. 1980); State Hwy. Bd. v. Shepard, 127 Vt. 525, 530, 253 A.2d 155, 159 (1969).
109. See Miller v. United States, 620 F.2d 812, 828 (Ct. Cl. 1980). See also Caporal v. United States, 577 F.2d 113, 118 (10th Cir. 1978) (administrative ruling on amount of compensation will not be reversed unless clearly erroneous).
110. See Kohl v. United States, 91 U.S. 371-72 (1875). See also Boom Co. v. Peterson, 98 U.S. 403, 406 (1878) ("[E]minent domain . . . appertains to every independent government . . . . [I]t is an attribute of sovereignty.").
112. See e.g., Georgia v. City of Chattanooga, 264 U.S. 479, 483 (1923).
sent.114 In those states, the takings without consent were upheld on the basis of public necessity because members of the general public, including the affected riparian owners, received sufficient benefits from the operation of a nearby mill to justify such takings.115 The Mill Act rule has had an interesting history in Massachusetts, which only grew to accept this rationale in 1927.116 However, as early as 1819, perhaps reflecting the spirit and intent of the federal framers, the Supreme Judicial Court of Massachusetts had stated that "'[l]t . . . must be admitted that, by the principles of every free government, and of our constitution in particular, it is not in the power of the legislature to create a debt [or servitude] from one person to another . . . without . . . the consent of the [injured] party. . . .'"117

Agreement on the validity of the Mill Act rule was far from unanimous. Many states rejected it,118 as did the Supreme Court in 1874.119 However, the spirit of the Mill Act rule lives on even today, as can be seen in Hawaii Housing Authority v. Midkiff.120 But any justification for a state's exercising or delegating eminent domain in any form should be restricted to documented, pre-exercise public needs, not post-taking rationalizations.121

VI. BUSINESS REGULATION

Like government's power in eminent domain, its authority to regulate business is broad and pervasive. Recent examples are the Supreme Court decisions upholding the following: (l) a North Da-

115. Id. (citing Head v. Amoskeag Co., 113 U.S. 9 (1885); Blair v. County of Cuming, 111 U.S. 363 (1884)).
119. See Loan Ass'n Topeka, 87 U.S. (20 Wall.) 655, 664-65 (1874) (rejecting use of eminent domain to condemn property for redevelopment by large employer).
121. For examples of this salutary rule in the context of public employees' First Amendment freedoms, see Tygrett v. Barry, 627 F.2d 1279, 1285-86 (D.C. Cir. 1980); United States ex. rel. Cluckman v. Laird, 469 F.2d 773, 783 (2d Cir. 1972) (rejecting after-the-fact rationalizations).
kota statute which required any corporation operating a pharmacy to have a majority of its shares owned by pharmacists who are actively engaged in the pharmacy’s management despite the fact that larger drug store chains could provide drugs more cheaply;\(^{122}\) (2) a New Orleans ordinance outlawing push-cart vendors who had not already been in business for at least eight years;\(^{123}\) (3) a California statute requiring newly established auto dealers to obtain permission from a state agency prior to opening for business if any existing area auto dealer objected to the new entrant;\(^{124}\) and (4) a Maryland statute prohibiting oil refiners from operating retail gas stations, despite the higher consumer prices resulting from the state’s mandatory regulation.\(^{125}\) Finally, there is the landmark decision of Kotch v. Board of River Port Pilot Commissioners\(^{126}\) in which the Supreme Court strained to uphold a river pilot licensing statute which virtually legalized nepotism and was particularly discriminatory in practice to women and minorities.

VII. ECONOMIC SUBSTANTIVE DUE PROCESS AND JUDICIAL ACTIVISM

Given the woeful state of economic liberties in this nation, consideration should be given to the legal justification for treating economic liberties as second-class freedoms while viewing other guarantees of the same Bill of Rights as somehow “preferred.” As will be seen, the difference in treatment of those two branches of the Bill of Rights cannot be justified. Further, it is well within the judiciary’s power to extricate us from the current situation in which we find ourselves, considering that it was the judiciary’s interpretation of the Constitution that put us there and that a return to sounder, earlier case-law is a task uniquely within the judiciary’s competence.

\(^{125}\) Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125, 147-48 (1978).
\(^{126}\) 330 U.S. 552 (1948).
“Economic substantive due process” has been used interchangeably with “substantive due process.”127 It is that reservoir of perhaps unexpressed constitutional guarantees that protects against excessive government control or deprivation no matter how much procedural fairness is given.128 As one district court has noted: “Substantive due process encompasses those few select rights, not specifically enumerated in the constitution, which have nonetheless been deemed . . . to be ‘fundamental to our system of ordered liberty.’”129 Substantive due process, according to the Supreme Court, “restrains state action, whether legislative, executive or judicial.”130

Reminiscent of Mark Twain’s premature obituary, reports of substantive due process’ death are greatly exaggerated since substantive due process has been recognized recently at both federal and state levels.131 The Supreme Court supposedly abandoned substantive due process when it upheld the conviction of a retail grocer


Actions raising substantive due process issues are likely to be resolved on legal grounds with the relevant facts stipulated or at least not the subject of sharply differing uncorroborated testimony. Thus, it should be noted that an appellate court need not defer to a trial court’s finding of facts when testimony/credibility issues are not determinative. See United States v. Singer Mfg. Co., 374 U.S. 174, 193 (1963) (reviewing “essentially undisputed facts”); Counsnon v. Allstate Ins. Co., 115 N.H. 60, 62, 333 A.2d 463, 464 (1975) (summarizing rule); Ploog v. Ogilvie, 309 N.W.2d 49, 53 (Minn. 1981) (“Where the critical evidence is documentary, there is no need to defer to the trial court’s assignment of its meaning.”).


in 1934 for selling about two dollars' worth of milk below the minimum price set by New York.\(^{132}\)

Addressing the Supreme Court's abdication of economic liberties, Professor Bernard Siegan stated that "[N]o change has been so drastic as that which occurred in the early 19[30s and] 40s when the Court abandoned judicial review of economic and social legislation . . . . [T]he American government thereafter consisted of only two branches, not three."\(^{133}\) The Supreme Court after all, had abandoned earlier precedent which had recognized firm and fixed limits on government's prerogative in this area by denigrating those principles as mere "notions of public policy [which happen to be] embedded in earlier decisions of the Court . . . [which] should not be read into the Constitution."\(^{134}\) By reducing established constitutional precedence to mere public policy, the Court dangerously cast the legal system adrift with no permanent or transcendent principles to govern future adjudication.

The unworkableness of reducing constitutional law to little more than current mores or an opinion poll was summarized by the Supreme Court in 1933 when it noted that "[t]he public policy of one generation may not . . . be the public policy of another."\(^{135}\) As it said in 1866, "[n]o doctrine, involving more pernicious consequences, was ever invented by the [mind] of man than that any of [the Constitution's] provisions can be suspended [or terminated] during any of the great exigencies of government."\(^{136}\)

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133. Siegan, Economic Liberties and the Constitution 3 (1980).
136. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120 (1866). See also Tyson & Bros. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (abhoring idea that the Constitution is anything that "has a sufficient force of public opinion behind it"); Hawke v. Smith, 253 U.S. 221, 227 (1920); South Carolina v. United States, 199 U.S. 437, 448-49 (1905) (warning against reducing Constitution to "the mere reflex of . . . popular opinion or passion."). The infamous Dred Scott segregation case, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), was perhaps the first product of "judicial activism," C. Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 70 (1986). Judicial activism is not inherently "liberal" or "conservative" but rather involves a refusal to subordinate the courts to the intent of the framers and legislature. Thomas Sowell, Judicial Activism Reconsidered (1989).
This very idea was expressed more simply by Justice Sutherland in the following way: "To miss . . . the difference between [interpretation and judicial legislating] is . . . to convert what was intended as . . . enduring [legal] mandates into mere moral reflection."137 After all, the "Constitution is a written [document]. As such, its meaning does not alter. That which it meant when adopted it means now."138 As the Supreme Court wryly observed in 1795: "The constitution is the origin and measure of legislative authority . . . . Not a particle of it should be shaken; not a pebble of it removed . . . . [O]ne precedent leads to another; precedent gives way to precedent; . . . thus the constitution eventually [might be] destroyed."139 Noting the virtual abandonment of that view and the fact that the Constitution is written and not an oral tradition, Justice Jackson declared candidly in 1953:

Rightly or wrongly, the belief is widely held by the . . . profession that [the] Court no longer respects . . . rules of law but is guided . . . by personal [values] . . . . [T]his Court also . . . generated an impression . . . that regard for [sound] precedents . . . is [no longer] absolute, that words no longer mean what they have always meant . . . , [and] that the law knows no fixed principles.140

Chief Justice Marshall later repudiated his own dictum in Marbury v. Madison141 that the Supreme Court could vary its interpre-

137. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting). Justice Sutherland continued:
[T]o say . . . that the words of the Constitution mean today what they did not mean when written . . . is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise . . . . [S]pecific provisions may . . . turn out to have been inexpedient. This does not make those provisions any less binding. Constitutions can not be changed by events alone. They remain binding . . . until . . . amended . . . .'
Id. at 403 (citation omitted) (quoting People ex rel. Twitchell v. Blodgett, 13 Mich. 127, 139 (1865)). See also TVA v. Hill, 437 U.S. 153, 195 (1978) ("I'd give the [d]evil [the] benefit of [the] law, for my own safety[!] sake") (quoting R. BOLT, A Man For All Seasons, Act I, in THREE PLAYS 147 (Heinemann ed. 1967)).

139. Vanhorne's Lesse v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (1795).
140. Brown v. Allen, 344 U.S. 443 (1953) (Jackson, J., concurring). See also SCM Corp. v. United States, 675 F.2d 280, 286 (Ct. Cl. 1982) (Nichols, J., dissenting) ("Things have . . . reached the point where the result-oriented jurist will attain the result he desires whatever the words say that are to be construed."). See also, J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); J. O'CONNELL, THE JUDGES WAR 273 (1987).

141. 5 U.S. (1 Cranch) 137 (1803).
tation of the Constitution in light of shifting public sentiment.\textsuperscript{142} As the Supreme Court noted in 1936, the "judicial branch . . . has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former . . . and, having done that, its duty ends."\textsuperscript{143}

Frankly, the Supreme Court's adherence to constitutional history has been selective at best.\textsuperscript{144} The present path on which the judiciary is generally embarked in this regard seems to ignore Thomas Jefferson's prophetic warning that "if the Constitution were ever destroyed, it would be . . . [so] destroyed by construction or interpretation . . . by the Federal judiciary."\textsuperscript{145} Alexis DeTocqueville has noted that if "well-meaning but imprudent Justices depart from previously established constitutional principles, the nation may eventually be plunged into anarchy."\textsuperscript{146} William Johnson, one of the ablest of all the Justices, remarked of the need to watch and monitor closely "the advancement of judicial power, in common with all power."\textsuperscript{147} Justice Frankfurter also added that "[j]udicial power is not immune against the human weakness [of self-aggrandizement]."\textsuperscript{148}

If one were to believe that our twentieth-century republic requires virtually unlimited judicial discretion, candid argument to that effect should be made rather than relying on penumbras or natural law to judicially enact "wise" social policy. But, as noted earlier, we are applying a \textit{written} Constitution, not an inchoate oral tradition,

\textsuperscript{142} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387, 399 (1821). \textit{See also} Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824), in which Chief Justice Marshall said that "the [j]udicial power is never exercised for . . . giving effect to the will of the [j]udge."

\textsuperscript{143} United States v. Butler, 297 U.S. 1, 62-63 (1936).


\textsuperscript{145} C. Patterson, \textit{The Constitutional Principles of Thomas Jefferson} 70 (1953).

\textsuperscript{146} A. DeTocqueville, \textit{Democracy in America}, 150 (1900).


to current issues. Our Constitution is not an enigma requiring a judicial caste to render its meaning understandable. After all, it was written by, for, and to the people—a fact too often overlooked by the judiciary. As Justice Frankfurter noted, the judiciary was not granted the authority to save the citizenry from itself despite the judiciary’s desire to assume such authority:

The Court is not saved from being oligarchic because it professes to act in the service of human ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements... [A] democracy need not rely on the courts to save it from its own unwisdom.149

Sincerity is no guarantee for truth, and reliance on natural law is "not much more than [a] literary garniture [or a judicial fig leaf] ... and not a guiding means for adjudication."150 Given the abundance of diametrically opposed and often opaque discussions among theologians, philosophers, and social scientists on the subject, the utter uselessness of natural law as an objective standard for adjudication and the clear and present invitation for judicial legislating presented thereby should be obvious to all who objectively consider the matter.151

149. A.F. of L. v. American Sash Co., 335 U.S. 538, 555-56 (1949) (Frankfurter, J., concurring). See also United States v. Butler, 297 U.S. 1, 87 (1936) ("Courts are not the only agency of government that must be assumed to have the capacity to govern.").

150. Frankfurter, John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 225 (1955). See also Rochin v. California, 342 U.S. 165, 171 (1952) (Frankfurter, J., for the Court) ("Due process ... is not ... a revival of 'natural law.'"); Adamson v. California, 332 U.S. 46, 70, 75, 90 (1947) (Black, J., dissenting) ("[T]he 'natural law' theory of the Constitution ... degrade[s] the ... Bill of Rights" and is "an incongruous excrescence on our Constitution ...."); Calder v. Bull, 3 U.S. (3 Dallas) 386, 399 (1798) (Iredell, J., concurring) ("[T]he Court cannot pronounce [a law] ... void merely because it is ... contrary to ... natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject...").

151. See Wynehamer v. People, 13 N.Y. 378, 430 (1856) ("[T]he doctrine that there exists in the judiciary some vague, loose and undefined power to annul law, because ... it is 'contrary to natural equity and justice,' is in conflict with the first principles of government..."). See also Reynolds v. Sims, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting):

[Modern] decisions give support to a ... mistaken view of [the] Constitution and the constitutional function of [the] Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform.... The Constitution is not a panacea for every blot upon the public welfare, nor should [the] Court ... be ... a general haven for reform movements .... [The] Court ... does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the ... political process. For when,
Despite what some may say, a return to the basic principles of our written Constitution is not "activism." It is merely an honoring of the intent of the framers. If indeed the original intent of any part of the Constitution is lost, a new constitutional convention should be called promptly. Otherwise, the judiciary is left with no standard other than popular or elitist mores with which to steer the continued development of constitutional law. While some may favor judicial implementation of personal or class views or biases, that attitude may well undo our hard-won freedoms. When those with strongly-held contrary beliefs and values are elected to office, they will impose a much different set of standards than the standards imposed by their electorally-ousted predecessors. Thus, as noted earlier, the judiciary and constitutional law would be reduced to little more than a prize in a new version of the "spoils" system. With no fixed constellation of principled constitutional guarantees, the foundation needed to prevent radical shifts back-and-forth will simply cease to exist. Without such an anchor, constitutional jurisprudence will drift interminably or be blown about by ever-shifting winds.

Likewise, stare decisis does not prevent courts from returning to the original principles of constitutional interpretation.\(^{152}\) Although seldom (if ever) so stated, stare decisis has been readily abandoned when the courts are reducing governmental prerogative and ex-

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in the name of constitutional interpretation, the Court adds something to the Constitution . . . , the Court in reality substitutes its view of what should be [left] for the amending process. In Bell v. Maryland, 378 U.S. 226, 342 (1964), Justice Black in dissent stated that: "Our duty is simply to interpret the Constitution, and in doing so the test . . . is not whether a law is offensive to our conscience or to the 'good old common law,' but whether it is offensive to the Constitution." See also T. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 55 (1972) ("The meaning of the Constitution is fixed . . . and it is not any different at any subsequent time when a court has occasion to pass upon it.").

152. See Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980) ("The doctrine of stare decisis has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible.' "); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action [the] Court . . . has [freely] exercised its power to reexamine . . . its constitutional decisions."). See also Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467.
pandering individual freedom. If anything, a return to the framers' intent in the area of economic substantive due process should be relatively easy, given the fact that ample constitutional history and early post-ratification case-law exists. More recent, erroneous decisions can be overruled because "stare decisis is ... not a ... formula of adherence to the latest decision ... when such adherence involves collision with a prior doctrine ... intrinsically sounder, and verified [on economic liberties by experience]." Furthermore, "the Supreme Court has overruled over 230 of its own precedents in recent memory, at the urging of the Federal Government." If anything, the decisions nearer to the creation of the Constitution and the Bill of Rights should be given greater weight in constitutional interpretation than those of much later vintage. This is especially true when those later decisions are not supported by a solid historical


This clearly appears to be the motivating spirit behind the rule summarized in 21 C.J.S. Courts § 193 (1940) (citing Helvering v. Hallock, 309 U.S. 106, 119 (1940)): The rule of stare decisis is not so imperative ... that error may be perpetuated and grievous wrong be the result. Accordingly, unless a doctrine or principle has become so ... established that it may fairly be [said] to have become a rule of property [vesting rights in private individuals], ... the courts will not adhere to it, although established by previous decisions, if they are convinced that it is erroneous .... While the principle asserted here seems to have been applied principally, if not exclusively, in the realm of personal freedoms, both the spirit and intent of the Constitution and common sense dictate that it be applied to economic liberties in like measure.


155. Helvering v. Hallock, 309 U.S. 106, 119 (1940). See also United States v. Young, 210 F. Supp. 640, 641 (W.D. Mo. 1962); Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring) (candid admission that "[d]ecisions of this Court do not have equal intrinsic authority."). Courts are not to have pillow-like qualities by bearing the imprint of the latest appellate pronouncement. Rather, when faced with divergent lines of cases, "it is the duty of ... court[s] to follow the decision which it conceives is based on the sounder reasoning." 21 C.J.S. Courts § 192 (1940).

156. The Supreme Court employed this principle in upholding Georgia's capital punishment law, when it noted that: "At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress [which contained many sponsors of the Eighth Amendment] ... enacted legislation providing death as the penalty for specified crimes." Gregg v. Georgia, 428 U.S. 153, 177 (1976) reh'g denied, 429 U.S. 875 (1976).
record or, worse, when they disclaim the need or possibility of securing any such record at all.

After all, it was not until 1958 that the Supreme Court, reminiscent of Napoleon crowning himself, first decreed that its "interpretation of the Fourteenth Amendment [and the Constitution generally] . . . is the supreme law of the land" equal to the Constitution itself.157 By this proclamation, the Court ignored the fundamental distinction between the Supreme Court's interpretation of the Constitution and the Constitution itself. The Supreme Court seemed to retreat from this statement in 1984 when it said that judicial precedent "cannot be read as authorizing a court to [act] . . . counter to [constitutional and] statutory policy."158 Thus, consistent with principles of stare decisis, case-law which has erroneously interpreted the Constitution should be void ab initio, however long-standing it may be because "[n]o interest which would be served by . . . an adherence to stare decisis is superior to the demands . . . of the Constitution."159 Further, "stare decisis . . . [should not] be followed to the extent that error may be perpetuated . . . even though it may have been reasserted . . . a number of [times]."160 In short, "[p]recedence . . . can be no justification for the continuance of an erroneous practice."161

157. Cooper v. Aaron, 358 U.S. 1, 18 (1958). The analogy of the Supreme Court's self-indulgent elevation to Napoleon's crowning of himself is apt, but it is not original. See Kurland, Curia Regis: Some Comments on the Divine Right of Kings and Courts "to Say What the Law Is," 23 Ariz. L. Rev. 581 (1981). As usual, Professor Raoul Berger has crisply and thoroughly illuminated the legal and historical issues here. Perhaps due to his retirement, he has spared no one's false pride in discussing these pressing questions. See Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 Ohio State L.J. 1, 2 (1986) ("For all the rivers of ink since spilled by activists, there is a veritable sea of apologies for judicial revisionism—they have not, according to Michael Perry, himself an activist, come up with 'a defensible nonoriginalist conception of constitution text/interpretation and judicial role' "); Berger, Constitutional Law and The Constitution, 19 Suffolk U.L. Rev. 1, 2 (1985) ("[A]cademic thinking has gone so far . . . as to prompt G. E. White to pose the satirical question, 'Why not teach a class o[n] constitutional law without the Constitution . . . ?'").


159. Graves v. Schmidlapp, 315 U.S. 657, 665 (1942). See also United States v. Bryan, 339 U.S. 323, 346 (1950) (Jackson, J., concurring) ("Of course, [while] it is embarrassing to confess a blunder, it may prove more embarrassing to adhere to it."); Craig v. Harney, 331 U.S. 367, 376 (1947) (Douglas, J., for the Court) ("It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation.").

160. 21 C.J.S. Courts § 193 (1940).

As to the apparent distaste of many constitutional scholars for historical research and proclivity for free-wheeling policy-making, Professor (now Judge) Monaghan posits the following insight:

One cannot read the works of Professors Tribe, Karst, Michelman, and a whole host of others[. . .] without a profound feeling that . . . for them the constitution is essentially perfect in one central respect: properly construed, the constitution guarantees the . . . most equality and autonomy . . . which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens . . . [Thus], each [of these] commentators can be fairly described as "perfectionist."163

Professor Monaghan further explained that these perfectionists are fellows-travelers with "[o]ther commentators [who] rely more explicitly on insights derived from currently fashionable philosophic or economic concepts to generate both common law and constitutional principles."163 He continued:

Application of common law approaches to . . . constitutional law . . . has important consequences for interpretation. First, it invites the extraction of quite general political principles from specific constitutional guarantees. Second, and more important, the common law method encourages the elaboration of supplemental, nontextually grounded principles of political morality to fill in any gaps [in the face of Congress' and the States' failure to do so] . . . .

The common law approach [of an expansive body of law applied to constitutional law] is particularly congenial to professors of law . . . . The tedious labor associated with the historical search for original intent is eliminated . . . . Armed with the insight of current social, political, and economic thinking, these commentators can 'reason' about contemporary [constitutional] needs in the same way that they would about tort problems . . . [so that] constitutional values themselves become [merely] one set of interests . . . to be weighed against competing social values.164

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163. Id. at 391.
164. Id. at 391-92. See also John M. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A. J. 943, 945 (1963):

Much of the useful criticism of judicial decisions . . . now comes from the law schools. I believe it would be of great value were their output . . . supplemented on an organized basis by bar critiques . . . bringing to bear the points of view of active practitioners on
At this point, it may be well to recall the important historic role economic liberty held before and during our nation's first century. Undoubtedly, the framers were concerned about the confiscatory tendency of all governments.\textsuperscript{165} In 1886, the Supreme Court, quoting James Madison, noted that "[t]he great end for which men entered \ldots society was to secure their property."\textsuperscript{166} Justice William Patterson, a leadingframer, stated that a primary objective of the social compact must be the preservation of property because property will not be inviolable if the legislature is vested with the dangerously enormous power to take land from one citizen and give it to another.\textsuperscript{167}

In 1829, speaking for the Court, Justice Story said: "The fundamental maxims of a free government \ldots require, that the rights of \ldots property \ldots be held sacred."\textsuperscript{168} Furthermore, history is replete with evidence showing the fundamental nature of economic liberty. However, one need not look back any further than 1972 for such evidence when the Supreme Court noted that: "[T]he dichotomy between personal liberties and property rights is a false one \ldots [A] fundamental interdependence exists between [the two, and n]either could have meaning without the other. That [property] rights

\begin{itemize}
\item \textsuperscript{165} See generally M. Farrand, The Records of the Federal Convention of 1787 (1911). Some may object that the approach urged here is too "literalist." Please note Justice Holmes' warning that "[t]here is a strong presumption that the literal meaning [of a law] is the true one." United States v. M. H. Pulaski Co., 243 U.S. 97, 106 (1917). However, here it is just not the language of the Constitution that is being interpreted but the application of a fairly abundant historical record, including clear decisions by the Supreme Court soon after the Constitutional Convention. In this context, the epithet "literalist" seems little more than a guise behind which to hide one's dislike of an historically-based jurisprudence.
\item \textsuperscript{166} Boyd v. United States, 116 U.S. 616, 627 (1886).
\item \textsuperscript{167} Vanhorne's Lessee, 2 U.S. (2 Dall.) at 310-12.
\item \textsuperscript{168} Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).
\end{itemize}
are basic civil rights has long been recognized." The Supreme Court has elsewhere noted the importance of economic liberties in the context of the "little guy's" ownership of property.

It may be asked whether a valid distinction exists between a wealthy citizen's property and a "little guy's" property. If such a distinction is valid, how is it to be defined in a consistently principled way? Given the effect of investors' decisions on the production of jobs and expansion of the economy, harming a wealthy property owner would surely injure the "little guy" as well. If we allowed individuals to have preferred rights in consumer goods commonly held by the "little guy" while strictly regulating and thereby discouraging development and production of new goods, services, and jobs by stifling and disparaging entrepreneurship, the right to own and enjoy increasingly costly, rare, and lackluster goods would indeed be no bargain. Ranking freedoms is a tricky, if not presumptuous, business, indeed.

In 1976, the Supreme Court stated:

The authors of the Bill of Rights did not undertake to assign priorities . . . . [And] if the authors of those guarantees . . . were unwilling or unable to . . . assign[] to one [right] priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

In 1982, the Court reiterated this point by noting that there is "no principled basis on which to create a hierarchy of constitutional values on a complementary [sic] sliding scale . . . ."

A right or guarantee is fundamental if it is "explicitly or implicitly guaranteed by the Constitution," not by its perceived relative

169. Lynch v. Household Finance, 405 U.S. 538, 547-48 (1972). The Court further noted that "the line between [personal freedoms and economic liberties] has been difficult to draw with any consistency or principled objectivity." Id. at 551.


shifting societal importance.\textsuperscript{173} A contrary rule would inevitably result in particular guarantees being placed on a constitutional rollercoaster with courts periodically decreeing that social conditions no longer warranted terming one right "fundamental" while those same changed conditions justified catapulting a theretofore "ordinary" freedom to exalted "fundamental" status. A return to first principles would be soundly in keeping with the Supreme Court's apt observation in 1914 that "[l]ife, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any . . . may lessen or extinguish the value of the other[s] . . . ."\textsuperscript{174} Undoubtedly, such a return to basic principles would involve adjustment, but "[i]f the provisions of the Constitution may not be upheld when they pinch as well as when they comfort, they may as well be abandoned."\textsuperscript{175} After all, "the validity of a [constitutional guarantee] does not depend on whose ox it goes."\textsuperscript{176}

A return to first principles will likely involve the judiciary's collective resolve to adopt a proper attitude of "[h]umility . . . an alert self-scrutiny so as to avoid infusing into the vagueness of a constitutional command one's merely private [if allegedly popular] notions."\textsuperscript{177} As with the supposed abandonment of economic substantive due process, this includes a realization that while the judiciary "is forever adding new stories to the temple of constitutional law, . . . the temples have a way of collapsing when one story too many is added."\textsuperscript{178} Above all, the courts "must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts . . . were not earlier able [or willing] to enforce what the Constitution demands."\textsuperscript{179}

\textsuperscript{174} Smith v. Texas, 233 U.S. 630, 636 (1914) (Holmes, J., for the Court).
\textsuperscript{175} Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).
\textsuperscript{176} Wells v. Simonds Abrasive Co., 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).
\textsuperscript{177} Haley v. Ohio, 332 U.S. 596, 602 (1948) (Frankfurter, J., concurring).
\textsuperscript{179} Chessman v. Teets, 354 U.S. 156, 165 (1957).
As applied to economic substantive due process, this means, as Justice Holmes said, that "the most enlightened judicial policy is to let people manage their own business in their own way . . ."\(^{180}\) and that liberty may be nothing more than "doing what you want to do" within the limits of a self-governing republic.\(^{181}\)

**Standard of Review**

What standard or scope of review should courts apply to government regulation of economic liberties? Should special provisions be made for experimental laws and, if so, when should the experiment be deemed to be complete so that judicial review may begin in earnest? Taking the second question first, the Supreme Court in 1932 overturned an Oklahoma statute that had the effect of prohibiting the entry into the marketplace of new ice manufacturers (in a day when electric refrigerators were considered to be luxuries), ruling that "unreasonable or arbitrary interferences or restrictions cannot be saved . . . merely by calling them experimental."\(^{182}\) Otherwise, one is faced with a never-ending conundrum in which the experiment is, like some moot issues, ever-recurring but constantly evading meaningful judicial review. That is the case when a legislature fails to insert a sunset clause in such laws which serves to automatically terminate the experiment at the end of a prescribed time period. Sunset clauses should permit rigorous judicial review of burdensome economic regulation. Whether or not re-enacted, a sunset clause in such laws tacitly declares that the time deemed necessary for a particular experiment to prove worth-while has ended.

As to the first question, the standard of judicial review obviously should be the same for both personal freedoms and economic liberties. Personal and economic liberties are both part of one Bill of Rights involving a single "constitutional legality . . . indivisible . . . [in which] the right to wound one part of the body . . . is the right to destroy the life."\(^{183}\) Aghast as some might be at the thought of

\(^{180}\) Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 411 (1911) (Holmes, J., dissenting).


scraping the "compelling government interest" standard of review, there is little, if any, solid historic support for it. As Justice Black stated in 1965:

The Due Process Clause with an 'arbitrary and capricious' or 'shocking to the conscience' formula was liberally used by this court to strike down economic legislation . . . . That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.184

Justice Rhenquist echoed that concern in 1972:

[I]n the field of economic and social legislation, the Court has given great latitude to the legislatures . . . However, this salutary principle has been departed from by the Court in recent years . . . where the Court has felt that the classification has affected what it conceives to be 'fundamental personal rights.'

The difficulty with the approach, devoid as it is of any historic or textual support . . . , is that it leaves . . . to the Justices of this Court the determination of what are, and what are not, 'fundamental personal rights.' Those who framed and ratified the Constitution and the . . . amendments to it chose to select certain . . . rights and freedoms, and to guarantee them against impairment . . . . While the determination of the extent to which a right is protected may result in . . . drawing . . . fine lines, the fundamental sanction of the right itself is found in the language of the Constitution, and not elsewhere. The same is unfortunately not true of 'the doctrine of fundamental personal rights.' This body of doctrine created by the Court can only be described as a judicial superstructure, awkwardly engrafted upon the Constitution itself.

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[H]ow is the Court to know when it is dealing with a 'fundamental personal right'?

While the Court's opinion today is by no means a sharp departure from the [recent] precedents on which it relies, it is an extraordinary departure from . . . the intent of the framers . . . .and the import of the traditional presumption of constitutionality accorded to legislative enactments. Nowhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is . . . a 'fundamental personal right.'185

In this same vein, Learned Hand noted that "'[t]here is no constitutional basis for asserting a larger measure of judicial supervi-

sion" over personal freedoms than economic liberties.\textsuperscript{186} Likewise, one commentator has stated:

As several of the Justices have noted in dissent, there is only a verbal difference between the ‘fundamental rights’ branch of the [compelling] government [interest] test and the now discredited [substantive] due process of such cases as \textit{Lochner v. New York}. Both of them leave the Court entirely at large, with full freedom to enact its own natural law conclusions. The only difference is . . . that type of interest . . . protected.\textsuperscript{187}

Justice William O. Douglas recognized that economic liberties and personal freedoms should not be treated differently and argued that judicial review in both areas use the strict scrutiny standard.\textsuperscript{188}

The practical effect of either scrapping the “compelling government interest” standard or applying it uniformly to economic liberties would be considerable. “A justification by ‘compelling government interest’ is a burden which has been sustained only once

\textsuperscript{186} \textsc{Hand, The Bill of Rights} 50-51 (1962). \textit{See also} Morrison, \textit{Does the Fourteenth Amendment Incorporate the Bill of Rights?}, 2 Stan L. Rev. 140, 167 (1949) (“If substantive due process is a natural-law gloss in the economic field, it is just as much so in the field of civil liberties. There is no basis for rejecting the doctrine in one case and adopting it in the other except the subjective preferences or convictions of the individual judge.”). Professor Tribe has noted that:

Apart from its analytic weakness, the distinction between economic and non-economic rights overlooks the importance of property and contract in protecting the dispossessed no less than the established . . . and in no event could it justify more than the most moderate difference in degree between the judicial roles [or standard of review] in the two areas.


\textsuperscript{187} L. Lusky, \textit{By What Right?}, 266 (1975). This development was foreseen by Justice Holmes in Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting):

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to . . . invalidating . . . these rights if they happen to strike a majority of the Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche [power] to embody our social and economic belief in its prohibitions . . . [W]e should be slow to construe . . . the Fourteenth Amendment as committing to the Court . . . no guide but the Court’s own discretion . . .

\textsuperscript{188} Lindsey v. Normet, 405 U.S. 56, 82 (1972) (Douglas, J., dissenting).
in the annals of civil rights litigation.”  But the *same* standard should apply to both “branches” of the Bill of Rights, regardless which is chosen, since they are co-equal under the Constitution.

VIII. **Ideas About Economic Liberties Have Consequences**

Ideas do not exist in a vacuum. They clearly and directly affect our lives and legal system. After all, “[l]aw is nothing else than reason.”  Justice Frankfurter noted that “[l]aw isn’t something that exists in a closed system within itself, but draws its juices from life.”  And as Justice Holmes explained, “[t]he law is the witness and external deposit of our moral life.”

Too often economic liberties have been regarded as matters of interest to the rich only. Yet economic liberties are just as important for those who aspire to achieve wealth, regardless how comfortable or desperate they may be. As Professor Siegan said:

> For a great many in our society, the opportunity to engage freely in a business, trade, occupation or profession is the most important liberty society has to offer.

> [In that and other ways] the Constitution speaks to the general political condition that has changed little if at all since the eighteenth century. The Framers’ . . . concerns are as pressing today as they were two hundred years ago.

> **[T]he Court should protect the liberties necessary to maintain the form of government [originally] created. [I]n the economic sphere, the Framers sought to perpetuate a system based on property and private enterprise.**

> Although many jurists complain about substantive due process in the economic sphere, they have not been reluctant to accept the course pursued . . . in . . . recognizing—some would say creating—a privacy right entitled to substantive protection [under the ‘penumbra’ theory]. This suggests that such criticism relates to the ends and not the means . . . in order to accomplish . . . social and economic goals—the identical objective ascribed to the Court of the ‘discredited’

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192. O. W. Holmes, *The Path of the Law*, in *Collected Legal Papers* 170 (1920). The “law” is an empty shell into which society pours its values. Standing alone and apart from that moral anchor, the “law” is susceptible of being manipulated in quite nasty ways. *See also* R. Neuhard, *The Naked Public Square* 152 (1986 ed.) (“The law is a friendly fellow, amenable to our wishes, plastic in the hands of the powerful.”).
substantive due process period . . . . Omission of a protection is not less defective or arbitrary than its exaggeration . . . .

Constitutional freedom was seen [by its detractors] as a cover under which the ambitions of [the rich] could be nourished . . . . [Yet] [e]conomic due process usually favored economic competition—a state of affairs not always pleasing to big business [especially when upstart small businesses erode their market by cheaper and better products] . . . . In general, the Supreme Court's present abdication with respect to socioeconomic legislation [a huge portion of any legislature's output] has been more beneficial to the rich than . . . . the poor. 193

Furthermore, there clearly exists a strong tendency for the "little guy" to get squeezed out of lucrative government business contracts, especially in large cities with a one-party political system. In this regard, the highly-regulated economies in Boston or Berkeley are as subject to abuse as those in Moscow or East Germany. Moreover, business regulation often has the (perhaps unintended) consequence of reducing jobs or increasing consumer prices or both, which are matters of vital importance to the "little guy." In reviewing Muller v. Oregon, 194 in which the Supreme Court upheld the validity of an Oregon statute limiting women laundry workers to 10-hour work days, Judge Posner concluded that the employer in that case was permitted to: (1) reduce the women's pay to reflect the shorter hours, (2) hire fewer new workers or lay-off some workers if constrained by minimum wage laws, and/or (3) raise his prices. 195 Any of those alternatives would hurt the "little guy" worker and consumer.

The callous and inhumane Marxist retort that "one must break some eggs in order to make an omelet" fails miserably to address these economic dynamics and is nothing more than tacit agreement

193. Siegan, supra note 133, at 4, 12, 15, 20. While many of the ideas expressed herein may seem to ring of moral values and concepts, the reader is reminded that:
The socialists have been successful largely because they have argued in moral terms. Unwillingness to learn from experience any lessons as to the actual practice of socialism, many socialists rely on the superficial attraction of a pleasing moral vision to which many, especially intellectuals, readily aspire. This morally attractive aspiration gives the socialists much of their power, and once their program has been implemented and the terrible truth of socialist practice becomes known, the drift to a redistributive subsistence economy and the collapse of democracy may become irreversible.


that under Marxism, the individual has little or no worth. After several decades of communism tempered with vast amounts of western assistance, Marxist nations today not only lack enough "omelet" to feed all the hungry mouths but also have stopped producing eggs altogether. As a result, those Marxist nations reluctantly are beginning to accept desperately-needed free market principles.

The philosophical inconsistencies, resulting from the judiciary's diverse treatment of personal freedoms as opposed to economic liberties along with its self-professed ineptitude in dealing with economic matters, seem all the more indefensible, given the judiciary's willingness to order massive institutional relief on public budgets and treasuries in a variety of civil rights cases. The "judicial power of the purse" has been with us for some time, despite self-exculpatory statements to the contrary by some jurists. Economic regulation should be no more of a mystery to the judiciary than are taxation, offender rehabilitation, criminal insanity, marital irrec- oncilable differences, and lost future-earnings. The mere existence of legal periodicals such as The Business Lawyer and Journal of Law and Economics clearly attest to the fact that the legal profession is well acquainted with the nuances of economics and with its importance to human liberty and law.

196. As Justice Jackson noted, [Communism's] whole philosophy is to minimize man as an individual . . . . If any single characteristic distinguishes democracy from Communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state. American Communications Ass'n v. Douds, 339 U.S. 382, 443 (1950).

197. See Turpin v. Mailet, 579 F.2d 152, 165 n.38 (2nd Cir. 1978) (listing instances in which Supreme Court ordered relief which "placed significant fiscal burdens on governmental entities"), vacated on other grounds, 439 U.S. 974 (1979); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) ("[The trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which . . . . require the judge's continuing involvement in administration and implementation.").

As noted earlier, the courts have held that eminent domain and business regulation may be evaluated by a standardless ad hoc case-by-case method. Given the inherent nature of such a system, near absolute discretion is placed in trial judges or hearings examiners, especially given the individual’s demanding burden of proof on appeal. Yet, use of such a standardless system is thought of by many as normal despite the fact that an ad hoc system stunts, or precludes, future development of a consistently principled jurisprudence. This is true, given the fact that in an ad hoc system, the possibility that meaningful principles can exist is rejected at the outset.

One eminent economist, August von Hayek, has spoken of the need to adhere to fixed principles and to prohibit unprincipled ad hoc decisions:

It has come to be regarded as the sign of the judicious mind that in social matters one does not adhere to fixed principles but decides each question ‘on its merits;’ that one is generally guided by expediency and is ready to compromise between opposed views . . . . The pragmatic [expedient] attitude . . . far from increasing our command over developments, has in fact led us to a state of affairs which nobody wanted [in which unprincipled standardlessness is a way of life].

It is a serious confusion thus to speak of principle when all that is meant is that no principle but only expediency should rule . . . If the choice between freedom and coercion is . . . treated as a matter of expediency, freedom is bound to be sacrificed in almost every instance . . . .

* * *

The idea that we are not fully free to pick and choose whatever combination of factors we wish our society to possess, or to fit them together in a viable whole . . . that we cannot build desirable social order like a mosaic . . . and that many well-intentioned measures may have a long train of unforeseeable and undesirable consequences, seems to be intolerable to modern man.199

Likewise, renowned philosopher C. S. Lewis explained that only in relatively recent times has mankind begun to doubt that its value judgments are rational and objective.200 It is the modern view that value judgments are really not judgments at all but, instead, are nothing more than sentiments, complexes, or attitudes, which are produced by pressures of the environment and tradition and which

differ among the various communities.201 He then states the follow-

[T]he fatal superstition [is] that men can create values, that a community can choose its 'ideology' as men choose their clothes. Everyone is indignant when he hears the [Nazi] Germans define justice as that which is to the interest of the Third Reich. But it is not always remembered that this indignation is perfectly groundless if we ourselves regard morality as a subjective sentiment to be altered at will .... If 'good' and 'better' are terms deriving their sole meaning from the ideology of each person, then of course ideologies themselves cannot be better or worse than one another. Unless the measuring rod is independent of the things measured, we can do no measuring .... [and] progress and decadence are ... meaningless words.202

Going one step further, modern humanity's allegedly chronic alienation is due not to an intrinsic flaw in the free market or in competition but rather to the tension created by comparing the limitations of this life with the inhumane standards of a utopian existence which collectivists vehemently assert can and will be achieved on earth. Faced with the utopian claim that humanity can and must achieve those unreachable heights, many mortals succumb to the belief that heaven is obtainable on earth and to the feeling of alienation that ensues. Thus, as disillusioned individuals begin striving to achieve the unrealistic utopian premise rather than accepting humanity's limited capacity for perfection and a limited democratic system of gov-

201. Id.
202. Id. Author Ayn Rand has explained the impracticality of being too practical:

A major symptom of a man's—or a culture's—intellectual and moral disintegration is the shrinking of vision and goals to the concrete bound range of the immediate moment ... [or] the inability to think and act in terms of principles ....

The present state of our culture may be gauged by the extent to which principles have vanished from public discussion, reducing our cultural atmosphere to ... betraying all its major values, selling out its future for some spurious advantage of the moment ....

But there is nothing as impractical as [the] so-called 'practical' man. His view of practicality can best be illustrated as follows: if you want to drive from New York to Los Angeles, it is 'impractical' and 'idealistic' to consult a map and select the best way to get there; you will get there much faster if you just start out driving at random, turning (or cutting) any corner, taking ... [the nearest] road in any [convenient] direction, following nothing but the mood and the weather of the moment ....

[M]en have been emerging from universities, for many decades past, with the helplessness of epistemological savages, with no inkling of the nature, function, or practical application of [unvarying] principles.

ernment needed to deal with that reality while maximizing personal freedom, those individuals begin to blame modern western civilization for any and all obstacles standing in the way of paradise.

In noting that governmental intervention into the operations of a more-or-less free market discourages resourcefulness or fairness and encourages government, rather than the objective operation of the market, to decide who profits or loses, Professor Hayek described this shifting of authority (from the operation of the market to government) as a vain attempt at avoiding the inevitable consequences of market imbalances:

[I]n the case of complex spontaneous orders [of a free market] we will never be able to determine more than the general principles on which they operate . . . . This ignorance of how the mechanism of . . . [a free market] will solve . . . [the] 'problem' . . . often produces panic-like alarm and the demand for [the] government . . . [to] restor[e] . . . the disturbed [previously unstable] balance . . . .

The necessity of adaptation to unforeseen events will always mean that someone is going to be hurt . . . [by market 'corrections']. This leads to the demand that the . . . adjustment be brought about by deliberate guidance, which in practice . . . mean[s] that . . . [government] is to decide who is to be hurt. The effect . . . is often that the necessary adjustments will be prevented whenever . . . foreseen [while the imbalance worsens and the eventual 'correction' is made proportionately (if not geometrically) even worse].

Professor Hayek concluded that a free market did not mandate that human nature must first become better than it is to make the economy work properly and that true morality is a matter of free

203. The Essence of Hayek, supra note 199, at 307-08. Before becoming Director of the Office of Management and Budget, David Stockman had the following insight on the futility of "planned" economies:

The essential impulse of the planner is to pierce and dispel the veil of uncertainty that hangs over society's long-term future by extrapolating resource supply-and-demand trends, and then to impose regulations, management schemes, and other trend-altering constraints on current patterns of production and use in order to insure balance for the indefinite future.

What planners everywhere fail to recognize, however, is that future uncertainty is an inherent corollary of the basic impulse that propels economic life, whether under market-price systems centralized state-directed systems, or the array of variants in between. That impulse is the universal striving of men and societies to increase wealth and living standards by getting more for less—more output or utility for less resource input.

will, not government coercion in the form of imposing a just economic order on others, however well-meaning the imposition. In short, the free market does not require that an elite run things indefinitely until the rest of us are sufficiently enlightened to assume full adult responsibilities and rights. That patronizing view of humanity disturbed Hayek as it manifested itself in two important ways that are hallmarks of totalitarian systems: first, the belief held by many that the state must coerce individuals into deciding to share their wealth with others, and second, the belief held by certain groups that they were anointed with the power to direct life until humanity eventually becomes better able to safely share that power. Hayek noted:

[The free market] system ... does not depend ... on our finding good men for running it, or on all men becoming better than they now are ... [A free market] grant[s] freedom to all, instead of restricting it ... to 'the good and the wise.'

To the ... [Judeo-] Christian tradition ... man must be free to follow his [individual] conscience in moral matters [rather than be coerced by law] if his actions are to be of any [moral] merit ....

To this might be added the observation of Aldous Huxley in *Brave New World* that while humanity has ever-increasingly progressed technologically, it has not collectively advanced morally whatsoever. If this were true, we would surely have a long wait under communism for the masses to “mature” to the point of true self-government, a wait at least equal to that of the Second Coming itself.

204. The Essence of Hayek, supra note 199, at 137-38.
205. Id. at 137-38, 139-40. Like it or not, law has profound roots in traditional moral concepts. See 52A C.J.S. Law nn.95-99 (1968). Frederic Bastiat, the nineteenth century French philosopher, noted:

[T]he statement [that] the purpose of the law is to cause justice to reign is not a ... [strictly] accurate statement. It ought to be stated that the purpose of the law is to prevent injustice from reigning ... Justice is achieved only when injustice is absent.

But when the law, by means of its necessary agent, force, imposes upon men ... regulation of ... [matters previously left to the individual] then the law is no longer [acting] negatively ... [to prevent injustice but instead] acts positively upon people [by mandating the moral values implicit in the new law enforced].

F. Bastiat, The Law 29 (1984). Furthermore, Bastiat explained that “[a]lthough mankind is not [and never will be] perfect, ... all hope rests upon the free and voluntary actions of persons within the limits of [injustice]. ...” Id. at 73.

Justice Holmes' statement that "the most enlightened judicial policy is to let people manage their own business in their own way..." applies with equal force to the type of government intervention in the free market that Hayek condemned. In this connection, as noted earlier, we should "remember[] always that generosity is not a virtue when dealing with the property of others." Those who are indifferent to governmental infringement of economic liberties would likely protest most vehemently the government's infringement of personal freedoms by restricting abortion and reinstating prayer in the public school system.

Traditional lore has it that "good" kings and queens, republics and public officials give large sums of money to the poor. They are called "compassionate" while those not similarly inclined are called "heartless" and "insensitive." However, no mention is made of how such philanthropists came by their largess. This tradition is, of course, fantasy because government is not a philanthropic institution. Instead, it is an organization that routinely employs public force and coercion against those who resist its commands. If you refuse to

207. Doctor Miles Medical Co., 220 U.S. at 411.
209. Similarly, Michael Novak, a commentator on religion and the free market, noted the trend in both fact and fiction to dramatize "distributive justice" at the expense of an obligation to produce wealth:

In pre-modern literature, most treatises on justice have a great deal to say about distributive justice, but it had not entered... the mind of man to imagine that he had an obligation to produce, to create wealth...

...[But by about the start of the industrial age,] [t]here was a productive ethic. The world of the year 1800 had 800 million should in it, most of whose lives were nasty, brutish, and short. Famines racked London or Paris every fifteen or twenty years, killing as many as ten thousand people; the average life expectancy in France in 1800 was twenty-seven for females and twenty-four for males. Those who could produce more food, shelter, and clothing... were suddenly acquiring an obligation to do so. Justice now imposed an obligation upon those who could produce... [Therefore,] Justice,... has a productive as well as a distributive dimension, and the first is a precondition of the second.


Some might be inclined to say that a "duty to produce" applied to situations where humanity was facing starvation only, not to modern times where "luxuries" or non-necessities are produced. Any such "minimalist" view ignores the fact that as humanity strives to achieve a physical and spiritual standard above and beyond the level of stark necessity, its needs will correspondingly grow and expand. For example, while petroleum is not an absolute physical necessity, its sudden disappearance would quickly produce death and famine as cities became shut off from food transportation and as buildings
part with that portion of your funds on which government lays claim, you go to jail or face the executioner.

Yet the legal profession serves as an unwitting accomplice in the process of incorporating heretofore imical concepts into law. Professor Hayek added:

In spite of the collapse of . . . totalitarian regimes . . . [or near collapse averted only by western aid], their basic [values] . . . continue[] to gain ground, so much so that to transform completely the legal system into a totalitarian one all that is needed now is to allow the ideas already reigning in the abstract sphere to be [put] into practice.

* * *

When a general philosophy of the law which is not in accord with the greater part of the existing law has recently gained ascendency . . . the same lawyer will, through . . . habits and techniques, and generally . . . unwittingly, become a revolutionary force, as effective in . . . transforming the law down to every detail as [he or she was] before in preserving it.

* * *

In other words, law . . . [will] not . . . consist of abstract [unvarying] rules which make possible the formation of a spontaneous order by the free action of individuals through limiting the range of their action, but is to be the instrument of [manipulative] arrangement . . . by which the individual is made to serve [government's] purpose.210

Noting the Frankenstein-like character of such trends, he added that “sources of many of the most harmful agents in this world are often

and homes became uninhabitantly cold. Further, such a “minimalist” view makes the fatal mistake of attempting to throttle or isolate “physical” man while allegedly encouraging the growth of “spiritual” man, forgetting their unity. In sum, the argument for the “horse-and-buggy” body and the “space-age” mind is both ludicrous and tragically short-sighted. As the early twentieth century thinker Ludwig von Mises noted:

To form a correct conception of the social significance of luxury consumption, one must first of all realize that the concept . . . is an altogether relative one [which is essentially historical]. Many things that seem to us necessities today were once considered as luxuries . . . . This is the course of economic history. The luxury of today is the necessity of tomorrow . . . . Luxury consumption provides industry with the Stimulus to discover and introduce new things.

[Even] the rich idler . . . fulfills function in . . . life . . . [by] awaken[ing] in the multitude a consciousness of new needs and gives industry the incentive to fulfill them.


210. The Essence of Hayek, supra note 199, at 310-11, 315-16. Elsewhere, Professor Hayek noted that “[o]utside the sphere of individual responsibility there is . . . no[. . . . . . . . . . . . .] chance of proving one’s conviction by sacrificing one’s desires to what one thinks right. Only where we ourselves are responsible for our own interests and are free to sacrifice them has our decision moral value.” A. Hayek, The Road to Serfdom 211 (1944).
not evil men but high-minded idealists . . . [I]n particular the foundations of totalitarian barbarism have been laid by honourable and well-meaning scholars who never recognized the offspring they produced."211

Former U.N. Ambassador Jeanne J. Kirkpatrick summed up the distinction between mere dictatorships (usually those on the political far right), which usually develop into more democratic societies and are not usually bent on transforming the total man but only on maintaining personal power, and totalitarian regimes (usually Marxist), which tend to remain permanently and to control the totality of one's existence (hence the adjective "totalitarian"):

A totalitarian regime is distinguished by its rulers' determination to transform society, culture, and personality through the use of coercive state power. Non-totalitarian systems whether autocracies or democracies do not use power for such broad purposes. The distinguishing characteristic of totalitarian goals is that they dramatically extend the scope of government activity . . . expand[ing] the scope of coercion in a society.

* * *

Totalitarian governments are those whose rulers see the whole of the society, economy, culture, and personality as appropriate fields for government regulation. What one reads, writes, studies, [wears], publishes, works at, where one lives and works, what one is paid, and by whom are all thought to be the business of government . . . [T]otalitarian is utopianism to come to power.

* * *

[T]otalitarian[ism] . . . emphasizes the identity of individual . . . [for] collective purposes, [so that] the . . . moral perfection of men is . . . inextricably . . . made dependent on the perfection of society.212

The nature of totalitarian systems is hardly new and cannot be presumed to have been beyond the ken of the framers. As noted scholar Robert Nisbet summed up:

211. The Essence of Hayek, supra note 199, at 314.

This debate is hardly new. As Dr. Kirkpatrick notes:

Plato believed that an individual's moral quality derived from his membership in a just society in which everyone accepted his assigned station and duties and voluntarily and consistently subordinated personal to collective goals. Aristotle argued that his teacher overestimated human malleability [and perfectibility] and underestimated the tenacity of organic ties and human wickedness. Aristotle also argued that experience and law were better guides than reason alone to the good society and that Plato's proposal would sacrifice real goals to illusory ideals.

Id. at 193.
There have been two great traditions in Western social and political thought, and these have little to do with conventional distinctions between 'liberal' and 'absolutist.' In the first, which begins with Plato, the political state is given an emphasis that virtually extinguishes other forms of private association. Hobbes, Rousseau, Bentham, Michlet, Fichte, Treitschke are among . . . [those] in this tradition . . . .

The second tradition is far more interesting and . . . valuable . . . . This tradition begins . . . with Aristotle . . . and includes . . . Cicero, Thomas Aquinas, Bodin, Althusius, Burke, Tocqueville, Proudhon . . . . Basic to this tradition is the clear distinction between social institutions and the political state . . . . A political government may be nominally democratic or republican, but it cannot be a genuinely free government if the powers of the state have reached out to encompass all spheres of social, moral, economic, and intellectual existence. Conversely, a government monarchical or oligarchical in structure can be a free government if . . . it respects the other institutions of society and permits autonomies . . . in the [private] social and economic spheres.213

Because this has been forgotten or ignored, Nisbet claimed, the value attributed to the public sector has far eclipsed that attributed to individual initiative.214 As a result, an individual's immoral or anti-social behavior has escaped censure so long as that behavior provides some kind of service to the public.215 In other words, "[t]o be aggressive and rapacious in the name of one's family, job, or business is by definition evil; but to be aggressive and rapacious in the name . . . of HEW or [the] IRS . . . carries a different evaluation in the mind of the political intellectual."216

Despite this glaring inconsistency, Kirkpatrick explains that the reason for popular current intellectual disdain for western institutions and values is "the intellectuals' habit of measuring institutions and practices against abstract standards . . . [for whenever] society is measured against an abstract [and unattainable] conception of a just order, it will [always] be seen to have failed."217 Thus, she

214. Id.
215. Id. at 668.
216. Id.
217. J. Kirkpatrick, supra note 212, at 194. She also noted that, "[i]t is . . . easy to understand why the New Class is more often liberal than conservative. The habit of measuring existing practices against abstract principles inevitably leads to discontent with the status quo." Id. Until the mid-1960's, she added, "reform proceeded in response to some concrete evil. Since then, more and more reforms have been stimulated by the goals of reformers, rather than by the desires the affected groups . . . . The difference is nothing less than . . . [one] between democratic government and [a] revolutionary dictatorship." Id. at 202.
concludes, "[t]he political temptation of the new class lies in believing that its members' intelligence and exemplary motives equip them to reorder the institutions, the lives and . . . characters of almost everyone." 218

Perhaps, as Plato asserted, today's New Class utopians fervently believe that a perfect society will exist when everyone has accepted his or her station in life. Such a belief routinely subordinates the individual to the collective goals of society and imposes a natural elite who must assign to those less gifted their lot in life until such time that society as a whole becomes "sufficiently enlightened." This is, of course, nothing other than the collectivist or modern totalitarian claim that the individual is incapable of self-government and must be ruled by higher authority until the ever-awaited golden era somehow arrives. Of course, the New Class disdains inherited wealth and privilege and seeks to level society in that regard. However, its members fail to realize that individual merit in the form of innate talent and intelligence is nothing more than a genetic, as opposed to a financial, inheritance. Both forms of inheritances are the result of nature's lottery rather than true individual effort.

Whatever the truth in that regard, the dynamics and vibrancy of the free market render soulless regimented economies an anemic spectacle in comparison. As Justice Benjamin Cardozo said, "[a free market or economy] never stands still. It either grows or decays." 219 After all, "[t]here is no such thing as achieved liberty; like electricity, there can be no substantial storage [of liberty for later use] and it must be generated as it is enjoyed, [or] the lights go out." 220 Thus, an individual's personal disregard for "opportunistic and heartless entrepreneurs" should not stand in the way of honoring economic liberty. As noted by Justice Frankfurter, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." 221

218. Id. at 203.
As to the qualifications needed to be a New Class reformer, Edmund Burke explained the paradoxical truth in his belief that, generally, those who are best able to find fault are the least qualified to work toward reformation "because their minds are not only un-furnished with patterns of the fair and good, but by habit they come to take no delight in the contemplation of those things. By hating vices [in the abstract] too much, they come to love men too little." In this regard, Irving Kristol noted that:

[Zealous environmentalists] are not really interested in clean air or clear water at all. What does interest them is modern industrial society . . . , toward which they have profoundly hostile sentiments . . . . [T]hey are at bottom rejecting a liberal civilization which is given shape through the interaction of a countless sum of individual preferences. Since they do not like the shape of that civilization, they are moved to challenge—however indirectly or slyly—the process that produces this shape. What [they] really want is very simple: . . . the authority, the power to create an 'environment' . . . [which] will be a society where the rulers will not . . . 'think economically . . . .'

The 'consumer protection movement,' like the 'environmentalist' movement, is a revulsion against the kind of civilization that common men create when they are given the power, which a market economy . . . uniquely give[s] them . . . .

[W]e can summarize our situation as follows: the Old Left accepted the idea of the common good proposed by bourgeois-liberal society . . . . Bourgeois liberalism insisted that individual liberty was a precondition of this common good; [while] the Old Left insisted that centralized planning was a precondition but that individual liberty would be an eventual consequence. The experience of post-World War II decades has revealed that the Old Left simply could not compete with bourgeois liberalism in this ideological debate. The result has been the emergence of the New Left which implicitly rejects both the bourgeois-liberal and Old Left idea of the common good, and which therefore [implicitly] rejects . . . the ideological presuppositions of modernity itself. This movement, which seeks to end

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222. E. Burke, Preserving and Reforming, 5 Works 302-9 (1789). As Frederic Bastinat noted:

Clearly then, the conscience of the social democrats cannot permit persons to have any liberty because they believe that the nature of mankind tends always toward every kind of degradation and disaster. Thus, . . . the legislators must make plans for the people in order to save them from themselves.

[But] [i]f people are as incapable . . . and as ignorant as the politicians indicate, then why is the right of these same people to vote defended with such passionate insistence?

. . . If the natural tendencies of mankind are so bad that it is not safe to permit people to be free, how is it that the tendencies of these [elite] are always so good? . . . [D]o they believe that they . . . are made of a finer clay than the rest of mankind? . . . [I]f [they] . . . have received from Heaven an intelligence and virtue that place them beyond and above mankind . . ., let them show their title[] to this superiority.

F. Bastiat, supra note 205, at 61-62.
the sovereignty over our civilization of the common man, must begin by seeking the death of 'economic man,' because it is in the marketplace [of a free society] that this sovereignty is most firmly established. It thinks of itself as a 'progressive' movement, whereas its import is regressive. This is one of the reasons why the New Left... comes more and more to resemble the Old Right, which never did accept the liberal-bourgeois [principles] ... .

Professor Robert F. Nagel summed up the dynamics that have aggravated the judiciary's self-perception as a part of the New Class elite protecting freedom against a benighted, insensitive citizenry:

The single most significant event for present-day judges and scholars was the federal judiciary's extended and often heroic assault on racial segregation in the South. The profound formulative influence of this struggle has shaped as has nothing else the law, role, and aspiration [of the judiciary]. The operative image has been the courts attacking a pernicious and deeply ingrained part of popular culture. By degrees... this image of the judiciary... has consolidated and grown, so that the courts' basic function has become [that of] critic and reformer of the general culture... [whose] role... is to uplift an unappreciative and uncomprehending mass sensibility... [and in so doing] persistently... isolate[s] itself from the general culture... .

The antidote to the judiciary's inflated self-view is the realization that "legislatures are ultimate guardians of the liberties... [to] as great a degree as the courts." As noted earlier, Justice Frankfurter aptly saw that by merely professing to act with human ends in mind, the court does not save itself from being oligarchic because "[a]s

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223. I. KRISTOL, TWO CHEERS FOR CAPITALISM 61-62 (1978). Professor James P. Beckwith has noted that:

From the vantage point of a secure, sanitary, and prosperous society, the historical lessons of the past 200 years are forgotten all too quickly. The idea of progress, being relative, is not compared to a forgotten past. In lamenting the inequality of wealth, many ignore universal, medieval misery. In a concern over long-term degenerative diseases allegedly caused by the environmental impact of a mature market system, many forget that in pre-industrial society few people lived long enough to develop such diseases. They further forget that in our own time life expectancies continue to lengthen. In warning of the imminent exhaustion of resources, many forget that technology is not static, that the market is flexible and responsive to change, and that experience has disproved repeatedly these dire predictions... .

[H]istory... overcome[s]... the naive assumption that wealth is an everpresent fixed quantity to be redistributed rather than an expandable... presence... limited only by saving, capital investment, and human ingenuity.

Beckwith, supra note 21, at 3.


history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements. But a democracy need not [and cannot] rely on the courts to save it from its own unWisdom. 226

In raw philosophical terms, C. S. Lewis summed up the gross inadequacy of using vague amorphous concepts of public good as the underlying philosophical or moral anchor or foundation for a nation:

Many a popular 'planner' on a democratic platform, many a mild-eyed [social] scientist in a democratic laboratory means, in the last resort, just what the Fascist means. He believes that 'good' means whatever men are conditioned to approve. He believes that it is the function of him and his kind to condition men, to create consciences by ... psychological manipulation of infants, state education and mass propaganda .... [He does not yet fully realize that those who create conscience cannot be subject to it [as the creator is always superior to his or her creation] .... If 'good' means only the local theology, how can those who invent the local theology be guided by any idea of good themselves? The very idea of good presupposes some objective moral law which overarches rulers and ruled alike. Subjectivism about values is eternally incompatible with democracy .... [since] [w]e and our rulers are of one kind only so long as we [are] subject to one law [equally] ....

If we returned to the objective view [of morality] we should demand qualities [in our leaders] much rarer, and much more beneficial virtue, knowledge and skill. 'Vision' is for sale ... everywhere. But give me a man who will do a day's work for a day's pay, who will refuse bribes, who will not make up his facts, and who has learned his job. 227

227. C. S. LEWIS, supra note 200. On the view that much of government, including the judiciary, is infected with "gift-giving" bribery of one sort or another, see J. NOONAN, BRIBES (1984).

Some might say that unless government undertakes to be "compassionate," we will become a nation of scoundrels and thieves. As noted by Frederic Bastiat:

This is an absurd conclusion, worthy only of those worshippers of government who believe that the law is mankind.

... Does it follow that if the law is restricted ..., we will be unable to use our facilities [for good]? Suppose that the law does not force us to follow certain forms of religion, ... does it then follow that we shall eagerly plunge into atheism, hermitry, misery and greed? .... Does it follow that we shall then cease to associate with each other, to help each other, to love and succor our unfortunate brothers, ... and to strive to improve ourselves to the best of our abilities?

BASTIAT, supra note 205, at 72. Elsewhere, Bastiat noted that many of the intellectuals during the two centuries preceding the French Revolution were immersed in:

[T]he study of antiquity .... [which] present[ed] everywhere in Egypt, Persia, Greece,
One ignores only at great peril the truth that, as Alexander Hamilton stated, once "morality [is] overthrown (and morality must fall with religion [or any belief in permanent truths]), the terrors of despotism can alone curb . . . man, and confine him with[in] the bounds of social duty." Simply put, if we as individuals live under

Rome the spectacle of a few men molding mankind. . . . But this . . . proves only that since men and society are capable of improvement [on their own], it is to be expected that error, ignorance, despotism, slavery and superstition should be greatest towards the origins of history . . . not understanding[ing] that knowledge . . . grows with the passage of time . . . .

*Id.* at 50-51. Those who object to Batistat's reasoning by arguing that any development or evolution of human nature is so slow as to amount to nothing of consequence in over 6,000 years of recorded history inadvertently testify that any "reformation" of humanity by Marxism or other utopian means will last a very long time indeed.

228. Hamilton, *The Spectacle of Revolutionary France*, 6 *The Stand* (1978) (emphasis added). Professor Peter L. Berger, Director of the Institute for the Study of Economic Culture at Boston University recently summarized Marxism's quasi-religious nature and its attraction for the New Class: Marxism can . . . be understood as a . . . secularized version of the classical biblical view of history as consisting of a fall from grace, a set of redemptive events . . ., and . . . a great climax that will bring ordinary human history to an end. Marxism has substituted private property and its "alienations" for original sin, the revolutionary process for . . . God's redemptive activity, the proletariat . . . for the church, and the attainment of true [world-wide] communism for the advent of the kingdom of God.

. . . .

Both in the Third World and in the West, intellectuals have been prime candidates for this 'fideistic' commitment [to Marxism] . . . . How is one to account for that? . . . . [I]n most countries intellectuals have become more estranged from . . . religiously based morality than any other . . . group. Consequently, . . . intellectuals suffer from . . . 'alienation' . . . [and] are . . . more susceptible to any secular messages of redemption from these ills. The socialist myth, particularly in its Marxist version, is unusually well suited to meet these needs . . . . Modern intellectuals are indeed 'children of the Enlightenment'—but not very happy children at that. They do aspire to Enlightenment ideals—progress, reason, scientific truth, humanistic values. But they also desire at least some of the traditional virtues that modernity has undermined—collective solidarity, transcendence of individualism, and, last [but] not least, moral certainty and ultimate meaning. Marxism has plausibly offered this curious melange of modern and countermodern appeals from its inception.

P. BERGER, THE CAPITALIST REVOLUTION: FIFTY PROPOSITIONS ABOUT PROSPERITY, EQUALITY AND LIBERTY 197, 199 (1976). "Alienation" likely occurs not through any inherent process of "modernization" but rather as a result of the inevitable tension between daily reality and the unreachable utopian goal of Marxism with which our present mortal existence is inhumanely contrasted.

Without putting too fine a point on it, Professor Berger notes modern intellectual's imperviousness to empirical evidence in this important instance:

What is remarkable . . . is the ingenuity with which many have succeeded . . . explaining away the empirical discrepancies . . . . [So that] the location of the promised land was simply shifted on the map of the world . . . [from] the Soviet Union . . . to [ ] China . . . then Cuba or Vietnam or Mozambique or Nicaragua . . . ad infinitum. Nothing illustrates the impermeability of myth to empirical disconfirmation as powerfully as the propensity of

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a philosophy that permits unbridled self-gratification, doing as much as one can get away with, the citizenry will inevitably cry out for a "strong-arm" to forcibly impose social order.

Irving Kristol noted the fragile condition of the very philosophical or moral beliefs which make modern open society possible. Yet seemingly paradoxically, modern liberal society forcefully tends to denigrate and eventually eradicate such beliefs, resulting in the very impassioned conditions that give way to totalitarian systems. Kristol explained that a liberal society must necessarily be secular, with religion mainly becoming a private affair. As a result, there is "a diminution of religious faith and a growing skepticism about traditional consolations of religion . . . ." This disestablishment of religion inevitably leads to several significant consequences. One such consequence is that individuals urgently and unreasonably demand that their society provide them with temporal happiness. Another related consequence, is the inability of society to arrive at a "convincing and generally accepted theory of political obligation." In other words, mere civil loyalty is no longer sufficient to convince an individual to die for his or her country. Kristol declared:

For well over a hundred and fifty years . . . , social critics have been warning . . . that bourgeois society was living off the accumulated moral capital of traditional religion and . . . moral philosophy, and that once this capital was depleted, bourgeois society would find its legitimacy ever more questionable. These critics were never, in their lifetime, . . . popular or persuasive. The educated classes . . . simply could not bring themselves to believe that religion or philosophy was that important to a polity. They could live with religion or morality as a purely private affair, and they could not see why everyone else . . . could not do likewise . . . . [Yet] it is becoming clearer every day that even those who

intellectuals to locate 'true socialism' in one place after another.

Id. at 204.
229. Kristol, supra note 223, at 63.
230. Id.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id. at 64.
236. Id.
thought they were content with a religion that was a private affair are themselves discovering that such a religion is existentially unsatisfactory.237

Kristol's implication was clearly that our open society will inevitably disintegrate into one or another form of overt or covert tyranny just as a variety of other nations have over the course of recorded history unless society is able to discover a way to continually give individual private decisions true moral value on a daily basis. The free market system—in which economic liberties thrive, individual economic and moral choices are encouraged, and private spheres of life are respected—is the only way of achieving and maintaining an open society. The less the free market operates in an open society, the greater the tendency for that society to destroy the very common base of values that infuses it with life and the nearer that society is to despotism (with or without a democratic facade).238

After all, the free market alone provides a daily, direct, and measurable competition among vying philosophies, values, and beliefs which are continually being weighed against one another on the free market's scale.239 Perhaps it is because the free market gives

237. Id. at 65-66.
238. Some people fear freedom and responsibility. So be it, because in a free society mass man easily can live a life of unity and security in private collectives such as a monastery, kibbutz, or utopian community. On the other hand, for the individual who cherishes autonomy, to live as an individual within a socialist society is nearly impossible. Where is [he or] she to go, and what is to insulate [him or] her from the reach of the state? Beckwith, supra note 21, at 24. For a review of the extra-legal aspects of this issue, see L. von Misses, LIBERALISM IN THE CLASSICAL TRADITION (1935), SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS (1932); and OMNIPOTENT GOVERNMENT (1940).
239. Justice Holmes summed this up well in Abrams v. United States, 250 U.S. 616, 630 (1919) (emphasis added):

[When men ... realize] that [the test of] time has upset many fighting faiths, they may come to believe even more ... that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.

Yet zealots or extremists at either end of the political and philosophical spectrum disregar reliance on the free market of ideas, claiming instead that the situation is "too urgent" or that the masses are blinded by a class or special interest group to see the nature of the "problem." The author is reminded of a chance meeting with a rather erudite member of the Spartacus League, a group of Marxist intellectuals. After hearing an analysis of "American capitalism," the author suggested that if the group's position were as strong as its members believed, that serious efforts should be made to amend the Constitution by eliminating private property and installing a socialist or collectivist regime instead. As the reader might imagine, the response to his suggestion contained far more heat than light.
each producer and consumer a vote with the evidence piling up in its favor, that those who oppose the free market invariably attempt instead to point to other issues arising in any economic system that falls short of their lofty standard of unattainable collective perfection. While there is always room for improvement in any economic system, judgment not tempered by a healthy dose of practical reality is doomed to lead to disastrous consequences if it goes unchecked. For those of us burdened with humanity's limited capacity for perfection, such demands by critics of the free market would lead to an unmercifully inhumane demand for constant perfection under a collectivist system. If indeed we have all fallen short of the glory of God, what pretensions must a system make in presuming to raise humanity to such heights?

Communism has gained adherents and nations over the past several decades simply because it is as a "religion" which addresses humanity's basic hunger for the divine:

[T]he Totalitarian State . . . demands complete obedience and unlimited devotion from its members who may have to undergo a period of probation before their admission and who may be degraded in rank or expelled from the party altogether if they show any signs of disloyalty or inefficiency. In short, it resembles a religious or military order . . . and it tends to foster the same strong esprit de corps they do.

* * *

[C]ommunism is not simply a form of political organization; it is . . . a philosophy and a creed . . . . Communism . . . challenges Christianity on its own ground by offering mankind a rival way of salvation. In the words of a Communist poster: 'Jesus promised the people paradise after death, but Lenin offers them Paradise on earth.' Consequently the opposition of Communism to Christianity rests . . . on the religious exclusivism of the Communist philosophy . . . .

Communism does indeed require an intense religious-like belief of its adherents. According to Marx and Lenin, no single nation can progress higher than being merely socialist until all nations first become socialist. Once all nations become socialist, communism will only then come into being. At that point in human history, many wonderful things supposedly will occur by an-as-yet-unexplained process: the need for national boundaries will end and we will become one family under one world government. Human misery, greed, lust, and hatred will somehow cease. In short, heaven will come to exist upon earth.  

241. Discussing communism and the Communist Manifesto, the Encyclopedia Americana puts it this way:

In their later writings, Marx and Engles described the ideal communist society . . . as a system of social ownership under which . . . the state would cease to be an instrument of force [law] and "wither away" [somehow] and the individual would live in freedom and harmony with society.

. . . .

[It would be] a new epoch in human history, as a socioeconomic order with [an] unrestricted abundance of productivity but no private ownership of the means of production, an order without classes, class struggle, exploitation and oppression.

7 ENCYCLOPEDIA AMERICANA COMMUNISM 436, 439 (1989). See also L. VON MISES, SOCIALISM 82 (1951) ("As soon as there is no longer any . . . class . . . struggle . . . . then there will be nothing to repress and nothing to make necessary a . . . repressive power, [the] state . . . . The intervention of state power [then] . . . at last . . . falls asleep of its own accord."). (quoting ENGLAS, HERRN EUGEN DURRINGS UMVALZUNG DER WISSENSCHAFT 302 (1910)).

However, a steady stream of renewed scholarly thought concludes that Marxism or any "planned" economy is unworkable since no one person or group of dedicated "planners" can ever know enough to adequately plan for the rest of us as an ever-increasing knowledge base raises ever-new questions and commensurate ever-new areas of ignorance:

Implicit in Karl Marx’s critique of capitalism was the original conception of . . . "comprehensive planning" . . . [which involved] a presupposition that it is actually possible to . . . control the causal development of a modern . . . advanced economy.

. . . .

Yet without such [all-encompassing] knowledge [justifying substituting the multitude of forces that make up the free market for a centralized bureaucracy,] the [government] planning bureau would be unable to justify intervening in ignorance into the workings of the market.

. . . .

[T]he advocates of . . . planning never tire of reminding us what a tremendously arduous task planning a modern economy is, by [so that] in doing so they are not responding to the central contention of the knowledge problem argument, which concludes that the way a modern economy works necessarily precludes its being rationally controlled . . . .
Please pause here for a moment to consider the truly astounding leap of faith required by the communist creed. In view of humanity's 6,000 years of proof that it is incapable of learning from history, acceptance of a collectivist "salvation" requires a leap of faith that, short, our economic malaise cannot be blamed on the fact that our economy is out of control [in the sense that it can be "planned"] because no modern economy could possibly be otherwise.

D. Lavoie, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? 3-4, 6, 8-9 (1985). In this respect, Professor Lavoie added that:

[A] [g]rowing knowledge [base] does not constitute an ever-widening grasp of reality. But there is a sense in which we cannot say [that] our ignorance is being reduced, for the more we know, the more new questions we are able to ask.

... . . .

The conclusion . . . that the social aspirations of advocates of comprehensive planning would more than exhaust the intellectual capacity of human minds . . . has a [further] troublesome obstacle to overcome . . . the existence of a[ ] . . . general and insurmountable limit to the powers of the mind . . . . It is exceedingly difficult for our intelligence to [routinely] grapple with its own shortcomings, since to describe them in detail would require the spelling out of [that] which we do not know . . . .

Id. at 58, 65. See also Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 357 (1945) (Jackson, J., concurring) ("People do not have words to fit ideas that have never occurred to them.").

Another reason suggested by Professor Lavoie as to why Marxism is unworkable is the little-noticed conflict between its true origins and proclaimed aim of universal peace and brotherhood:

Contrary to the usual story, the notion of planning was not born in the mind of . . . Karl Marx, but rather in the mind of an elitist admirer of the military order, military discipline, and rule by an intelligentsia made up of engineers, industrialists, and bankers.

... . . .

Planning was born as a mutual protection for a corporate elite.

... . . .

[As] argued forcefully by the American liberal Walter Lippman[,] . . . [planning] is essentially a militarization of the economy, the most complete forms [to date] of which have been National Socialist and Stalinist communism.

... . . .

Stalin was able to perfect the war economy, from which other nations that had democratic traditions had to retreat in peacetime by declaring a permanent civil war within his own country's borders . . . .

When the story of the Left is seen in this light, the idea of economic planning . . . appear[s] . . . [to be] reactionary. The theory of planning was, from its inception, modeled after feudal and militaristic organizations.

Lavoie, supra, at 218, 220, 222, 230.
makes the beliefs of the most radical religious fundamentalist absolutely pale in comparison. To ignore communism's leap of faith is to ignore what should be its most obvious and fundamental tenent, for without the arrival of the elusive future golden age, its hardship will be tragic and wasteful on a global scale. Ignoring the fact that many theologians have shown that traditional Judeo-Christian teachings enables all to share a truly abundant life here and now, the prospect of a next life seems infinitely more likely to come to pass than paradise in this one.

The lack of a deity does not preclude a deeply-held belief such as communism from being a "religion" if it serves as the ultimate concern in one's life. 242 As the Supreme Court said, "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture [and] Secular Humanism ...." 243 Thus, some apparently worship a utopian future golden age, with an activist judicial priesthood wittingly or not serving as a handmaiden or midwife. 244

Ideas certainly have consequences. Ideas about economic liberties have consequences which affect individuals' lives through the broadening and lessening of personal freedoms. If our nation should decide to embrace a system other than the free market, it should at least

242. The Supreme Court said as much in the context of a military draftee's conscientious objector claim in Welch v. United States, ("[I]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that ... occupy in the life of that individual 'a place parallel to that filled by God' ... his beliefs function as a religion in his life ...."). Welch v. United States, 398 U.S. 333, 340 (1970) (quoting United States v. Seeger, 380 U.S. 163, 176 (1965)).

243. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961). Those in professions other than law have noted that principle also:

Humanity, [John] Dewey recognized, was innately religious .... [So] [h]e urged ... Americans to adopt 'a common faith,' a public philosophy based on a morality that valued ... the furtherance of mutual aid and affection .... Indeed, Dewey was more frank than most secularists in admitting the religious nature of his secular scheme. He correctly saw that secularization involved the replacement of one religion with another.


244. See Kornhauser, supra note 240, at 172 ("Judges have long employed religious terms when speaking of the Constitution") (citing H. BLACK, A CONSTITUTIONAL FAITH (1968); Lerner, Constitution and Court as Symbols, 46 YALE L.J. 1290, 1294-95 (1937); Levinson, The Constitution in American Civil Religions, 1979 SUP. CT. REV. 123).
do so with a clear vision of the practical consequences and the like-
lihood (or lack thereof) of reaching the purported collectivist goal of heaven-on-earth. Like democracy, a free market system is the worst system, except for all the others.

In sum, the current philosophical and legal malaise affecting eco-

nomic liberty seems to stem from the following five popularly ac-
cepted concepts which are nonetheless erroneous:

1. The first is a failure to acknowledge or to recognize the in-
evitable chill on the exercise of personal freedoms as a result of excessive governmental regulation and control of economic liberties. After all, he or she who controls the purse-strings reigns supreme.

245. Given the quasi-religious nature of beliefs about the issues cited here, the author readily acknowledges the resistance and outright hostility that these statements may engender and the limited potential for rational discourse with collectivist "true believers". As Professor Lavoie noted,

[The kinds of attitudes toward market institutions that the advocacy of comprehensive planning [has] instilled in its followers [have] made it psychologically if not logically im-
possible for them to endorse the radical ideal sketched here . . . [and] turn immediately from vehemently condemning the market (for its inability to attain what turns out to be an impossible standard) to [at least silently] warmly embracing it . . . .

Unfortunately, it can still be said today that all revolutions have only served to transfer rule from one hand to another . . . [and has shown] 'very convincingly that . . . state ownership of the means of production . . . is not only compatible with all [the] disasters of the capitalist world . . . but that it adds to them a series of disasters of its own: in-
efficiency, lack of economic incentives and, above all, the unrestricted role of the omnipotent bureaucracy, a concentration of power never before known in human history.'

. . . .

Common law principles accompanied the evolution of free markets in Britain, and some form of property rights prevailed in every nation that participated in the rapid eco-

nomic growth known as the industrial revolution [in which most of the Third World longs to join].

. . . .

The birth of free-market notion in classical liberalism represents a powerful movement in direct—if not always consistent—opposition to the status quo . . . . The citadels of power are . . . , whether they know it or not, more threatened by the spontaneous forces of the openly competitive market than by any other factor . . . . Ideologies that seek increased governmental intervention into the economy have been only helping the powerful secure better control . . . .

LOAVIE, supra note 241, at 232, 238, 240-42 (quoting SPOONER, VICES ARE NOT CRIMES (1875)).
2. The second is a perception that government-mandated redistribution of wealth is laudable in furthering public morality. Forgotten is the injustice done to the honest citizen whose wealth is taken against his or her will. Also forgotten is the truth that individual initiative is the sine qua non of any morally good action or decision. Such efforts at legislating morality are no less abhorrent when done by the political right or left. Zealous but misguided individuals’ refusal to heed this truth will produce results reminiscent of, yet far bloodier than, the worst excesses of the Temperance movement.

3. The third is a belief that extensive governmental regulation of the economy somehow ultimately benefits the “little guy.”

4. The fourth is a failure to see that any system which inexorably restricts individual initiative inevitably reverts from a system of “contract” to one of “status.”

5. The fifth is a religious utopian thesis that, given enough public largess, human nature will develop into a qualitatively new entity. This thesis is fundamental to Marxism which posits that humanity will ultimately reach a perfect state of existence only after all nations become socialist. However, given humanity’s inability to change in 6,000 years of recorded history and given the permanence and excesses of totalitarian regimes in both ancient and modern times, the optimism implicit in Marxism requires an insurmountable leap of faith which makes the beliefs of the most radical religious fundamentalists pale in comparison.

246. As stated by Tom Bethell in The Riches of the Orient:

Once the presumption is established [under any system that creates an elite group of ‘planners’] that some citizens are inferior to others, or are somehow disadvantaged, then contracts . . . will cease to be the dominant mode of transaction . . . [and] will be replaced by command and coercion . . . .

The characteristic activities of the modern . . . state can . . . be defined as the struggle to expand the number of groups whose ‘underprivileged’ status entitles them to privileged treatment . . . unconsciously seek[ing] to reverse what the English legal historian Sir Henry Maine called . . . the ‘movement of progressive societies . . . from status to contract.’


247. As to arguments that Marxism is an “historical inevitability”, Professor Lavoie offers these
IX. CONCLUSION

Restoring the relation between economic liberty and personal freedoms, which are part of a single Bill of Rights, to a balanced equilibrium would go far to again recognize the importance and interdependence of both. Since, as in other areas of life, economic and personal freedoms are integral parts of a single constitutional whole, grossly different judicial treatment of them is simply not justified or supported by logic or by historical record. The judiciary certainly has the expertise to review economic legislation vigorously, given the judiciary’s readiness to issue institutional relief against state and local governments, a practice which directly requires massive ongoing public expenditures and a plunge into a multitude of political and economic thickets.

Returning to the framers’ intent on any matter, including economic rights, is not judicial activism. To the contrary, judicial activism constitutes a departure from allegedly outmoded principles in the name of a supposedly higher good, but which inevitably amounts to little more than imposition of one’s own personal or class views or biases. Judicial activism may well be motivated by a wish to engage in social-engineering while leaving behind the mundane limits of judicial restraint and historical research necessary to justify constitutional case-law.

sobering thoughts:

The thesis that planning is bound to come is usually joined to ... Heilbronner[s] [claim] that ‘it is futile to think of social evolution as permitting a return to the ‘simpler’ ways of the past.’ ‘History,’ he proclaims, ‘is a cumulative process that permits no such retreats.’

[It is not clear how Heilbronner [or any advocate of that theory] has gained access to ... what history will or will not permit [given humanity’s free will] ... . However, the evident failure of Marxists or any other social scientists to predict the future development of capitalism should have taught us by now that nobody can claim any special access to the laws of history ... If human beings wanted to return to an older [and sounder] mode of social cooperation, and if no socioeconomic reasons were given as to why this cannot work, then there is no reason to doubt that history will ‘permit’ such a development. Heilbronner’s position [as to Marxism’s ‘inevitability’] ... suggest[s] that, if human folly ever takes social evolution down the wrong path, we are for some unexplained reason doomed never to backtrack and correct the errors.

Loavie, supra, note 241, at 143-44.
If the original meaning of the Constitution has been irrevocably lost, with regard to personal freedoms or economic liberties, the desire to restate and reaffirm such basic understandings and guarantees by convening a new constitutional convention should be overwhelming. In the absence of a strong move in that direction, one can only suspect that a new constitutional convention is seen by some as an obstruction to continued imposition of personal or class values under the guise of effecting social progress though constitutional adjudication. As worthy a goal as effecting sound progress may be, "[i]t is not admissible to do a great right by doing a little wrong."248

Even if sincerely held, the belief that constitutional adjudication might properly proceed on the basis of current mores raises a profoundly disquieting element into the supposed permanency of constitutional guarantees—and is indeed treacherous shifting-sand upon which to build constitutional jurisprudence of the future. If current disregard of the need and basis for a consistently principled approach to constitutional adjudication continues, the inevitable social and legal disintegration that follows will result in imposition of a new orthodoxy that will almost certainly be much less free. As noted earlier, a Republican form of government is still quite young in relation to the millennia of despotism that comprises nearly all of recorded history. No one knows whether democracy will be permanently established or simply will dissolve under its own weight into a footnote of world history which has been comprised of almost constant tyranny of one sort or another. Like God at the Creation, we should so value freedom and liberty that we are willing to tolerate the sin or abuse resulting from allowing free moral agents to exercise that liberty.

The essence of much said here is summed up by a simple statement which appears in the North Carolina Constitution: "A frequent recurrence to fundamental principal is absolutely necessary to preserve the blessings of liberty."249 Justice Louis D. Brandies put it well in Whitney v. California:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end

249. N.C. Const. art. I, § 35.
and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.\textsuperscript{250}

In parting, the author wishes to state that his purpose has not been to advocate any one partisan view over another. Like the late Professor Alexander M. Bickel, he is libertarian or "conservative in the classic sense, believing that justice in any society depends on respect for the rules; respect by citizens, presidents, secretaries of state, and judges."\textsuperscript{251}

It is, obviously, of prime importance to recall that each freedom imposes a corresponding responsibility and that when any freedom is long exercised without concern for its corresponding responsibility, it will be reduced or destroyed one way or another. Without a self-governing, restrained people, loss of liberty results. In parting, perhaps the source of Judeo-Christian wisdom and compassion\textsuperscript{252} says it best:

\begin{quote}
For all the law is fulfilled in one word, even in this; thou shalt love thy neighbor as thyself.
\end{quote}

\textsuperscript{250} 274 U.S. 357, 375 (1927). The thought that maintaining, let alone improving, a republic and constitution requires considerable bravery and stamina rings throughout statements by the Supreme Court. See Blinn v. Nelson, 222 U.S. 1, 7 (1911) (Holmes, J., for the Court) ("[C]onstitutional law like other great mortal contrivances has to take some chances . . . ."); Adler v. Board of Education, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) ("We need be bold and adventurous in our thinking to survive."). Of course, "boldness and bravery" do not authorize departing from the limits of our written constitution. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 636 (1943) ("Government of limited power need not be anemic government"). Fear of returning to basic principles of personal and economic constitutional guarantees bodes ill for the health of our legal system. Loubriel v. United States, 9 F.2d 807, 808 (2nd Cir. 1926) (Learned Hand, J.) ("[T]here is no surer sign of a feeble and fumbling law than timidity in penetrating the form to [get to] the substance."); \textit{Solzhenitsyn at Harvard} 5-6 (Ethics and Public Policy Center 1980) ("A decline in courage may be the most striking feature . . . . in the West today . . . . Such a decline is particularly noticeable among the ruling and intellectual elites . . . . Must one point out that from ancient time a decline in courage has been considered the first symptom of the end?").


\textsuperscript{252} See NASH, POVERTY AND WEALTH: THE CHRISTIAN DEBATE OVER CAPITALISM 199 (1986) ("A capitalism that is cut loose from traditional values is a capitalism that is headed for trouble. A capitalism grounded on . . . Judeo-Christian values versus a capitalism grounded on hedonism, the love of money and materialism are head[ed] in two different directions"); HOUERWAS, COMMUNITY OF CHARACTER 79 (1981) (quoting John Adams) ("Our Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other.").
But if you bite and devour one another, take heed that you be not consumed one of another. 253


[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established . . . . [W]hile the rights of private property are sacredly guarded, we must not forget that the community also has rights, and that the happiness and well being of every citizen depends on their faithful preservation.