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## Government Regulation: From Independency to Dependency, Part 2

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## GOVERNMENT REGULATION: FROM INDEPENDENCY TO DEPENDENCY, PART 2

STEVEN ALAN SAMSON<sup>\*</sup>

### ABSTRACT

*What Robert Bellah calls 'expressive individualism' has led to unprecedented social legislation in America and expanded government employment since the 1960s, helping to produce a generous supply of public services, policy entrepreneurs, and clientele groups. The legal scholar Lawrence M Friedman notes that 'the right to be 'oneself,' to choose oneself, is placed in a special and privileged position.' As a consequence, 'achievement is defined in subjective, personal terms, rather than in objective, social terms.' When the claims of expressive individualism are considered in tandem with the increasing reach of the modern social service state, a case may be made for their mutual dependency.*

*Today, the regulatory operations of central governments impinge upon virtually all areas of life, leading to widespread efforts by interest groups to have their vision of the good life implemented through law and regulatory oversight. Much of the resulting fiscal, educational, and social intervention is largely invisible to the electorate but has led to greater dependency. It also led the economist George J Stigler to offer a theory of regulatory capture when he observed that clientele groups develop a mutually beneficial relationship with the agencies that regulate their activities. Indeed, when this becomes business as usual, few will call it corruption. Thus, when examining laws and public policies, it is always wise to ask: Cui bono? Who benefits? As the Watergate whistle-blower, Mark Felt, put it: 'follow the money.'*

*This article is drawn from a series of eight introductory lectures and readings for a course on government regulation. Part II is a revision of the last four lectures.*

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## I THE REFORMIST IMPULSE AND PROGRESSIVISM

The first part was devoted to an examination of the proper sphere and scope of the law in a free society, two very different conceptions of liberty, the principles of limited government that the framers designed into the Constitution, and the economic dynamism that has been one of the fruits of western Christianity.

Let us now consider the factors that have led to a greater and greater state of dependency. A speech attributed to Congressman David Crockett of Tennessee, like the later writings of Frederic Bastiat on legal plunder and Francis Lieber on Anglican liberty, bears witness to a constitutional world that even in the late 1820s was beginning to pass away.<sup>1</sup> James Kurth ascribes this breakdown of traditional political forms to a misapplication of the original rejection by the Protestant Reformation of what reformers believed to be the misuse of hierarchy and community in matters relating to salvation. What Kurth calls the Protestant Deformation is a more general stripping of hierarchy and community, traditions and customs, from every area of life.<sup>2</sup> His thesis complements Ralph Raico's attribution of 'The European Miracle' to the influence of Christianity, as discussed in the previous section, while also accounting for its decline.<sup>3</sup>

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<sup>1</sup> Foundation for Economic Education, 'Not Yours to Give' <<http://www.fee.org/library/detail/not-your-to-give-2>>. This speech, sometimes entitled 'Not Yours to Give,' which was published only decades following Crockett's death, is most likely a conflation of fact and folklore: American Memory, 'A Century of Lawmaking for a New Nation: US Congressional Documents and Debates, 1774-1875' <<http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=006/llrd006.db&recNum=308>>.

<sup>2</sup> Kurth identifies six stages in this process of declension, culminating in a highly individualistic idea of universal human rights defined to the exclusion of hierarchy and community, tradition and custom: James Kurth, 'The Protestant Deformation' (December 2005) *The American Interest* <<http://www.the-american-interest.com/articles/2005/12/1/the-protestant-deformation/>>.

<sup>3</sup> See Liberty University, 'Selected Works of Steven Alan Samson' <[http://works.bepress.com/steven\\_samson/133/](http://works.bepress.com/steven_samson/133/)>.

Indeed, these and innumerable other works provide a historical context for understanding both the Christian contribution to the rise of the West as well as its transition away from its specifically Christian character.<sup>4</sup> In light of this history, Stephen Moore raised an interesting question in a *Wall Street Journal* editorial some time ago: how is it that America, ‘sweet land of liberty,’ has become a nation of takers rather than makers?<sup>5</sup>

Such problems are not unique to our day and age. Joshua 9 describes Jotham’s resistance to Abimelech’s tyranny and is noteworthy for its story of the trees and the bramble. Psalm 73 warns of the slippery places where the wicked are brought to destruction. In ‘Heart of Darkness,’ Joseph Conrad characterized civilization as a thin veneer. It is a resource that must be renewed every generation. How each generation is educated may be a truly a matter of national security, but does that make it the unique and specific responsibility of the state? The paradox is that the state must depend upon virtues that it is not well-equipped to instill. As the Christian political philosopher J Budziszewski puts it: ‘through *subsidiarity*, the government honors virtue and protects its teachers, but

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<sup>4</sup> Especially recommended are M Stanton Evans, *The Theme Is Freedom* (Regnery Publishing, 1996) which is also cited in David Gress, *From Plato to NATO: The Idea of the West and Its Opponents* (Free Press, 2004). Recent scholars who have reflected on the diverse elements that brought western civilization into being include Remi Brague, Pierre Manent, Philippe Nemo, Christopher Dawson, Roger Scruton, and Rodney Stark.

<sup>5</sup> Stephen Moore, ‘We’ve Become a Nation of Takers, Not Makers’ (April 2011) *The Wall Street Journal*  
<<http://online.wsj.com/news/articles/SB10001424052748704050204576219073867182108?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748704050204576219073867182108.html>>; See also Nicholas Eberstadt, *A Nation of Takers: America’s Entitlement Epidemic* (Templeton Press, 2012) 23: ‘[B]oth political parties have, on the whole, been working together in an often unspoken consensus to fuel the explosion of entitlement spending in modern America.’

without trying to take their place.’<sup>6</sup> A healthy civil society that nurtures a variety of institutions, including the voluntary associations noted by Alexis de Tocqueville, does not require a vast regulatory apparatus to take care of every need.

Let us now examine some of the ways and the reasons why the heritage of our civilization has been placed at risk. In the fourth section we focused on the religious underpinnings of the West’s dynamic economic growth. In this section we will consider the religious and intellectual sources of a shift toward greater intervention and regulation by the state. Although these trends long predated the Progressive movement of the early twentieth century, it was during the Progressive period of a century ago that many of them reached their first great flowering.

Marc Allen Eisner has identified four major attributes of Progressivism: a heavy emphasis on scientific expertise, an immersion into evolutionary theory, a celebration of democracy, and a rejection of constitutional formalism.<sup>7</sup> Let us begin by considering each factor.

First, the post-Civil War period saw, beginning in 1876 with the founding of Johns Hopkins University, the advent of the German-style scientific research university, culminating in the Ph.D. In fact, Francis Lieber, who spent a year in England, was one the earliest German-educated scholars to emigrate to the United States, which he did in 1827. Before the end of the nineteenth century, higher education was in the grips of an intellectual revolution that transformed public education and led to the creation of science-based professions and professional associations in such field as

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<sup>6</sup> J Budziszewski, *The Revenge of Conscience: Politics and the Fall of Man* (Spence Publishing Company, 1999) 70.

<sup>7</sup> Marc Allen Eisner, *The American Political Economy: Institutional Evolution of Market and State* (Routledge, 2011) 42-4.

law, medicine, education, and theology. During the same period, the United States became the largest investment market in the world as it entered the Second Industrial Revolution with the subsidization of transcontinental railroads, the electrification of cities in the 1880s, the development of new steel-making processes, innovations in precision instruments, a growing emphasis on heavy industry, and the advent of the telephone, the automobile, and the airplane – all in less than four decades.

All of this was accompanied, second, by the intellectual revolution inspired by the theory of evolution. Francis Lieber may have remained unconvinced by Darwin's thesis, but the social sciences began taking on evolutionary coloring in the 1850s and a new generation of scholars took to it swimmingly. By the late nineteenth century, a paradigm shift had occurred throughout academic circles. The Idealist philosophy of Hegel and other German philosophers had already made the earlier New England Transcendentalists receptive to progressive ideas. Following the Civil War, constitutional interpretation began to be transformed. Ronald Pestritto contends that Woodrow Wilson, contrary to James Madison, believed that 'the latent causes of faction are *not* sown in the nature of man, or if they are, historical progress will overcome this human nature.'<sup>8</sup>

Third, the Progressive reform movement pioneered many specific Progressive and democratic practices. The so-called Wisconsin Idea placed the university at the center of advice about public policy. Through the efforts of Governor Robert M LaFollette, Sr., one of the 'heroes of insurgency,'<sup>9</sup> Wisconsin came to be seen as a 'laboratory for democracy.' This early progressive program as a whole was influenced by a growing

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<sup>8</sup> Ronald J Pestritto, *Woodrow Wilson and the Roots of Modern Progressivism* (Rowman & Littlefield, 2005) 6-7.

<sup>9</sup> Thomas Dreier, *Heroes of Insurgency* (Human Life Pub Co, 1910).

German immigrant population inspired by social welfare system established under Otto von Bismarck. Among the innovations associated with Wisconsin were a progressive state income tax, primary elections, workers' compensation, regulation of utilities, university extension services, and the direct election of senators. In Oregon, William S U'Ren's Direct Legislation League promoted the Oregon System, which included the initiative, referendum, direct primary, and recall. Throughout the country, Progressives promoted new forms of city government, such as the commission system and use of city managers, and pushed for the income tax and direct election amendments, along with anti-trust legislation, new regulatory laws, and the Federal Reserve System. At the end of the First World War Progressives were also instrumental in the ratification of the prohibition and women's suffrage amendments.

Finally, the most revolutionary aspect of the Progressive movement was its reinterpretation of everything according to a process philosophy that arose out of the historicism of Hegel and the evolutionary biology of Darwin. A leading academic Progressive, Woodrow Wilson, who earned his Ph.D. at Johns Hopkins, served for many years as the president of Princeton. In quick succession, he was elected governor of New Jersey (1910) and president of the United States (1912) before publishing a book, *The New Freedom* (1913), that expressed the Progressive credo:

All that progressives ask or desire is permission – in an era when 'development,' 'evolution,' is the scientific word – to interpret the Constitution according to the Darwinian principle; all they ask is

recognition of the fact that a nation is a living thing and not a machine.<sup>10</sup>

Thus was born the notion of a 'living Constitution' that responds to fluidly to changing circumstances. Gone was the language of binding the government with the chains of the Constitution. Thus was a so-called relic of horse and buggy days relegated to the intellectual and institutional scrap heap.

Support for Progressivism crossed party lines. So it should not be surprising that a broad-based middle class movement which inspired the allegiance of three very different presidents – Theodore Roosevelt, William Howard Taft, and Woodrow Wilson – was guided more by the pragmatism of William James and John Dewey than by a coherent ideology. The New Nationalism promoted by Herbert Croly and Theodore Roosevelt was designed to convert the national government into a countervailing force that could regulate business practices on behalf of the public interest.<sup>11</sup> In other words, Big Government was necessary to control Big Business. In the end, Progressives were more successful at converting the central government into a major power broker than in breaking up the centers of financial and industrial power. A powerful government bureaucracy grew but not as an independent force. Instead, a pragmatic partnership tied business and government together.

What shall we make of such a transformation in which the twin forces of evolution and revolution leapfrog into an endlessly progressive future? In

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<sup>10</sup> Woodrow Wilson, *The New Freedom* (Doubleday, Page, and Co, 1921) 48.

<sup>11</sup> See Sidney M Milkis, 'Why the Election of 1912 Changed America' (15 February 2003) Claremont Review of Books <<http://claremont.org/index.php?act=crbArticle&id=1247>>.



*The Republic of Choice*, the legal scholar Lawrence M Friedman maintains that:

the right to be ‘oneself,’ to *choose* oneself, is placed in a special and privileged position; in which *expression* is favored over *self-control*; in which *achievement* is defined in subjective, personal terms, rather than in objective, social terms.<sup>12</sup>

Where once society favored the inner-directed personality type associated with the Protestant Ethic, now it ironically favors the other-directed personality described by David Riesman and his co-authors of *The Lonely Crowd*.

What Robert Bellah termed ‘expressive individualism’ in *Habits of the Heart* has led to unprecedented social legislation since the 1960s and expanded government employment while helping produce a generous supply of public services, policy entrepreneurs, and clientele groups presided over by national political and administrative agencies.<sup>13</sup> As the political scientist James Kurth notes:

The ideology of expressive individualism thus reaches into all aspects of society; it is a total philosophy. The result appears to be totally opposite from the totalitarianism of the state, but it is a sort of totalitarianism of the self. Both totalitarianisms are relentless in breaking down intermediate bodies and mediating institutions that stand between the individual and the highest powers or the widest forces. With the totalitarianism of the state, the highest powers are

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<sup>12</sup> Lawrence W Friedman, *The Republic of Choice: Law, Authority, and Culture* (Harvard University Press, 1990) 3.

<sup>13</sup> Robert Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press, 1985).

the authorities of the nation state; with the totalitarianism of the self, the widest forces are the agencies of the global economy.<sup>14</sup>

The imperial self, like the imperial state, opportunistically seizes whatever advantages it can. The economist George J. Stigler helped develop the theory of regulatory capture, one of the mainsprings of public choice theory, in which clientele groups develop a mutually beneficial relationship with the agencies that regulate their activities. Writing somewhat tongue-in-cheek, Stigler observed:

The first purpose of the empirical studies is to identify the purpose of the legislation! The announced goals of a policy are sometimes unrelated or perversely related to its actual effects, and the *truly intended effects should be deduced from the actual effects*.<sup>15</sup>

Let that barbed hook work its way down for a moment. *Cui bono?* Who benefits? Follow the money. Stigler is saying in effect that if you want to know the real purpose of a law, look at its actual effects, not the reasons given for public consumption. *Q.E.D.*: That is as close to an empirical demonstration of legislative intent as you are likely to get. Bastiat's analytical model of legal plunder is here once again substantiated.<sup>16</sup>

What is common to both totalitarian tendencies is the subordination of the citizenry and rivals to some sort of Rousseauan sovereign 'general will' –

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<sup>14</sup> Kurth, above n 2.

<sup>15</sup> George J Stigler, *The Citizen and the State: Essays on Regulation* (University of Chicago Press, 1975) 140. Stigler's comment anticipates the remark by then Speaker of the House Nancy Pelosi before passage of the Affordable Care Act in 2010 that 'we have to pass the bill so that you can find out what's in it.'

<sup>16</sup> Peter Schweizer uses the term 'legalized extortion' and examines the 'shake-down' not only of individual businesses but also of entire industries in *Extortion: How Politicians Extract Your Money, Buy Votes, and Line Their Own Pockets* (Houghton Mifflin Harcourt, 2013); Hughes refers both to rent-seeking and protectionism: Jonathan R T Hughes, *The Government Habit Redux: Economic Controls from Colonial Times to the Present* (Princeton University Press, 1991) 11, 16, 220; for features of cronyism around the United States see Chrony Chronicles, 'What is Cronyism' <<http://cronychronicles.org/>>.

something reminiscent of the old Leninist conceit of ‘democratic centralism.’ By contrast, an earlier scholar, Francis Lieber, coined the term ‘institutional liberty’ to refer to a healthy interaction among various self-governing social, occupational, and religious institutions that historically undergirded political pluralism. The devolution and distribution of power has traditionally been upheld and protected by such constitutional ideas and forms as ‘federalism’ (Heinrich Bullinger and James Madison), ‘symplicities’ (Johannes Althusius), ‘sphere sovereignty’ (Abraham Kuyper and Herman Dooyeweerd), and ‘subsidiarity’ (Leo XIII and Hilaire Belloc).

Kurth contends that both these tendencies – state-sovereignty and self-sovereignty<sup>17</sup> – take us far afield from the sovereignty of God, which was the banner under which the Protestant reformers launched what Eugen Rosenstock-Huessy and his student Harold Berman called one of a series of secular revolutions. From the viewpoint of a thousand years of history, Rosenstock’s insight is that our major institutions arose *Out of Revolution*, to borrow the title of his 1938 treatise, which is subtitled *Autobiography of Western Man*. ‘The Truce of God, the free choice of a profession, the liberty to make a will, the copyright of ideas—these institutions are like letters in the alphabet which we call Western civilization.’<sup>18</sup>

Guilds, universities, endowments and trusts, police forces: these are among the fruits of a dynamic Christian civilization that spawned great reform movements as well as revolutions. Rosenstock-Huessy, a historian

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<sup>17</sup> See also Jeane Bethke Elshtain, *Sovereignty: God, State, and Self* (Basic Books, 2008).

<sup>18</sup> Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (William Morrow, 1938) 30.

and professor of law who left Germany about the time Hitler took power, wrote five years later:

Our contemporaries are asking for institutions to protect the child, the labourer, the mill hand, against exploitation. The character of the legislation and of the institutions are now under discussion, and as always the problem is how to go forward and take the next step without losing the gains secured by previous institutions.<sup>19</sup>

This is always the danger given the utopian and revolutionary tendency of what Lieber called Gallican liberty—as expressed through the French and Russian revolutions—to throw the Anglican/Protestant baby out with the bathwater.

Analyzing the culmination of the last half millennium of social change, James Kurth notes:

Expressive individualism -- with its contempt for and protest against all hierarchies, communities, traditions, and customs -- represents the logical conclusion and the ultimate extreme of the secularization of the Protestant religion. The Holy Trinity of original Protestantism, the Supreme Being of Unitarianism, the American nation of the American Creed have all been dethroned and replaced by the imperial self. The long declension of the Protestant Reformation has reached its end point in the Protestant Deformation. The Protestant Deformation is a Protestantism without God, a reformation against all forms.<sup>20</sup>

Here again we see the intellectual provenance of the Progressives' attack on constitutional formalism in the name of a living and breathing

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<sup>19</sup> Ibid 31.

<sup>20</sup> Kurth, above n 2; both Harold Berman, Lawrence Friedman, and Herbert W Titus are among the legal scholars who have discussed the impact of this 'revolt against formalism.'

Constitution. While serving as governor of New York, Charles Evans Hughes remarked, long before he became Chief Justice: ‘the Constitution is what the judges say it is.’ A later Chief Justice, Fred Vinson, added:

Nothing is more certain in modern society than the principle that there are no absolutes.... To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.<sup>21</sup>

It appears that logic was not their strong suit. A disregard for constitutional standards has subsequently spread through the system.

## II THE RISE OF THE REGULATORY STATE

Three quarters of a century ago, Garet Garrett opened his meditation on the New Deal political revolution with this striking sentence: ‘A time came when the only people who had ever been free began to ask: What is freedom?’ With the language of a bedtime story—‘Once upon a time’—Garrett ushers us into a mythological dimension that should give us pause. In the Foreword to *The People’s Pottage*, Garrett posed some leading questions:

Why should people not be free to say they would have less freedom in order to have more of some other good? What other good? Security. What else? Stability. And beyond that? Beyond that the sympathies of *we*, and all men as brothers, instead of the willful *I*, as if each man were a sovereign, self-regarding individual.<sup>22</sup>

Note the way he describes the framing of the issue: How freedom has been redefined as selfishness. Garrett, who was for many years the editor of the *Saturday Evening Post*, understood that a successful revolution in

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<sup>21</sup> *Dennis v United States*, 341 US 494, 508 (1951).

<sup>22</sup> Garet Garrett, *The People’s Pottage* (Caxton Printers, 1953) 5 <<http://mises.org/books/pottage.pdf>>.

the name of reform had occurred. As early as 1938 when he wrote a booklet entitled 'The Revolution Was,' he could describe the revolution in a single sentence: 'Executive power over the social and economic life of the nation was increased.'<sup>23</sup>

Decades after Garrett wrote, the legal historian Harold J. Berman described a spirit of lawlessness that had spread through the land:

The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse. ... Almost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law, on the part of all classes of the population.<sup>24</sup>

Perhaps this breakdown of discipline is connected with the increase of executive power in the same way as a vacuum is to whatever fills it.

We should note that the problem Garrett and Berman have described is not simply a matter of public administration but also displays a loss of loyalty to longstanding legal and political traditions. James Madison made a profound observation in *Federalist 57*:

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together.

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<sup>23</sup> Ibid 16.

<sup>24</sup> Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University, 1983) 39.

It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny.

If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.<sup>25</sup>

In that last phrase, Madison seems to anticipate the rise of a political messianism<sup>26</sup> that pursues high-minded goals through high-handed means by corrupting the tradition of limited government and thus contributing to the failure of the legislative, executive, and judicial branches to honor constitutional limitations. ‘[W]hat is to prevent discretionary justice,’ Berman later asked, ‘from being an instrument of repression and even a pretext for barbarism and brutality, as it became in Nazi Germany?’<sup>27</sup> He added:

Cynicism about the law, and lawlessness, will not be overcome by adhering to a so-called realism which denies the autonomy, the integrity, and the ongoingness of our legal tradition. In the words of Edmund Burke, those who

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<sup>25</sup> James Madison, ‘The Federalist No 57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation (2013) Constitution Society <<http://www.constitution.org/fed/federa57.htm>>.

<sup>26</sup> J L Talmon, *Political Messianism: The Romantic Phase* (Secker & Warburg, 1960); see also Rosenstock-Huessy, above n 18, 217.

<sup>27</sup> Berman, above n 24, 40-1.

do not look backward to their ancestry will not look forward to their posterity.<sup>28</sup>

The Bible, which is at the base of this tradition,<sup>29</sup> provides for the rule of law, which, after all, is designed to regulate behavior. The Ten Commandments summarize the law and the Great Commandment summarizes the essence of the law. But punctilious attention to the external signs of the law can cause it to become hidebound and, well, legalistic. Jesus answered one group of hair-splitting theologians that sought to test him by replying that they neither knew the Scriptures nor the power of God (Matt. 22:29). Today's revolt against legal formalism has promoted a similar disrespect for law.

The historical influence of the preaching of the Gospel shows both the Scriptures and the power of God at work in the development of Western civilization. The English legal tradition makes a distinction between law and equity that carries over into the United States Constitution. With the rise of commerce during the Middle Ages,

rules governing business activities multiplied. The separate justice [for commerce] developed into equity proceedings in the courts of Chancery, the laws of bailment grew, and if the sea was involved, the courts of Admiralty applied laws derived from the Hanseatic League, which in turn were based upon the ancient rules of the sea, the laws of Oleron [Eleanor of Aquitaine] and Wisby. Business developed within a corset of law that defined acceptable rules of behavior.<sup>30</sup>

The creative interplay between law and equity provided a spawning ground for the development of Anglican liberty and, later, American

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<sup>28</sup> Ibid 41.

<sup>29</sup> See John C H Wu, *Fountain of Justice: A Study in the Natural Law* (Sheed and Ward, 1955).

<sup>30</sup> Hughes, above n 16, 38.



liberty. During the Protestant Reformation, a new mass medium—the printing press—contributed to the intellectual ferment that resulted from the circulation of new translations of the Bible into the vernacular languages. In *The Book That Made Your World*, the Indian philosopher Vishal Mangalwadi describes the intellectual atmosphere of sixteenth century England:

Alehouses became debating societies as people interpreted and applied the Bible differently to the intellectual and social issues of the day. Some were content to let the church settle their disputes. Others realized that the only way to determine which interpretation was correct was to read the Bible with valid rules of interpretation. This was a bottom-up revolution. It infused the minds of all literate Englishmen—not just those in universities—with a new logical bent. It took no time for that movement to spread into other aspects of people’s lives. . . . [O]nce the English people began using logic to interpret the Bible, they acquired a skill that propelled their nation to the forefront of world politics, economics, and thought.<sup>31</sup>

It should be noted that self-governing Americans, who were the heirs of that period of Protestant ferment, later showed themselves to be capable of systematizing laws both formally through the codification movement led by David Dudley Field in New York and informally through the development of mining laws during the California gold rush to which his brother, the future Justice Stephen Field, devoted some of his early efforts. Insights into this period may be gleaned from Hernando de Soto’s *The Mystery of Capital* and the work of another legal historian, J Willard Hurst, who attributed nineteenth century industrialization in part to a

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<sup>31</sup> Vishal Mangalwadi, *The Book That Made Your World: How the Bible Created the Soul of Western Civilization* (Thomas Nelson, 2011) 87-8.

‘release of energy’ that resulted from a preference shown ‘for dynamic over static property.’<sup>32</sup>

Given this intellectual vitality, it should be evident, however, that protecting the integrity of the state, the law, the economy, and all other institutions is an even greater challenge when literacy becomes almost universal. As Mangalwadi observed:

Influenced by William Tyndale’s book *The Obedience of a Christian Man* (1528), Henry [VIII] thought that reading the Bible would make Englishmen docile and obedient. He was furious when just the opposite happened.<sup>33</sup>

Centuries later, Madison thought it necessary to use ‘ambition to counteract ambition’ because of the release of so much pent-up intellectual and entrepreneurial energy within the dynamic American society.<sup>34</sup> The energy released by the Glorious Revolution and subsequent Industrial Revolution was partially rooted in an English Reformation modeled, as noted by Eric Nelson, on *The Hebrew Republic*.<sup>35</sup>

Alongside this intellectual ferment, there is another factor to consider. The English system of land tenure helps explain the rise of the regulatory state, which the economic historian Jonathan R. T. Hughes traces back to the colonial period:

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<sup>32</sup> James Williard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press, 1956) 28.

<sup>33</sup> Mangalwadi, above n 31, 87.

A <sup>34</sup> James Madison, ‘The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments’ (2013)

<<http://www.constitution.org/fed/federa51.htm>>.

<sup>35</sup> See Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard University Press, 2010); see also Gai Ferdon, ‘The Political Use of the Bible in Early Modern Britain’ (2013) The Jubilee Centre <<http://www.jubilee-centre.org/political-use-bible-early-modern-britain-dr-gai-ferdon/>>.

The essence of American capitalism was transplanted from England in the mainland American colonies. . . . For in the ancient English land tenure of free and common socage lay the seed of American capitalism as it would be in future, a powerful right of private ownership of land and natural resources, which in time was generalized to other forms of private property. In socage tenure the owner had the full rights to exploit, as he pleased, both surface and subsurface resources. Rapid alienation meant selling, buying, and settling land as fast as men and women were willing to take up new territories. . . . Fee socage ensured that land, once it was open to private purchase, would be settled at maximum speed. It also meant that, if society at large was to be protected from the adverse spillover effects of private economic activity, government power would ultimately have to be imposed and private right controlled.<sup>36</sup>

But there was also an important stipulation in this arrangement: Taxes had to be paid or else the land reverted to the donor, which during the colonial period meant the Crown and which today is the people of the United States. This arrangement virtually guaranteed that land would not be left idle as it is in some parts of the world.

The regulatory state that has grown up for more than a century meets some very real needs but has also encouraged long-standing expectations within society. Although American economists typically criticize government regulations as something incompatible with a free market, Hughes argues they are retained because the public considers them desirable. But, at the same time, Hughes illustrates and underscores Bastiat's main point:

The country's form of government not only lends itself to favoritist legislation, but *depends* upon it. A history of American government limited to those laws that sprang

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<sup>36</sup> Hughes, above n 16, 20.

pure from the brains of the nation's politicians with no special interests as their objects would be a very short history indeed.<sup>37</sup>

The historical precedent for such intervention is the use of the police powers that date back to the Middle Ages to protect public health, safety, peace, and morals:

Controls over business activity at the state and municipal levels were primarily by license to limit entry, to raise tax revenues, to control morals, and to regulate the quality and prices of franchised public-service enterprises.<sup>38</sup>

Another scholar, Robert Kagan, has noted:

Many regulatory programs have been extremely effective, even if relatively little is spent on enforcement. Regulations to prevent anthrax in cattle herds virtually eradicated that deadly disease. ... Safety regulations have sharply reduced deaths in coal mines.<sup>39</sup>

On the other hand, Kagan believes that some regulatory skepticism is justified: 'banking regulations did not prevent disastrously large numbers of overly risky loans by American savings and loan organizations in the 1980s or by their Japanese equivalents half a decade later.'<sup>40</sup> The question can even be raised whether a particular regulatory regime creates certain expectations that permit or even encourage risky business. Kagan continues: 'An example of widespread noncompliance or wholly inadequate enforcement can be found to match almost every regulatory success story.'<sup>41</sup>

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<sup>37</sup> Ibid 17.

<sup>38</sup> Ibid 37-8.

<sup>39</sup> Robert A Kagan, 'How Much Do National Styles of Law Matter?' in Robert A Kagan and Lee Axelrod (eds), *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (University of California Press, 2000) 6.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

The problem may have less to do with the jurisdiction that creates the regulations than with the larger purposes pursued by those with vested interests and the compatibility of these interests with traditional expectations. As Hughes notes:

What was controlled traditionally were four crucial points in the flow of economic transactions: (1) number of participants in a given activity, (2) conditions of participation, (3) prices charged by participants either for products or services, and (4) quality of the products or services. . . . This social control matrix is the subtle and complex economy of controls we have experienced historically, and with a few exceptions (for example, output control over crude-oil extraction, or production by permit only, as in the case of peanut farming) still do.<sup>42</sup>

What does such intervention signify? It is protectionism of one sort or another: first, last, and always. As the economic historian Douglass North has commented: ‘A continuing dilemma of regulatory agencies is that they can become vehicles whereby the regulated regulate the regulators, in the interest of the regulated—rather than that of the public.’<sup>43</sup>

What has changed since the Progressive era is the growth of the administrative apparatus itself and its increasing use as an instrument of political favors and favoritism.<sup>44</sup> Perhaps the single most important and lasting innovation of Franklin Delano Roosevelt’s New Deal era was the

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<sup>42</sup> Hughes, above n 16, 16.

<sup>43</sup> Ibid 97.

<sup>44</sup> Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (Yale University Press, 1982) 65. Mancur Olson drew out several implications from the prevalence of what Theodore J. Lowi in *The End of Liberalism* called ‘interest group liberalism,’ which is commonly called ‘clientelism’ today. Olson’s seventh implication has considerable bearing on this discussion: ‘Distributional coalitions slow down a society’s capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth.’ The implications for responsiveness to any sort of international or domestic emergency situation should also be evident.

Executive Reorganization Act of 1939, which, as Sidney Milkis has noted,

enhanced the [president's control of the expanding activities of the executive branch. As such, this legislation represents the genesis of the institutional presidency, which was equipped to govern independently of the constraints imposed by the regular political process. ... Patronage appointments had traditionally been used to nourish the party system; the New Deal celebrated an administrative politics that fed instead an executive department oriented to expanding liberal programs. As the administrative historian Paul Van Riper has noted, the new practices created a new kind of patronage, 'a sort of intellectual and ideological patronage than the more traditional partisan type.'<sup>45</sup>

As a result of this so-called Third New Deal, the Democratic party was transformed into an incumbency party—'a way station on the road to administrative government'—for the generations that followed and thus became the means of 'embedding progressive principles (considered tantamount to political rights) in a bureaucratic structure that would insulate reform and reformers from electoral change.'<sup>46</sup>

The myth of Progressivism held that 'good government' (once mocked as 'goo-goo') would guide society along the paths of progress. The reality, however, returns us to Bastiat's problem of false philanthropy, which may be seen in conjunction with Hughes's governmental habit. Bastiat detected a contradiction at the heart the socialism of his day:

Here I encounter the most popular fallacy of our times. It is not considered sufficient that the law should be just; it must be

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<sup>45</sup> Sidney M Milkis, 'The Presidency and Political Parties,' in Michael Nelson (ed), *The Presidency and the Political System* (CQ Press, 4<sup>th</sup> ed, 1995) 353.

<sup>46</sup> Ibid 353-4.

philanthropic. Nor is it sufficient that the law should guarantee to every citizen the free and inoffensive use of his faculties for physical, intellectual, and moral self-improvement. Instead, it is demanded that the law should directly extend welfare, education, and morality throughout the nation.<sup>47</sup>

As Sheldon Richman has noted:

If philanthropy is not voluntary, it destroys liberty and justice. The law can give nothing that has not first been taken from its owner. He applies that analysis to all forms of government intervention, from tariffs to so-called public education.<sup>48</sup>

In Bastiat's own words:

As long as it is admitted that the law may be diverted from its true purpose—that it may violate property instead of protecting it—then everyone will want to participate in making the law, either to protect himself against plunder or to use it for plunder. Political questions will always be prejudicial, dominant, and all-absorbing. There will be fighting at the door of the Legislative Palace, and the struggle within will be no less furious. To know this, it is hardly necessary to examine what transpires in the French and English legislatures; merely to understand the issue is to know the answer.<sup>49</sup>

But Bastiat was also careful to use such terms as 'legal plunder' and 'false philanthropy' analytically rather than moralistically:

I declare that I do not mean to attack the intentions or the morality of anyone. Rather, I am attacking an *idea* which I believe to be false; a *system* which appears to me to be unjust; an injustice so

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<sup>47</sup> Frederic Bastiat, *The Law* (The Foundation for Economic Education, 1998)

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<sup>48</sup> Sheldon Richman, 'Bastiat, Liberty, and The Law' (1996) *The Freeman* <[http://www.fee.org/the\\_freeman/detail/bastiat-liberty-and-the-law/](http://www.fee.org/the_freeman/detail/bastiat-liberty-and-the-law/)>.

<sup>49</sup> Bastiat, above n 47, 14.

independent of personal intentions that each of us profits from it without wishing to do so, and suffers from it without knowing the cause of the suffering.<sup>50</sup>

Thus Bastiat's argument is offered at the level of a public philosophy and draws upon a long tradition of Christian realism. Consider a passage (no. 358) from *Thoughts* by the seventeenth century mathematician and Christian apologist Blaise Pascal: 'Man is neither angel nor brute, and the unfortunate thing is that he who would act the angel acts the brute.'<sup>51</sup> Now consider the full force of Pascal's observations in light Bastiat's observation: 'We must remember that law is force, and that, consequently, the proper functions of the law cannot lawfully extend beyond the proper functions of force.'<sup>52</sup>

We need to be reminded that force potentially brutalizes whatever it touches. This is nowhere more passionately or memorably argued than in Simone Weil's *The Iliad, or the Poem of Force* (1940).<sup>53</sup> Political compulsion is a blunt instrument to which people must have the freedom to adjust their expectations and actions if they are to avoid being broken upon it. As a means of delivering an ameliorative social reform agenda, political compulsion at best offers only a more diffuse and anonymous outlet for philanthropic impulses rather than a surgical tool for correcting society's defects. In the absence of a political consensus about means and ends, it can only sow endless discord.

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<sup>50</sup> Ibid 23.

<sup>51</sup> Charles W Eliot (ed), *The Harvard Classics* (Collier & Son, 1909) vol 48, 122.

<sup>52</sup> Bastiat, above n 47, 24. Law is force and is thus, as Bastiat acknowledged, the power to kill.

<sup>53</sup> Simone Weil and Rachel Bepaloff, *War and the Iliad* (New York Review Books, 2005).



The regulatory state inaugurated by the Roosevelt's Third New Deal may be sharply contrasted with the decentralized federal republic and the public philosophy with which the American experiment began. Before the Great Depression, Calvin Coolidge restated an earlier vision of America that had been memorialized at Independence Day celebrations for 150 years. In 'The Inspiration of the Declaration,' Coolidge noted what shaped the thinking of the ordinary people who agreed together to separate from imperial Britain. 'They were a people who came under the influence of a great spiritual development and acquired a great moral power.' More specifically, the President stated: 'No one can examine this record and escape the conclusion that in the great outline of its principles the Declaration was the result of the religious teachings of the preceding period.' Coolidge concluded with the following observation:

No other theory is adequate to explain or comprehend the Declaration of Independence. It is the product of the spiritual insight of the people. We live in an age of science and of abounding accumulation of material things. These did not create our Declaration. Our Declaration created them. The things of the spirit come first. Unless we cling to that, all our material prosperity, overwhelming though it may appear, will turn to a barren scepter in our grasp. If we are to maintain the great heritage which has been bequeathed to us, we must be like minded as the fathers who created it. We must not sink into a pagan materialism. We must cultivate the reverence which they had for the things that are holy. We must follow the spiritual and moral leadership which they showed. We must keep replenished, that they may glow with a more compelling flame, the altar fires before which they worshipped.<sup>54</sup>

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<sup>54</sup> Calvin Coolidge, 'The Inspiration of the Declaration' (1926) *Vision and Values*  
<[http://www.visionandvalues.org/docs/VanTil\\_2010\\_March\\_Coolidge\\_DoI.pdf](http://www.visionandvalues.org/docs/VanTil_2010_March_Coolidge_DoI.pdf)>.

### III THE POLITICAL ECONOMY OF REGULATION

Let us for a moment think back to the first section at the beginning of this essay when we briefly noted Henry Hazlitt's *Economics in One Lesson*. The lesson was simply this:

The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups.<sup>55</sup>

Hazlitt asked, for example: does deficit spending stimulate the economy? During the New Deal era, deficit spending by the government was likened to 'priming the pump' with water to get it moving again. The assumption was that we could spend our way right back to prosperity if the government were to take the lead and assume much of the risk and expense by taxing and borrowing. Is this so different from the idea that Bastiat noticed nearly a century earlier when he observed how some people assumed that damage caused by a storm could benefit a community?

In order to understand where such an idea leads, Bastiat suggested that we look at the matter on a small scale. When a homeowner or storekeeper has a broken window replaced, the purchase of a new window may appear to be a boon to the local economy. In his essay 'That Which Is Seen, and That Which Is Not Seen,' Bastiat noted that what we see is the benefit to the glass manufacturer and the window installer. What we miss seeing is what economists call the *opportunity cost*—the other transactions that might otherwise have been made. The loss of a window may mean that the homeowner or storekeeper must forego some other

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<sup>55</sup> Henry Hazlitt, *Economics in One Lesson* (Arlington House, 1979) 17.

purchase that might have benefited the clothier or a furniture maker instead.<sup>56</sup>

Let us now remove the lenses that narrow our field of vision and, once again, enlarge the scope of our thinking. The fourth section cited Francis Lieber's analysis of an early experiment with totalitarianism in France: 'The advance of knowledge and intelligence,' he wrote, 'gives to despotism a brilliancy, and the necessity of peace for exchange and industry give it a facility to establish itself which it never possessed before.'<sup>57</sup> What needs to be asked here is: How did the advance of knowledge that preceded the despotism happen in the first place?

'Why Europe?' asks James Nickel in *Mathematics: Is God Silent?* He answers by quoting the physicist and philosopher of science, Stanley Jaki:

the history of science with its several stillbirths and only one viable birth, clearly shows that the only cosmology, or view of the cosmos as a whole, that was capable of generating science was a view of which the principal disseminator was the Gospel itself.<sup>58</sup>

David Landes asks the same question in *The Wealth and Poverty of Nations*: 'Why Europe? Why Then?' Landes focused on two factors: *buildup*, the accumulation of knowledge and knowhow; and *breakthrough*—reaching and passing thresholds.' He then emphasizes three considerations:

- 1) the growing *autonomy* of intellectual inquiry;

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<sup>56</sup> Frederic Bastiat, 'That Which is Seen, and That Which is Not Seen' Committee to Preserve the Works of Frederic Bastiat <<http://bastiat.org/en/twisatwins.html>>.

<sup>57</sup> Francis Lieber, *Miscellaneous Writings. Vol. I: Reminiscences, Addresses, and Essays* (J B Lippincott, 1880) 383-4.

<sup>58</sup> James Nickel, *Mathematics: Is God Silent?* (Ross House Books, 2001) 143.

- 2) the development of unity in disunity in the form of a common, implicitly adversarial *method*, that is, the creation of a language of proof recognized, used, and understood across national and cultural boundaries; and
- 3) the invention of invention, that is, the *routinization* of research and its diffusion.<sup>59</sup>

These considerations are the fruits of the Christian cosmology cited by Father Jaki. They help account for the accumulated mass of intellectual and material capital that produced what Ralph Raico called ‘The European Miracle.’ The question to ask today is how we are squandering that capital. Long before James Kurth answered by describing the stages of a Protestant Deformation, Erik von Kuehnelt-Leddihn did much the same in a short story. Like one of the characters in the story, the Kuehnelt-Leddihn suggests that a nominally Christian civilization is heedlessly ‘living from the whiff of an empty bottle.’<sup>60</sup> Have we been casting our seed on rocky ground? Are we eating our seed corn rather than planting it? Or, as the theologian Cornelius Van Til put it, living on ‘borrowed capital’ without replenishing it? Do we thoughtlessly risk draining the wellsprings of our civilization’s creativity?

Questions such as these make the study of economics, politics, ethics, law, and history so vital for getting our bearings. Let us turn to field of political economy for a few concepts that may help clarify the impact of what James Burnham called the ‘managerial revolution’ which has restructured our customary habits as well as our expectations. It may help

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<sup>59</sup> David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (W W Norton, 1998) 200-1.

<sup>60</sup> Francis Stuart Campbell, ‘The Whiff from the Empty Bottle’ (1945) 62 *Catholic World*, 20-7.

lead, first of all, to an understanding of how government regulation operates; secondly, an appreciation of the values, priorities, and stakes that are involved; and finally, insight into the ways the political agendas, ideologies, and special pleading of various interest groups shape public policy.

Like Sidney Milkis, Jonathan R. T. Hughes reached back to the Third New Deal that resulted from restructuring the administrative apparatus in 1939.

In Executive Order 8248 Roosevelt set this country on a completely uncharted course. Other presidents were happy enough to follow his charismatic lead, and from 1939 to the present, great and infamous events alike have stemmed from this power, including fundamental contributions to our burgeoning apparatus of nonmarket control over economic life.<sup>61</sup>

A concept that is especially relevant here is *rent-seeking*, which is discussed by Michael Munger: ‘In politics you try to move money around and take credit for it. In markets you try to create value and make profits.’

<sup>62</sup> Adam Smith identified three forms or sources of income: profits, wages, and rents. What is called rent-seeking involves the extraction of something of value from others without compensation and without enhancing productivity. Rent-seeking often involves the acquisition of special monopoly privileges through legislation or regulation by a government agency. A privilege, the Roman term for a private law, is a

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<sup>61</sup> Hughes, above n 16, 181.

<sup>62</sup> Michael Munger, ‘Rent-Seek and You Will Find’ <<http://www.econlib.org/library/Columns/y2006/Mungerrentseeking.html>>. The costs of rent-seeking are incalculable, as the Competitive Enterprise Institute’s annual Crews Report, ‘Ten Thousand Commandments,’; see Howard Swartz, ‘The Hidden Tax: Regulation’ <<http://pajamasmedia.com/blog/the-hidden-tax-regulation/?singlepage=true>>.

kind of property that exists at the pleasure of the state. Such a monopoly may allow its holder, for example, to charge high fees or else restrict entry into a market in order to reduce competition.

An example of rent-seeking would be the high fee for purchasing a taxicab medallion and the resulting restraint of trade. Walter Williams, who was once a taxi driver himself, has written on this phenomenon for decades.

Perhaps the most egregious form of licensure involves New York City taxicabs. The municipal government requires a medallion for each operating cab. The code also provides for regulation of taxi fares and other conditions of operation. The medallion system stemmed from the Haas Act of 1937. Under the act, the city sold medallions for \$10 to all persons then operating taxis.<sup>63</sup>

Since that time, no new medallions have been issued except for 54 awarded for operating wheel-chair accessible vehicles. What has happened in the three-quarters of a century since that date tells the rest of the story. In 1947, the medallion price rose to \$2,500. By 1960, it was \$28,000; 1970, \$60,000; 1998, \$200,000; and in May 2007, a taxi medallion sold for \$600,000. . . . In 2007, Medallion Finance Corporation had \$520,000,000 outstanding in taxi-medallion loans. As Williams describes it, the bottom line is simple: ‘the value of the medallion shows what the buyer is willing to pay for government protection from free-market competition.’<sup>64</sup> If a free market were introduced, the rent would disappear and the market value of the medallions would plunge.

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<sup>63</sup> Walter E Williams, *Race and Economics: How Much Can Be Blamed on Discrimination?* (Hoover Institution, 2011) 2.

<sup>64</sup> *Ibid* 2.

Another illustration of rent-seeking may be found in the Book of Acts, chapter 19, when Paul and his companions were caught up in a riot by a guild of silversmiths who sought to have them thrown out of town for hurting their idol business. But political institutions also provide foundations for cooperative enterprises and the liberty that enables us to pursue our vocations. Ancient Roman *collegia* and medieval guilds, including roving bands of college students, were predecessors of craft unions like the American Federation of Labor and modern universities.

Unfortunately, the distance between legitimate and illicit extractions – taxes as opposed to mere brigandage – is often not very great. In *The City of God*, St Augustine recounted the story of a pirate leader captured by Alexander the Great: ‘When that king asked the man what he meant by infesting the sea, he boldly replied: ‘What you mean by warring on the whole world. I do my fighting on a tiny ship, and they call me a pirate; you do yours with a large fleet, and they call you “Commander.”’<sup>65</sup>

Another and related concept is that of the *free rider*. A free rider is the beneficiary of some collective good for which he does not pay the costs. When this sort of benefit takes the form of a privilege it is a variation on what Bastiat called legal plunder. What separated Alexander and the pirate was a difference of scale – ‘wholesale’ rather than ‘retail’ – but not of kind. Alexander may have considered the pirate a poacher, but both had larceny in their hearts.

A black market presents a different case. New York has a large and flourishing illicit and semi-legal gypsy-cab business that operates almost side by side with the licensed cabs. Free markets often reassert themselves when the expense and inconvenience of monopolies creates a

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<sup>65</sup> Saint Augustine, *City of God* (426) bk 4, ch 4.

demand for alternatives. This is a vast phenomenon that arises in all sectors of the economy. In the area of education, for example, alternatives to state schools run the gamut from charter schools to home schools. The means of financing these options also varies widely.

In *The Government Habit Redux*, Jonathan R T Hughes sets forth his major findings in a set of ten general propositions. Together they help us recognize the magnitude and difficulty we face if we wish to bring public spending back down to more manageable levels. The first proposition is the key to understanding the rest:

1. Regulation creates economic rent. This is really a truism. Regulation is interference with normal market outcomes. Someone loses, someone gains. The gains are economic rents---returns in excess of competitive returns. Resources flow to the highest returns and therefore to the rents. The economy adjusts accordingly. It becomes a different economy because of the rents—the regulation.<sup>66</sup>

What this means is that regulation is, by definition, something that removes a portion of the economy from the free market sector. The connection of the next proposition with Bastiat's legal plunder, which is logically connected to the first, should be even more evident:

2. The rents made available by regulation encourage free-riding by stretching the rules or ignoring them. If most people are held in check by regulation, it will pay, potentially, for individuals to violate the regulations, getting a free ride at the expense of the rest.<sup>67</sup>

But Hughes is perhaps being too generous here. New York's system of awarding taxi medallions might be regarded by an ordinary citizen as

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<sup>66</sup> Hughes, above n 16, 10.

<sup>67</sup> Ibid 11.



‘highway robbery.’ The result is the growth of an underground economy that keeps a wide variety of transactions off the books. When this black market becomes commonplace, government revenue sources dry up. Unless taxes are raised, then governments are likely to turn to other tools at their disposal, such as borrowing and inflation. Their costs of such alternatives are even more difficult to calculate.

The remaining propositions should bring the story of Alexander and the Gordian Knot to mind:

4. Rent-seeking is socially wasteful. ... 5. It pays special-interest coalitions to manipulate the power of the state to create rent. ... 6. Dominant groups will tend to use the state to redistribute wealth to themselves. ... 10. It pays those inside the government regulatory establishment to push for expansion of regulation. The more regulation, the greater the career opportunities for experienced hands in the regulatory game.<sup>68</sup>

Thus through the wonders of genetic engineering we have created something akin to Dr Dolittle’s pushmi-pullyu.

What began in the Progressive era as a desire for a living Constitution, matured during the New Deal into the desire for a permanent administrative state, and erupted in the 1960s as a continuing cultural revolution in the name of a quest for social justice. This has led us to Kurth’s sixth stage of the Protestant Deformation, expressive individualism, and a massive debt in the United States of more than \$100 trillion in future obligations. Unfortunately, the dollar amount of our mortgaged future may be the least part of the cost. Plunder may not be systematic, as Bastiat feared, but it has taken on a life of its own, like an old Roman-style corporation. Legal plunder has, as Bastiat expected,

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<sup>68</sup>

Ibid 11-2.

become ‘universal legal plunder.’<sup>69</sup> Perhaps Mammon is the proper word for it.

The New Testament uses the language of Roman law, however, to describe a rather different corporation: the Church. Its leavening influence continues to shape history after two millennia. Vishal Mangalwadi concludes *The Book That Made Your World* with a provocative observation:

Rome’s collapse meant that Europe lost its soul—the source of its civilizational authority—and descended into the ‘Dark Ages.’ The Bible was the power of revived Europe. Europeans became so enthralled with God’s Word that they rejected their sacred myths to hear God’ Word, study it, internalize it, speak it, and promote it to build the modern world. At the dawn of the twenty-first century, the West is again losing its soul. Will it relapse into a new dark age or humble itself before the Word of the Almighty God?<sup>70</sup>

#### IV THE STATE OF DEPENDENCY: LIFE, LIBERTY, AND PROPERTY

As we noted at the beginning of this essay, its subject, government regulation, is contested terrain. It is a busy intersection in a bustling center of commerce where law, economics, property rights, and ethics converge and often conflict. It is a place where interests and boundaries are often fluid and confused, where an honest surveyor or an impartial judge may be difficult to find, where any determination of what is at stake—costs and benefits, private as well as public—is part of what is in dispute. Our best efforts to get the lay of the land are too easily derailed or sidetracked as a result.

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<sup>69</sup> Bastiat, above n 47, 20.

<sup>70</sup> Mangalwadi, above n 31, 401.

During the Great Depression and before the outbreak of the Second World War John Maynard Keynes wrote *The General Theory of Employment, Interest, and Money* (1936). The best known lesson that he imparted was simply this:

The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.<sup>71</sup>

This is why we seem so often to reach a dead end in our efforts. We hear the wrong words and heed the wrong voices. As the Apostle Paul put it: ‘For now we see through a glass, darkly’ (1 Cor. 13:12 KJV). And so we too often conclude that, since we live in the country of the blind, the one-eyed man is king. That must mean we should follow . . . Cyclops?

As J Budziszewski notes in *The Revenge of Conscience*: ‘the Tower of Babel is a very ancient tale, and just as many voices, sects, and doctrines quarreled in pre-modern times as today.’<sup>72</sup> It is still incumbent upon us to do ‘due diligence’ and engage in critical reasoning. The Apostle Paul directs us along a better path: ‘Be diligent to present yourself approved to God, a worker who does not need to be ashamed, rightly dividing the word of truth’ (2 Tim. 2:15 NKJ). Even though the path we have been following has the appearance of inevitability, we need to understand that with this managerial revolution we are dealing with political strategies

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<sup>71</sup> John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Palgrave Macmillan, 1936) 383.

<sup>72</sup> Budziszewski, above n 6, 7.

and choices rather than eternal verities. Jonathan R T Hughes concludes his 1992 book on a sobering note:

The problems for which the controls were invented are to be managed in perpetuity, not solved. The ruling paradigm was established by the first federal nonmarket control agency, the ICC. We may well now have the controls *because* they reduce economic efficiency; the controls are seen to save us from the uncertainties of the free market just as civil government is seen to save us from the uncertainties of anarchy. Professors of economics may not like the parallel, but they do not make laws.<sup>73</sup>

Writing shortly after the introduction of Lyndon Johnson's Great Society programs, America's longshoreman philosopher, Eric Hoffer, made some astute observations about the general practical-mindedness of Americans that, in his judgment, made them largely immune to the appeals to abstract ideas of social and economic justice by intellectual elites nestled in academia, the media, and the bureaucracy. 'Up to now,' Hoffer wrote in 1964:

America has not been a good milieu or the rise of a mass movement. What starts out here as a mass movement ends up as a racket, a cult, or a corporation. Unlike those anywhere else, the masses in America have never despaired of the present and are not willing to sacrifice it for a new life and a new world.<sup>74</sup>

But decades later, the economist Thomas Sowell remarked on a transformation that by 1995 had already taken place. Having written earlier about *A Conflict of Visions* at a time when the 'constrained' or 'tragic vision' still had articulate defenders, Sowell now intensified his critique of the now prevailing 'vision of the anointed':

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<sup>73</sup> Hughes, above n 16, 231.

<sup>74</sup> Eric Hoffer, *The Temper of Our Time* (Harper & Row, 1969).

What is seldom part of the vision of the anointed is a concept of ordinary people as autonomous decision makers free to reject any vision and to seek their own well-being through whatever social processes they choose. Thus, when those with the prevailing vision speak of the family—if only to defuse their adversaries' emphasis on family values—they tend to conceive of the family as a *recipient* institution for government largess or guidance, rather than as a *decision-making* institution determining for itself how children shall be raised and with what values.<sup>75</sup>

Like Hughes, Sowell has been especially trenchant in analyzing the enormous damage that a secular clerisy of do-gooders has inflicted upon the civil body politic:

In order that this relatively small group of people can believe themselves wiser and nobler than the common herd, we have adopted policies which impose heavy costs on millions of other human beings, not only in taxes but also in lost jobs, social disintegration, and a loss of personal safety. Seldom have so few cost so much to so many.<sup>76</sup>

Let us turn to Sowell's friend Walter Williams who has time and again proven himself willing to 'speak truth to power.' Williams, who wrote a powerful memoir entitled *Up from the Projects* (2010),<sup>77</sup> more recently released another book: *Race and Economics*. In the preface he writes:

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<sup>75</sup> Thomas Sowell, *The Vision of the Anointed: Self-Congratulation as a basis for Social Policy* (Basic Books, 1995) 122.

<sup>76</sup> Ibid 260. See also a classic treatment of the subject: Julien Benda, *The Treason of the Intellectuals (La Trahison des Clercs)* translated by Richard Aldington (W W Norton, 1969).

<sup>77</sup> Walter E Williams, *Up from the Projects: An Autobiography* (Hoover Institution Press, 2010).

As a generality, if one is a member of a minority, he is less likely to realize his preferences if decisions are made in the political arena, particularly if they are made at the national level.<sup>78</sup>

In these words we may sense the quality of thought that Madison, Hamilton, and Jay instilled into the *Federalist Papers*. The excerpt that follows could serve, along with some of our readings this term, as a manifesto for a renewed constitutionalism:

Consider another comparison between market- and political-resource allocation. If one tours a low-income black neighborhood, he will see people wearing some nice clothing, eating some nice food, driving some nice cars, and he might even see some nice houses—but no nice schools. Why? The answer relates directly to how clothing, food, cars, and houses—versus schools—are allocated. Clothing, food, cars, and houses are allocated through the market mechanism. Schools, for the most part, are parceled out through the political mechanism. If a buyer is dissatisfied with goods distributed in the market, the individual can simply ‘fire’ the producer by taking his business elsewhere. If a buyer (taxpayer) is dissatisfied with a public school, such an option is not, in a black neighborhood, economically viable to him. He has to bear the burden of moving to a neighborhood with better schools.<sup>79</sup>

George Stigler made a similar point when he wrote:

Until the basic logic of political life is developed, reformers will be ill-equipped to use the state for their reforms, and victims of the pervasive use of the state’s support of special groups will be helpless to protect themselves.<sup>80</sup>

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<sup>78</sup> Williams, above n 63, 2.

<sup>79</sup> Ibid.

<sup>80</sup> Stigler, above n 15, 132.

It is a vicious circle that, once again, locks everyone into preordained failure, into the proverbial race for the bottom. An old Soviet-era saying applies here: ‘We pretend to work, they pretend to pay us.’ Our own variation on this theme is: ‘We have got the best tunnel vision money can buy.’ Instead, we need to stop looking at our feet and start inspecting the road ahead.

Government regulation is the old problem of monopoly all over again—for which antitrust laws and regulations were intended to be the solution. But instead of just private corporations vested by the state with such special privileges as limited liability, these overweening monopoly powers are now also vested in agencies of the government itself. When tax burdens and other problems mount, residents of various cities, states, and countries tend to ‘vote with their feet’ and take their time, talents, and treasure elsewhere. As a result, many countries, states, and communities must contend with a shrinking tax base.<sup>81</sup>

The late Roman Empire faced a similar problem and ‘solved’ it by making office-holding hereditary and continued service in office mandatory. Still, this did not stop a great many Roman families from exiting the empire before it crumbled. To rephrase an old line: A lot of good people came from Rome, and the better they were, the faster they came. The question we face today is: How can we keep our own entrepreneurs down home when we have made emigration such an

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<sup>81</sup> For several years Walter Russell Mead has written numerous articles on what he calls ‘the Blue Social Model’ derived from the earlier New Deal. See Walter Russell Mead, ‘American Challenges: The Blue Model Breaks Down’ (2010) *The American Interest* <<http://www.the-american-interest.com/wrm/2010/01/28/american-challenges-the-blue-model-breaks-down/>>. Another side of the same coin is the excessive level of indebtedness that results from the lack of political will to live within a budget. Niall Ferguson’s *The Great Degeneration* shows where this has led.

attractive option? How do we get our economy and our political priorities back into fighting trim?

Resistance may take many forms and those forms are most effective that can convey their lessons with a smile. An entertaining piece that supports this concluding section is a rap video entitled ‘Keynes vs. Hayek, the Second Round.’ Along with its predecessor, which may also be found on the web, it should remind us of something else the Apostle wrote: ‘For we wrestle not against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this world, against spiritual wickedness in high places’ (Eph. 6:12). Lord Keynes was correct in discerning some of the economic consequences of the Peace of Versailles and, later, some of the problems with unemployment during the Great Depression. But the video should remind us that we acclaim that the Keyneses of their day show how difficult it is to defend against what Erik von Kuehnelt-Leddihn called ‘clear but false ideas.’ We need to keep our eye on the ball at all times and learn not to be distracted by the crowd.

Perhaps there are a few things the frenzies of academic scribblers can teach us. Let us now end where we should wish to have started and then work our way toward a conclusion. The Keynes vs Hayek rap video linked in the footnote has some great lines and even some wisdom to impart for those who are prepared probe more deeply. Western civilization has been deeply cleft by the old dilemma of the One and the Many, the age-old battle of the universals. Consider these lines about the economy the video assigns to Keynes:

It’s just like an engine that’s stalled and gone dark. To bring it to life we need a quick spark. Spending’s the life blood that gets the flow going. Where it goes doesn’t matter. Just Get Spending Flowing.



The positivists and other reductionists who steer the ship of state say we human beings are nothing but sophisticated machines. Jeremy Bentham could scarcely have made the point plainer. But Hayek's reply cuts to the heart of the matter:

The economy's not a car. There's no engine to stall. No expert can fix it. There's no 'it' at all. The economy is us. We don't need a mechanic. Put away the wrenches. The economy is organic.<sup>82</sup>

Meeting the challenges of the day requires cultivation of clear-sighted public philosophy. Adam Smith's invisible hand, Bastiat's 'unseen,' Michael Polanyi's tacit dimension, Hayek's spontaneous order, the doctrines of subsidiarity and sphere sovereignty—these are ideas that we ignore at our peril. Indeed, 'ideas have consequences,' as Richard Weaver put it in the title of an American classic. We may not understand how these notions work, but, as Shakespeare put it in another context in *Hamlet*: 'There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy.' By the way, Shakespeare's valedictory meditation on his career and the arc of his life in *The Tempest* repays an occasional rereading for those who wish to better understand the trajectory of their own lives.

In diversity there is strength where trust and community prevail, where we are open to a free exchange of ideas and where we commit ourselves to a constitutionally limited government. Using the state to impose a 'one-size-fits-all' solution to every problem is a breach of trust and a recipe for strife. Legal plunder has a chilling effect by making us

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<sup>82</sup> Keynes vs Hayek, the Second Round may be found at various sites, including <<http://hayekcenter.org/?p=4804>> and <<http://www.forbes.com/sites/erikkain/2011/04/29/keynes-vs-hayek/>>. Michael Munger, who is cited in the last section, played the role of security guard in the rap video.

complicit in pulling the rug from under other people's feet and violating our own consciences. Americans still have a First Amendment that is not yet encased in glass – to be broken only in an emergency. To be a citizen means being a sentinel against all that threatens our lives, liberties, and property. The founders never intended that 'We the People' be replaced by a more compliant army of invertebrates.

So let us conclude our examination of the political economy of law, property, and regulation by returning to Kenneth Minogue's *Politics: A Very Short Introduction*, which is a meditation on the tension within the state between politics, the art of persuasion, and despotism, the technology of coercion. Despotism takes many forms and often comes presented in the tempting coloration of a counterculture. In our times it comes in the guise of what Minogue calls political moralism, which may begin as false philanthropy but, once it rules, tends to exhibit some degree of what Polanyi calls moral inversion and Roger Scruton calls the culture of repudiation.

Reaching back analytically to the period following the French Revolution, Minogue observes:

In the course of the nineteenth century ... as the suffrage broadened, welfare came to be as interesting to rulers as war had always been. Foreign enemies, on the one hand, and the poor on the other, were interesting politically because they constituted a reason for exercising dazzling powers of government and administration. The poor became so interesting, in fact, that they could not be allowed to fade away, and whole new definitions of poverty, as relative to rising levels of average income, were constructed in order not only to keep the poor in being but actually to increase their numbers. Simultaneously, new classes of supposedly oppressed members of

contemporary society began to use poverty leverage to extract benefits in redistributive states.

This is how the state in the twentieth century discovered dependence, which had previously occupied no more than a small patch in the sphere of morality. One moral virtue, charity, in a politicized form, expanded to take over politics.<sup>83</sup>

This is the power of legal plunder. It converts a sweet land of liberty into a perpetual squabble between tax drudges and free riders who are so blended together that it is difficult to tell the difference.

Yes, some kind of tutelary power has its place in the larger scheme of things but as the Apostle Paul also put it: ‘Now I say that the heir, as long as he is a child, does not differ at all from a slave, though he is master of all, but is under guardians and stewards until the time appointed by the father’ (Gal. 4:1-2). We are all always under authority but, politically, we are not made for a state of perpetual dependency. In fact, a ‘politics’ of dependency is a contradiction in terms. Once you leave the political realm of independence you enter that of despotism and submission.

As the Apostle indicates, there is a time appointed ‘by the Father’ to take our place at the table. Let us choose to be self-governing, to be politically mature, to freely and conscientiously take our stand. Indeed, we have nothing to lose but our chains. We may choose, as Jesus depicted in a parable, to become fellow-laborers in the vineyard of the Lord (Matt. 20:1-16).

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<sup>83</sup> Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford University Press, 2000) 108.

The concluding paragraph to Kenneth Minogue's little book on politics is a fitting way to wrap up this meditation on the political economy of regulation:

This introduction ends, then, with an example of political theory, an argument likely to provoke disagreement, perhaps even a bit of outrage. And if it does do that, it will have succeeded in illustrating one more aspect of the many-sided thing we have been studying. Farewell.<sup>84</sup>

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<sup>84</sup> Ibid 111.