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PARADOX, ASYMMETRY, AND SWITCHEROOS: APPROACHING CONSTITUTIONAL LAW FROM AN UNEXPECTED ANGLE

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How Quaint the ways of Paradox!
At common sense she gaily mocks![1]

The paradox has been challenging good minds ever since Antiquity. Defined as "a statement that seems contradictory, unbelievable, or absurd but that may actually be true in fact,"[2] it has also been called "truth standing on its head to attract attention."[3] The paradox is said to have played "a dramatic part in intellectual history, often foreshadowing revolutionary developments in science, mathematics, and logic."[4] The shock value of its apparent illogic has served to pry minds open to new possibilities:

> Whenever, in any discipline, we discover a problem that cannot be solved within the conceptual framework that supposedly should apply, we experience shock. The shock may compel us to discard the old framework and adopt a new one.[5]

The paradox can be fun — which sometimes leads to the misperception that it is nothing but fun. Like many a popular song, the paradox has a shallow surface and a deep interior.

A contemporary illustration of the paradox is the Yogi-ism.

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1. W.S. Gilbert and A.S. Sullivan, *The Pirates of Penzance*, Act II (1880).

2. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1298 (2d ed. 1979).

3. N. FALLETTA, THE PARADOXICON, A COLLECTION OF CONTRADICTORY CHALLENGES, PROBLEMATICAL PUZZLES AND IMPOSSIBLE ILLUSTRATIONS xvii (1983). A killjoy definition exposes the paradox as "a literary or rhetorical device whereby a supposedly true statement is couched for effect in apparently contradictory terms." THE UNIVERSITY DESK TOP ENCYCLOPEDIA 773 (1977). Falletta identifies three types of paradox: (A) a statement that appears contradictory but which is, in fact, true; (B) a statement that appears true but which, in fact, involves a contradiction; and (C) a valid or good argument that leads to contradictory conclusions. N. FALLETTA, *supra*, at xvii-xviii.

4. N. FALLETTA, *supra* note 3, at xviii.

5. *Id.* (quoting Rapoport, *Escape From Paradox*, SCIENTIFIC AMERICAN (July 1967)).

This form introduces a cartoon-like human figure who says apparently foolish things that make good sense. The fun is enhanced by creating an interplay with human character.[6]

The paradox approaches a familiar subject from an unexpected angle. This essay will address constitutional law in this spirit. The shock value, and sense of fun, associated with the paradox will be put to work stimulating fresh perspectives. The paradox is a born troublemaker. Let's see how much trouble we can make.

In our constitutional law, the paradox abounds. There is a paradox at the core of the system. At least since Chief Justice Marshall's opinion in *Marbury v. Madison*,[7] an unelected Supreme Court has power to override democratic decision-making in defense of the United States Constitution. An essential purpose is to safeguard the democratic functioning of our representative republic. In other words:

> To protect a democratic system, an undemocratic institution employs anti-democratic power.

Marbury itself is rich in paradox. Facing an intensely hostile environment,[8] the Supreme Court asserted the power to hold Acts of Congress unconstitutional. But this was done in such a way as to deny the Court's adversaries the opportunity to strike back. *Dictum* upheld the substance of Marbury's complaint that the incoming Jefferson Administration had acted arbitrarily in denying him his lame-duck appointment as justice of the peace. Then the Court found unconstitutional legislation that placed with the Supreme Court original jurisdiction in this type of case. This enabled the Court to evade the reef — a decision in Marbury's favor that would

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6. *See* P. PEPE, THE WIT AND WISDOM OF YOGI BERRA (1988). The formal logic of the Yogi-ism may be unassailable. "He [must have] made that [movie] before he died." *Id.* at 135. The obviousness of the logic is taken to reflect a simple mind. Similarly: "It ain't over 'til it's over!" *Id.* at xi. Other Yogi-isms express a demented logic. "Nobody goes to [that restaurant] any more, it's too crowded." *Id.* at 37. But further consideration brings out a perfectly sensible notion lurking beneath the comic overlay.

The implicit message underlying the classic paradox is: "How clever I am!" The implicit message underlying the Yogi-ism is: "How stupid he is!" And yet they often come out at the same place — a statement that is absurd in its "wrongness" but has a logic that must be located as part of the game. It is fitting revenge that Yogi Berra's name has become associated with a sophisticated form of paradox that uses character to enrich the game of logic.

7. 5 U.S. (1 Cranch) 137 (1803).

8. "Definite plans were already afoot to impeach [Justice] Samuel Chase . . . as a prelude to impeaching Marshall himself." Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 7 (1981). "It was widely believed — not least by John Marshall himself — that the Chief Justice would be impeached and removed from office if he supported the issuance of the writ." J. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 33 (1987).

have given the Jeffersonians a chance to defy the Court — while establishing the principle of judicial review. In "a context of self-denial," the Court established its power to review congressional legislation.[9] "Depriving itself of an apparent power . . . it secured for itself a far greater power."[10] Accounted a master-stroke of "the Great Chief Justice,"[11] *Marbury*'s paradox is:

Victory through assertion of ineffective power.

The paradox dominates *Dred Scott*[12] and its tragic consequences. The Court was there responding to paradoxical demands of the soon-to-be Confederates for the use of federal power to enhance "state sovereignty" by compelling active cooperation of state and local government in the apprehension and return of fugitive slaves.[13] Chief Justice Taney had long favored a narrow and cautious pattern of decision-making that minimized the Court's exposure. Initially, the Court was headed toward such a decision; but the Chief Justice himself led the way to the kind of decision of vast implications he had sought to avoid for decades.[14] Urged to make a bold decision by political forces on all sides, the Court asserted broad nationalistic power in order to produce a result favoring the "states rights" forces of the South.[15] The subsequent storm of controversy led to a civil war that left Taney an isolated figure drafting opinions holding the Union position unconstitutional in cases that never reached the Court.[16] Notwithstanding one of the Court's great "self-inflicted wounds,"[17] Congress greatly increased the role of the federal judiciary by legislation culminating in the post-Civil War Amendments to the Constitution.[18]

In a nutshell, *Dred Scott* represents:

A bold mistake by a cautious man promoting "state's rights" by na-

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9. J. ORTH, *supra* note 8, at 34.

10. *Id.*

11. W. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 32 *et seq* (1988) (reviewing the Court's work under Chief Justice Marshall).

12. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For a discussion of *Dred Scott*, see B. SCHWARTZ, FROM CONFEDERATION TO NATION, THE AMERICAN CONSTITUTION, 1835-1877 25 *et seq.* (1973); G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 78 (1976).

13. Bestor, *The American Civil War as a Constitutional Crisis*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 233-34 (L. Friedman & H. Scheiber eds. 1978).

14. *See* B. SCHWARTZ, *supra* note 12, at 29-33, 108, 117.

15. *Id.* at 112, 121.

16. H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875 241-42, 262-63 (1982).

17. Chief Justice Hughes included *Dred Scott* among the Court's "self-inflicted wounds." C. HUGHES, THE SUPREME COURT OF THE UNITED STATES, ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 50-54 (1928).

18. *See* Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876*, 237-45, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER (L. Friedman & H. Scheiber eds. 1978) (discussing the enhanced role of the federal courts).

tionalist theory that used federal power to impose obligations on the states, leading to the nadir of the Court's influence and an expansion of its role.

Since it was passed in 1798, the tangled history of the eleventh amendment has produced a cornucopia of paradoxes.[19] Adopted to overturn a decision that permitted an out-of-state plaintiff to sue a state in federal court in order to collect a debt,[20] the amendment deprived federal courts of jurisdiction over suits against states by citizens of another state or by foreigners. With the passing of the immediate threat of suits against the states by British creditors and American Tories whose property had been confiscated during the Revolution, the Supreme Court limited the effect of the eleventh amendment limitation by later holding that a suit against a state officer is not against the state itself if the officer is acting pursuant to an unconstitutional state law.[21]

But after the Compromise of 1877 — the compromise that ended Reconstruction in return for Southern acquiescence in the inauguration of Rutherford B. Hayes as President, the Supreme Court shifted its approach. The limitation on federal power represented by the eleventh amendment was then applied strictly so as to permit repudiation of bonds issued by reconstruction governments in Southern states notwithstanding the contracts clause of the Constitution.[22] With the withdrawal of federal troops from the South, and with Congress and the President committed to ending Reconstruction, the Supreme Court had no way to compel the Southern states to pay — even if it wanted to. The upshot was that, while "blinking at repudiation by most of the Southern states," the Supreme Court "was simultaneously insisting . . . that cities and counties in the West could not shelter their own repudiations behind the [e]leventh [a]mendment."[23]

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19. This discussion is generally drawn from I. ORTH, *supra* note 8, at 5-11. The eleventh amendment reads as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. CONST. amend XI.

20. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

21. *See* Osborn v. The President, Directors and Co. of the Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

22. Except in the case of Virginia, the eleventh amendment proved to be "the bondholders' Appomattox." J. ORTH, *supra* note 8, at 9. Virginia was never able to free itself of this debt because its contract with bondholders said the interest coupons would be receivable in payment of state taxes. "Under these circumstances federal courts did not need to rely on the political branches of government to enforce their orders but could protect creditors by a judgment that their taxes had in fact been paid." *Id.*

23. *Id.*

Later, the eleventh amendment came to be reinterpreted so as to reduce its impact based on theories involving state consent and a revival of "the Marshallian tradition respecting suits against state officers."[24] Still later, conservative Justices, concerned about confiscation of investment (discussed *infra*), and liberal Justices, concerned about state resistance to liberal policies (discussed *infra*), each found ways to avoid the jurisdictional bar of the eleventh amendment.[25] The outcome is that eleventh amendment jurisprudence is "replete with historical anomalies, internal inconsistencies, and senseless distinctions"[26] that largely defy coherent explanation in terms of constitutional principle.

Among the paradoxes generated by the eleventh amendment are the following:

(i) Within a generation after the defeat of the South in the Civil War, state sovereignty arguments grounded in the eleventh amendment were successful in a way never realized before the war.
(ii) The federal judiciary acquiesced in the repudiation of bonds issued by Reconstruction governments that were largely supported and controlled by Union military and political power.
(iii) A federal judiciary firmly committed to the protection of property countenanced the repudiation of millions of dollars in bonds, while that same judiciary held cities and counties to a strict standard.
(iv) The amendment has had little impact in the Twentieth Century because conservative and liberal Justices each had reasons to support this outcome.

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24. *Id.* at 10.

25. For a discussion of the terms "conservative" and "liberal" in one of their important common meanings, see W. Maddox & S. Lilie, *The Roots of Contemporary Ideologies*, in BEYOND LIBERAL AND CONSERVATIVE: REASSESSING THE POLITICAL SPECTRUM, 1-21 (1984). Drawing on this discussion, this article employs these terms as follows: A liberal is one who generally: (i) believes in an aggressive government approach to the economy, including reliance on regulation and subsidy, and manipulation of the economy for social ends; and (ii) favors government action protecting certain interests and rights of the individual, especially of those who are members of groups subject to serious disadvantages because of poverty, prejudice, disability or the like. A conservative is roughly the opposite — favoring a free market over heavy governmental intrusion in the economy and largely in opposition to the liberal position on the individual. This distinction is not unrelated to the concepts that, in a constitutional context, underlie the *Carolene Products* case and its progeny. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938). For a useful discussion of the liberal/conservative distinction viewed more broadly, see A. REICHLEY, CONSERVATIVES IN AN AGE OF CHANGE, THE NIXON AND FORD ADMINISTRATIONS 14 (1981).

It is sometimes argued that the term "conservative" in jurisprudential terms should refer to *judicial philosophy* dealing with such questions as the binding effect of precedent, avoidance of constitutional grounds of decision, and distinguishing judicial decision-making from the personal values of the Justices. *See* D. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST: THE EARLY YEARS 19-24 (1987) (and sources quoted therein). In my view, this usage merely adds to the confusion by employing the same expression for entirely different things.

26. J. ORTH, *supra* note 8, at 11. "Any step through the looking glass of the [e]leventh [a]mendment leads to a wonderland of judicially created and perpetuated fiction and paradox." Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980).

In the *Slaughter-House Cases*,[27] the issue involved action by a Reconstruction government in New Orleans that allegedly amounted to granting a single firm a monopoly of the slaughterhouse business. Paradoxically, the fourteenth amendment, which was imposed on the Confederate states as the price of readmission to the Union,[28] was invoked by white butchers who claimed to be essentially excluded from practicing their trade. Their cause was ably presented by former Supreme Court Justice Campbell, who had resigned to join the Confederacy despite his opposition to secession.[29] This culminated in a decision that: (i) left undisturbed the grant of special rights; (ii) emphasized that the essential purpose of the fourteenth amendment did not go beyond the protection of blacks; and (iii) adopted a restrictive interpretation of that amendment's section one that would blight civil rights enforcement for decades thereafter.

This means:

> The process by which judicial interpretation of the fourteenth amendment generally made that amendment ineffective for protecting the rights of black people started with a "victory" stressing that freed blacks were the primary beneficiaries of the amendment.[30]

Over the years following *Slaughterhouse*, various theories were developed permitting the use of the fourteenth amendment to protect investors. For example, Roscoe Conkling, one of the participants in the congressional debate, implied a "Conspiracy Theory" by suggesting that a *sub rosa* purpose of the fourteenth amendment was protecting the rights of corporations.[31] This appears to have influenced the Supreme Court, which announced it had already decided that corporations would be entitled to constitutional protection by virtue of the fourteenth amendment.[32]

Further, the Supreme Court in the 1890's decided that the due process clause of the fourteenth amendment makes the just compensation clause of the fifth amendment binding on state and local gov-

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27. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

28. *See generally* H. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 32-33 n.15 (4th ed. 1982); J. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984).

29. *See* P. SMITH, THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY 448-49 (1978).

30. Note that *Slaughterhouse* established a restrictive interpretation of the Post-Civil War amendments over the dissent of the conservative Justice Field. For a thoughtful challenge to the conventional "bifurcated" notion of protection for corporations and denial of protections for blacks proceeding hand in hand, see C. LOFGREN, THE PLESSY CASE, A LEGAL-HISTORICAL INTERPRETATION 80 (1987).

31. *See* B. SCHWARTZ, *supra* note 12, at 201-3.

32. H. ABRAHAM, *supra* note 28, at 31 n.11.

ernment.[33] Conservative Nineteenth Century Justices were reluctant to extend the reach of federal power through the commerce clause; and were also concerned that industry developing on a nationwide basis, particularly the railroads, needed protection from confiscatory action by local majorities. This paradoxical combination of motives[34] led the Court to move away from the "hands off" attitude to state regulation indicated by the *Munn*[35] case, to a position that by the turn of the century: (i) accepted the principle of rate regulation by federal, state or local authorities in the case of railroads and other public utilities, while insisting that such regulation must not be confiscatory;[36] and (ii) generally challenged the notion of governmental

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33. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897). In this case, the Court said:

> [A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States. . . .

Id. at 241.

The due process clause of the fourteenth amendment provides: "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV. The just compensation clause provides: "[N]or shall private property be taken for public use, without just compensation." *Id.* amend V.

34. *See* Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 SUP. CT. REV. 135, 143-45.

35. Munn v. Illinois, 94 U.S. 113 (1877). *Munn* is the key decision of the related *Granger Cases*, all decided concurrently, which upheld regulation of grain elevators (*Munn*) and railroads. *Dictum* in *Munn*, suggesting complete deference to state regulation, recognized that the regulatory power is one which may be abused "but that is no argument against its existence." *Id.* at 134. The Court added: "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.* For a discussion of how the agrarian impulse towards regulation of railroads and similar enterprises (thought of as "liberal" in our time) accompanied, and may have made easier, the imposition of Jim Crow restrictions, see C. LOFGREN, *supra* note 30, at 24.

36. *See* Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578 (1896) where, relying on case law that had developed over the preceding ten years, the Court found forbidden by the due process clause state legislation that required a previously chartered turnpike operator "to conform to a tariff of rates that is unjust and unreasonable, and prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders." *Id.* at 591-2. *See also* Smyth v. Ames, 169 U.S. 466 (1898), where, among the principles regarded as "settled" was state rate regulation "that will not admit of the [railroad] earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States." *Id.* at 526. This case established the "fair value" rule that would bedevil utility regulation until the 1940's, namely, "rates . . . [must not be] exacted without reference to the fair value of the property used for the public or the fair value of the services rendered . . . ." *Id.* at 544. *See also* Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n of West Virginia, 262 U.S. 679 (1923).

The Supreme Court recently observed that since 1896 the "guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." Duquesne

regulation of other kinds of private enterprise.[37]

The upshot was a half-century of what might be called "Conservative Asymmetry."[38] For the protection of investors, there was generous application of constitutional principles; but in other respects the Court, following the thrust of the Compromise of 1877 and its own inclinations, avoided effective application of the fourteenth amendment and the Bill of Rights.

In other words:

> During the Era of Conservative Asymmetry, the Supreme Court continued to deny fourteenth amendment protection to the explicitly intended beneficiaries of that amendment. However, conservative Justices used the amendment to secure the rights of corporate investors to protect their investments from confiscation, but were reluct to extend federal power via the commerce clause.

The 1920's saw the arch-conservative Taft Court carry out, in Professor Currie's phrase, a "reign of terror"[39] against legislation restricting or regulating non-utility business enterprise. As the Depression closed in, the Hughes Court began to shift away from Conservative Asymmetry. This shift accelerated after the Court Packing controversy of early 1937. What is remarkable is that putting aside Conservative Asymmetry was not enough for the Court; the ascendent majority made an abrupt shift to Liberal Asymmetry.[40]

Carolene Products' famous footnote four[41] signalled the new

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Light Co. v. Barasch, 109 S. Ct. 609, 615 (1989). "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Id.* at 616.

37. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), *overruled*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

38. This was the general thrust of Supreme Court decisions over the Era of Conservative Asymmetry, which lasted about a half-century, taking as benchmarks the conservative shift on the Court starting in the late 1880's, and the 1938 *Carolene Products* case.

39. *See* Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L. J. 65.

40. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34-40. *See also* H. ABRAHAM, *supra* note 28, at 8-27; Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981).

41. United States Carolene v. Products Co., 304 U.S. 144, 152 n.4 (1938). The "abstention" cases would provide another basis for the federal judiciary's withdrawal from active review of state action. *See* Younger v. Harris, 401 U.S. 37 (1971) (striking down a federal district court injunction preventing state prosecution of Harris under California's Criminal Syndication Act based on first and fourteenth amendment grounds); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (upholding a federal district court's dismissal of a suit seeking an injunction directed at a state commission's order as violative of due process guarantees). *But see* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506 (1989) (abstention inappropriate where a local regulatory authority refused to provide reimbursement for the Federal Energy Regulatory Commission's allocation of wholesale costs incurred in connection with a cancelled nuclear power plant).

policy. The footnote four distinctions permitted the Justices to pursue enforcement of those guarantees in the Bill of Rights they considered most important and to assure constitutional protection for those categories of persons they considered most vulnerable. But a non-utility business enterprise resisting government regulation on constitutional grounds would have to carry a burden that generally proved to be unmeetable.[42]

The Court's new policy vis-a-vis the business enterprise was more completely articulated during the Second World War. In the 1942 *Natural Gas Pipeline* case, exasperated by seemingly endless litigation over utility rates, Justices Black, Douglas and Murphy sought to eliminate the special status of public utilities.[43] This effort failed. Justice Douglas wrote the two landmark 1944 Opinions: *Federal Power Commission v. Hope Natural Gas Co.*,[44] and *Bowles v. Willingham.*[45] The *Hope* case applied constitutional protection to public utility regulation against confiscatory regulation but with greater flexibility than under *Smyth v. Ames.*[46] In *Bowles*, a case involving non-utility regulation (rent control), the Court refused to apply the rigorous protection against confiscation that governs regulation of public utilities. Thus, for public utilities, the Court continued to recognize that a workable scheme of regulation must be grounded in an understanding of what lies at the heart of the capitalist system — the investment process. The principle is this: if the combination of risk and opportunity represented by a particular enterprise is not competitive with other investment options available to the capital markets, the flow of investment dollars stops. In con-

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42. As phrased by Justice Douglas in *Berman v. Parker*, 348 U.S. 26, 32 (1954), legislative action came to be deemed "well-nigh conclusive." Such economic regulation was subject to "minimal scrutiny in theory and virtually none in fact." G. GUNTHER, CONSTITUTIONAL LAW 472 n.1 (11th ed. 1985). In the case of non-utilities, as described by Professor Tribe, the Court "declared that it would sustain regulation . . . if any state of facts either known or reasonably inferrable afforded support. . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 582 (2d ed. 1988). "Even this limited scrutiny soon gave way to virtually complete judicial abdication." *Id.* The Supreme Court "became willing to resort to purely hypothetical facts and reasons to uphold legislation or . . . to uphold it for virtually no substantive reason at all." *Id.*

43. Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 599-608 (1942) (Black, Douglas and Murphy, JJ., concurring). *See* McKenna, *The Special Constitutional Status of Public Utility Regulation: From* Munn *to* Duquesne Light, 21 U. WEST L.A. L. REV. 31 (1990) (stressed that the recent *Duquesne Light* case reaffirms constitutional protection for utilities is founded in the just compensation clause's prohibition against confiscation).

44. 320 U.S. 591 (1944).

45. 321 U.S. 503 (1944). *Bowles* stressed that the operative federal statute did not implicate a taking issue under the just compensation clause because that statute did not impose a "requirement that the apartments in question be used for purposes which bring them under the Act." *Id.* at 517. Indeed, the statute specified that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." *Id.*

46. 169 U.S. 466 (1898). For a discussion of the *Smyth* case, see *supra* note 36.

trast, the pseudo-paradox of confiscatory regulation says that regulation will benefit the public by imposing on the enterprise increased risk and decreased return to the point where that enterprise no longer represents a competitive investment option. If not reversed, a policy of confiscatory regulation will result in disinvestment that leads to decline and eventual failure. With rate regulation typically applied to essential services, the consequences of such a failure for society as a whole are likely to be grave. As shown by the landmark cases of the twentieth century, the special status of public utilities is grounded in these concerns.[47]

When it came to non-utilities, however, the *Bowles* Court assumed the firm could protect itself from confiscatory regulation by withdrawing the enterprise from the regulated activity.[48] If this assumption were valid, it could be said to justify more relaxed scrutiny in arguable harmony with the spirit of *Carolene Products*' footnote four, which was, among other things, concerned with a party's ability to protect itself. But the assumption turned out to be dead wrong in the case of providers of rental housing.

The removal of the federal judiciary from any effective role[49]

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47. In applying the constitutional standards that govern public utility regulation, courts evaluate whether the end result is rates that fall within a zone of reasonableness. Jersey Central Power & Light Co. v. Federal Energy Reg. Comm'n, 810 F.2d 1158, 1177-78 (D.C. Cir. 1987) (en banc). This requires a reasonable balancing of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates. *Id.*

In Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n of West Virginia, 262 U.S. 679 (1923), the Court stated that a public utility is entitled to charge rates that will permit the company:

> to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.

Id. at 692. The company's return "should be reasonably sufficient to assure confidence in the financial soundness of the utility"; and it "should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Id.* at 693.

Hope modified the logic of *Bluefield* by emphasizing the "end result" character of the constitutional test. "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *Hope*, 320 U.S. at 602. The Court continued to focus on the investment process central to continued viability of the enterprise. "[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *Id.* at 603. Such return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.*

48. 321 U.S. at 516-18 (1944).

49. For cases where the federal judiciary refused to deal with rent control as a substantive question, see Stern v. Teeval Co., 340 U.S. 876 (1950), *rev'g* Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884 (1950); Teeval Co. v. Dewey, 91 F. Supp. 891 (D. N.Y. 1950). *See also* Judge Friendly's opinion in Eisen v. Eastman, 421 F.2d 560, 567 (2d Cir. 1969) ("whether as some believe, rent control does not prolong the very condition that gave it birth, is a policy issue not appropriate for judicial concern."), *cert.*

amounted to granting to local government the option of imposing confiscatory regulation on the hapless providers of rental housing.[50] This option was exercised in New York City, where a very unamusing paradox was a policy ostensibly adopted for the benefit of the poor which eliminated housing that could accommodate the poor. The consequences of confiscatory regulation are visible in dramatic form in the Bronx Ruin: mile after mile of burned-out hulks and rubble where there once stood a thriving city.[51] Insulated by its own presumptions of constitutionality, the Court continues to be officially unaware of the Bronx Ruin and the process that produced it.[52]

As constitutional review of non-utility regulation became perfunctory, this cleared the way for the administrative state. So long as there was some supporting logic, however minimal, government could exercise power over business virtually unconstrained by the Constitution. The no-confiscation principle would be applied in certain limited contexts, such as public utility regulation, eminent domain, and inverse condemnation.[53] Outrages falling outside those limits simply would not be recognized, in much the same way that

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denied, 400 U.S. 841 (1970). In contrast, other courts have applied a constitutional standard to non-utility regulation: Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543, 350 A.2d 1 (1975) (rent control); Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), *denial of stay*, 110 S. Ct. 18 (1989) (hotel property used for single room occupancy); Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989) (striking down the confiscatory elements of Proposition 103, which imposed a twenty percent rate reduction and prohibited auto insurance companies from terminating existing policies).

50. For a broad review of price regulation, see Drobak, *Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation*, 64 WASH. U. L. Q. 107 (1986).

51. Rent control was preeminent among the public policy blunders that produced the Bronx Ruin. Not surprisingly, the "greatest disincentive to building new rental apartments is the fear that they may subsequently become rent-regulated." The New York Times, January 14, 1988 (Editorial) at 26. Based on direct observation for more than forty years, the Times concludes that rent control "accelerates the abandonment of marginal buildings, deters the improvement of good ones and creates wondrous windfalls for the middle class — all the while harming those it was meant to help, the poor." The New York Times, May 12, 1987 (Editorial) at A30. *See also*: P. SALINS, THE ECOLOGY OF HOUSING DESTRUCTION: ECONOMIC EFFECTS OF PUBLIC INTERVENTION IN THE HOUSING MARKET (1980); W. TUCKER, THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICIES 241 (1990).

52. Deference to state decision making is often justified by the need for "experimentation." *See* Sailors v. Board of Educ., 387 U.S. 105, 109-11 (1967) (upholding procedure for selecting members of county boards of education). During the years when the Bronx Ruin was being created, procedural rules and assumptions established by the Supreme Court precluded any official contact with the results of the "experimentation" for which the Court had cleared the way. *See* Pennell v. City of San Jose, 485 U.S. 1 (1988), where Chief Justice Rehnquist's opinion for the court discusses rent control as if he had never seen a photograph of the Bronx Ruin or heard of its existence.

53. *See* United States v. Causby, 328 U.S. 256 (1946) (finding a taking under the just compensation clause where low flying, heavy bombers disrupted chicken raising).

the old Court did not recognize outrageous violations of civil rights.[54] In effect, it was assumed that the Court's legitimate options continued to include selectively shutting out reality for decades at a time, and by this means suspending the practical effect of essential constitutional guarantees. As compared to the attitude of the Old Court, all that had changed was the identity of who would be favored and who would be disfavored, of what would be recognized and what would be ignored.

What this means is:

> The Supreme Court's decision to adopt Liberal Asymmetry in order to allow for more "experimentation" had the effect of insulating the Court from any official awareness of the disastrous consequences of confiscatory regulation permitted by the Court's effective suspension of constitutional guarantees. Ostensibly designed to help the poor, confiscatory regulation led to a broad withdrawal of the capital markets from the creation of unsubsidized rental housing and an ever-worsening shortage of housing for the poor. This struck a blow for poor people, great numbers of whom were given the opportunity to live on the sidewalk.

The second element in Liberal Asymmetry came to full development in the Warren Court as all the key guarantees in the Bill of Rights were made binding on the states through the due process clause of the fourteenth amendment.[55] Paradoxically, this was grounded in constitutional theory that the conservative Court of the 1890's had developed to justify applying the just compensation clause to the states.[56] In our time, the Supreme Court, in demanding full compliance by state and local government with these key guarantees (as interpreted), focuses on "personal rights"[57] — involving, for example, the first amendment and fairness for those accused of

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54. *See* United States v. Cruikshank, 92 U.S. 542 (1876), a case where a group of armed whites had killed over 60 blacks. It has been argued that the Supreme Court's decision went beyond limiting the reach of the fourteenth amendment to "state action" to the point of "free[ing] states from the constitutionl constraints of the Bill of Rights." M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 179 (1986).

55. *See* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, in THE EVOLVING CONSTITUTION: ESSAYS ON THE BILL OF RIGHTS AND THE U.S. SUPREME COURT 254, 258-65 (N. Dorsen ed. 1987). All the guarantees contained in the first eight amendments have been held applicable to the states except for the second amendment (right to keep and bear arms), the third amendment (no quartering of soldiers), the grand jury clause of the fifth amendment, and the seventh amendment (right of jury trial in civil cases). *Id.* at 263.

56. *See* Malloy v. Hogan, 378 U.S. 1, 4-6 (1964); Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

57. And yet, the Court has stated, "the dichotomy between personal liberties and property rights is a false one . . . .[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

crime. In defense of this position, liberal Justices cite the sacred character of the Bill of Rights as the keystone of our liberties,[58] and stress the role of the Court as an extension of constitutional authority.[59]

And yet the cold fact is the Court's policy of Liberal Asymmetry *as a practical matter* denies constitutional protection for disfavored parties, *e.g.*, Bronx landlords. Today, as in the 1890's, the just compensation clause is deemed an essential guarantee made applicable to the states by the due process clause of the fourteenth amendment, and as such, must be respected by government.[60] But the Court's half century of asymmetry consciously left such parties as the providers of rental housing vulnerable to confiscatory regulation, and then choose not to recognize the actuality of confiscatory regulation and its consequences.

In other words:

> Employing the Old Court's technique of precluding official knowledge of inconvenient reality, Liberal Asymmetry invokes the "sacred" authority of the Constitution and the Bill of Rights, while denying practical effect to essential constitutional guarantees where this denial comports with the values of the dominant Justices.

Supporting the shift from Conservative to Liberal Asymmetry was a dramatic reversal of liberal and conservative positions defining the proper role of the Supreme Court. When the Old Court was playing an interventionist role in defense of conservative values, conservatives applauded and liberals argued for judicial restraint.[61]

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58. The word "sacred" or a variation on it is frequently applied to key guarantees of the Bill of Rights. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), *overruled*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

59. *See* Brennan, *supra* note 55; Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433 (1986).

60. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). For the Framers of 1787, specifically for James Madison, protection of rights in property was central to the concept of a civilized society. *See* Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). Indeed, the catalyst that led to the Constitutional Convention of 1787 was the threat to property raised by Shays's Rebellion in Massachusetts some months earlier. *See* Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 113 (R. Beeman, S. Botein & E. Carter eds. 1987). A willingness to place absolute confidence in legislatures typical of the early Revolutionary period had by 1787 given way to caution born of experience. *See* Treanor, *supra*, at 700-07. The quick learners of the post-Revolutionary period knew how exposed to confiscation a creditor would be in a population of debtors or a landlord in a population of tenants. The just compensation clause is just one of the features of the Constitution designed to forestall confiscatory action by the many against the propertied few. *See* Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in ECONOMIC LIBERTIES AND THE JUDICIARY 39 (J. Dorn & H. Manne eds. 1987) (reviewing these features).

61. *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY v-xx (1941); R. Mc-

Liberal Justices continued in this vein for a time after control of the Court shifted.[62] But, as the Court came to pursue civil rights and other liberal causes, liberals on the Court, with notable exceptions,[63] and elsewhere, supported a broader and broader mandate for the Justices to interpret the Constitution creatively in order to justify or require liberal social and economic policies.[64] By the time of the Warren Court, there had been a neat reversal of roles, with conservatives arguing judicial restraint and liberals savoring the policy-making role of the Court.

As a result of this Great Switcheroo, liberals and conservatives over the past hundred years have each taken a turn at granting the Supreme Court power to decide matters of national policy largely unconstrained by the Constitution itself. Moreover, they have each taken a turn at arguing the Court should play a role stressing deference to elected government. Finally, they have each switched positions depending on whether dominance of the Court was liberal or conservative. On each side, jurists and scholars concocted the legal theory needed to justify first one position and then the other.

Today, we find conservative jurisprudence insisting on judicial restraint, and stressing the importance of deference to democratic decision-making.[65] Today, liberal jurisprudence supports vast discretion in the hands of the Court.[66] What is indeed paradoxical is that each side occupies a position opposite the historical alignment of political forces in America going back to the struggle between the Jeffersonians and the Hamiltonians.[67]

Certainly, an essential aspect of conservatism in American terms has been a skeptical view of unrestricted democratic power and consequent stress on the structural safeguards and property-re-

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CLOSKEY, THE MODERN SUPREME COURT 291, 304-09, 325-29, 342-47, 359 (1972).

62. *See* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 599, 600 n.4 (1942) (Black, Douglas and Murphy, JJ., concurring).

63. Exceptions include Justices Black, Jackson, and Frankfurter. *See* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Jackson, *The Supreme Court as a Political Institution*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT 360 (A. Westin ed. 1963); Frankfurter, *The Process of Judging in Constitutional Cases*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT 267; Frankfurter, *Self-Willed Judges and the Judicial Function*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT 436.

64. *Compare* the language of the three-Justice concurring opinion in *Natural Gas Pipeline*, 315 U.S. at 599-608, *with* Justice Douglas' Opinion for the Court in Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (articulating new doctrine based on "penumbras, formed by emanations from those guarantees [in the Bill of Rights] that help give them life and substance.")

65. *See* Scalia, *Economic Affairs as Human Affairs*, in ECONOMIC LIBERTIES AND THE JUDICIARY 31 (J. Dorn & H. Manne eds. 1987); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 702-06 (1976); W. REHNQUIST, THE SUPREME COURT, HOW IT WAS, HOW IT IS ch. 14 (1987).

66. *See* Brennan, *The Constitution of the United States: Contemporary Ratifications*, 27 S. TEX. L.J. 433 (1986); Brennan, *supra* note 53, at 254.

67. *See* P. SMITH, *supra* note 29, at 306 (reviewing this struggle).

lated guarantees of the Constitution. Liberalism in the Twentieth Century has characteristically professed greater willingness to believe that the general population, as opposed to an elite, can be trusted.[68] And yet, conservative jurisprudence now tends to exalt the democratic elements of government, while liberal jurisprudence is far more willing to subordinate democratic decision-making to an unelected judiciary.

Here, then, is the prince of all our paradoxes:

> The adversaries have not only exchanged positions vis-a-vis where they stood in the 1930's; the position of each side is dramatically out of alignment with its history and the philosophy each side thinks it believes in.[69]

As it now stands, the Rehnquist Court is at least marginally conservative. It is likely to become more conservative as elderly Justices are replaced. This suggests the premises underlying Liberal Asymmetry will be closely and skeptically scrutinized — a process that seems to be already initiated.[70] If we assume a conservative Court through the 1990's and beyond, would we see the complete rejection of Liberal Asymmetry? Would we see a move toward Conservative Asymmetry? Would we see a complementary shift by conservatives away from judicial restraint and toward an interventionist role reminiscent of the Old Court? And would liberals once again become crusaders for judicial restraint in an effort to control a Supreme Court more conservative than its political environment? If the future is simply an extension of the past — in other words, if we have learned nothing — we can expect to see a Second Great Switcheroo just as demeaning as the First.

At the very least we can say a Second Great Switcheroo is no more improbable than what presently exists. The first generation of conservative Justices might balk at making a U-turn, as did Justices Black, Frankfurter and Jackson. But, after a decade or so, surely conservative jurisprudence would be tempted to align itself with conservatism as it has existed since Alexander Hamilton. Surely

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68. *See* A. REICHLEY, *supra* note 25, at 14.

69. There may be nations where one could go away to a twenty-year Trojan War — or fifty-year, for that matter — and find on one's return all the same forces focused on the same issues and taking the same positions. Such a warrior returning to the United States might find everyone has changed sides.

Constitutional law is in this respect by no means unique. For example, before America's entry into the Second World War, conservatives tended to be isolationists and liberals supported an aggressive internationalist role. By the end of the Vietnam period, this had more or less reversed itself.

70. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 485 U.S. 1 (1987). *But see Pennell*, 108 S. Ct. 849 (1988); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (no taking in state regulation requiring coal pillars to be left in place).

conservatives, like the liberals of today, would come to define beneficent power as that which resides in their hands. Liberals are now in the paradoxical position of arguing that greater discretionary power should be exercised by an institution that is becoming more conservative. Perhaps they believe conservative Justices are so locked into a doctrine of judicial restraint that a conservative Court would not take advantage of the power liberals insist should be in its hands. If that is their belief, history suggests they are mistaken.

If we outline as a hypothetical paradox the Second Great Switcheroo of this century, it would look like this:

> The paradoxical positions of conservatives and liberals each occupying the other's historic position would be de-paradoxed. This would require a de-construction of liberal constitutional doctrine, and a reconstruction in liberal terms of some kind of doctrine that insulates the things liberals believe in from being undone by a resurgent conservative majority. On the conservative side, there would have to be some face-saving way of concluding that the Court is not after all so very closely controlled by the terms of the Constitution itself and its values — at least in relation to those things dear to the hearts of conservative Justices.

History suggests all of this would be accomplished somehow, but with some damage to the credibility of the entire process. While it might be fun to see sophisticated legal minds struggle to find ways around their own theories, it would not be fun to see the public come to believe constitutional law is an elaborate fraud. This republic is one of humanity's wonderful achievements. Not yet a government of laws rather than of men, but as close to that ideal as anyone has come. It would be a shame to spoil it.

Suppose we put aside history, and assume some capacity for maturity on both sides. Let us visualize an ascendant conservative majority that builds on the wisdom of previous Courts. Let us assume an effort to broaden and deepen our national consensus as conservatives and liberals recognize common values. This would mean a long-overdue reexamination of Liberal Asymmetry, but without another wild swing of the pendulum. And it would mean due and proper enforcement of every one of the essential guarantees in the Bill of Rights.

Assuring this result does not mean the Supreme Court must allow itself to be swamped by trivial cases. The Court today has virtually absolute discretion in shaping its agenda. Judicial statesmanship should, without abdication, avoid the need for constant Supreme Court re-involvement, by identifying key principles that courts below will find understandable and workable.

A principle the Supreme Court has recognized for more than a hundred years suggests one way the Court could avoid abdication

without being swamped by less important cases. *Munn v. Illinois*[71] distinguished grain elevators, where the enterprise need not continue in business, from firms (utilities) bound by a commitment to serve.[72] Justice Douglas' 1944 Opinion for the Court in *Bowles*[73] highlighted this distinction; and under *Hope* and *Duquensne Light*, rigorous constitutional protection against confiscatory regulation applied to firms that are at the mercy of local majorities. Reinvigorating this principle, the Court could make it very clear that a high level of scrutiny is triggered where the enterprise is "locked in."

In actual practice, however, the principle has not been applied consistently. By refusing to deal in a substantive way with confiscatory rent control, and by bricking over the windows and doors of the Court for the forty years that produced the Bronx Ruin, the Court has ignored the reality that the housing-rental enterprise is as immovable as the building itself. As demonstrated in the bleak landscape of the Bronx Ruin, a firm without "feet", *i.e.*, unable to escape confiscatory regulation by going elsewhere or (as a last resort) by withdrawing from the business, is unable to protect itself from the tyranny of local majorities. The same logic that subjects utility regulation to a rigorous test designed to prevent confiscation should embrace rent control.[74] A decision by the Supreme Court subjecting rent control to a higher level of scrutiny would be merely a renewal of a principle recognized a hundred years ago.[75]

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71. 94 U.S. 113, 126, 133 (1877).

72. Utilities are not entitled simply to abandon an unprofitable service. *See* Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930); Drobak, *supra* note 48, at 107, 110-11, 120; Pond, *The Law Governing the Fixing of Public Utility Rates: A Response to Recent Judicial and Academic Misconceptions*, 41 AD. L. REV. 1, 3 (1989); F. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION 225 (1968).

73. For a discussion of *Bowles*, see *supra* note 45 and accompanying text.

74. *See* Drobak, *supra* note 50, at 109-11 (discussing rent control). Similarly, where insurance companies are blocked from withdrawal, imposition of confiscatory rates conflicts with constitutional guarantees. *See* Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989).

75. As to appeals from rent control decisions, the Supreme Court can minimize its own involvement, just as it has in the case of utility regulation in recent years, by being generally deferential to state courts and lower federal courts. While the Court's pattern of extreme deference has led to grave problems in the field of utility regulation, as observed by Professor Pierce, Pierce, *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2046-52, 2070-71 (1989), nothing comparable to the Bronx Ruin has materialized in that field.

Perhaps a better alternative than imposing utility-type constitutional protection on rent control would be assuring a right of exit from the rental housing business. *See* Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (Rehnquist, J., dissenting). Faced with a real possibility that the property owner will either demolish his building or convert to cooperative or condominium status, rent control authorities would have to recognize that rent levels must cover costs and that actual payment of rents has to occur if a rental housing enterprise is to continue in operation. A variety of state and local regulations ostensibly designed to regulate the condominium relationship in fact serve to block exit from the rental business. *See* Baar, *Guidelines for*

Let us recall the paradox that underlies our entire constitutional system:

> Anti-democratic power exercised by an undemocratic institution in defense of the democratic functioning of our republic.

Relying on this, we can state the following:

> Because the Constitution recognizes there cannot be a functioning democracy if private property is taken for public use without just compensation, close scrutiny should apply where a firm that raises the issue of confiscatory regulation cannot protect itself by withdrawing the enterprise from the regulated activity. In such a case, elected government should be overruled as necessary to safeguard the democratic functioning of our republic.

Moreover, if the Court does not carry out its constitutional responsibility, there is still another level of failure. A constitution, as Justice Holmes said in his famous 1905 *Lochner* dissent, "is not intended to embody a particular economic theory."[76] Without challenging this statement, we can say that the functioning of the capitalist system now comes within the ambit of the Supreme Court's

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Drafting Rent Control Laws: Lessons of a Decade, 35 RUTGERS L. REV. 723, 835-38 (1983).

Rent control proceeds on a false analogy to utility regulation. The keystone on which utility regulations rests is non-discrimination. In principle, like services are furnished to all customers, or comparable groupings of customers, on the same terms and for the same price. By contrast, the essential concept of rent control as practiced in this country is discriminatory. It awards benefits often worth many thousands of dollars to particular sets of individuals who happened to be in the right place at the right time. Typically, the distinction between who benefits, and to what degree, and who does not benefit, has no relationship to either need or merit. Given continued judicial abdication, rent control functions as a social device whereby those who are now the effective local majority present themselves with important benefits, passing the cost on to a minority unable to defend themselves (investors), and to those not yet on the scene. *See* W. TUCKER, THE EXCLUDED AMERICANS, *supra* note 51, at 127 *et seq.*

Further, a public utility typically serves a broad range of customers and operates on the basis of a single "revenue requirement" covering its entire business. This may make it relatively painless for a company to comply with government policies focused on social objectives. Thus, for example, government policies commonly require that pricing for telephone service must be structured to favor residential subscribers over business subscribers. The telephone company is not endangered by such a requirement so long as the company is able to make up revenue shortfalls on service to one group of customers by charging other customers more. But the effects of rent control tend to be focused heavily on certain enterprises, *i.e.*, those in business at low rents when rent control goes into effect. These are generally small enterprises that have no way to make up the revenue shortfall created by controlled prices — a shortfall that is likely to increase over time as inflation outpaces allowed rent increases.

For these reasons, the utility regulation concept and the rent control concept are essentially mismatched. While applying *Hope*-type constitutional guarantees to rent control would be far better than nothing, the preferable approach, in my view, would be to assure a constitutional right of exit in harmony with principles recognized in *Munn* and *Bowles*.

76. Lochner v. New York, 198 U.S. 45, 74, 75 (1905) (Holmes, J., dissenting), *overruled by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

constitutional concerns.[77]

A great deal has happened since *Lochner*. With the Marxist alternative disintegrating, the capitalist system has matured. It is a system that has proven more flexible than the arch-conservative Justices of the Old Court believed possible. We now know that mature capitalism can accommodate, at some cost, social regulation deemed necessary for the protection of society's interests, provided regulation comprehends and respects the dynamics of the system. And decade by decade, in terms progressively clearer and more emphatic, the national electorate has stated its commitment to the capitalist system as its chosen economic instrument. If the Supreme Court permits regulation in violation of the just compensation clause, and if this confiscatory regulation imposes failure on that same capitalist system, especially on the parts of that system furnishing the most essential services, this conflicts with the expressed will of the electorate. This conclusion is not dependent on claiming that the Constitution is intended to embody a particular economic theory. It is a conclusion that follows from the nature of a government responsive to the will of the electorate, and the unmistakable decisional outcome of the democratic process.

Our closing paradox, then, is:

> When the affected enterprise cannot withdraw from the regulated activity, the Court's failure to provide constitutional protection against confiscatory regulation imposed by (elected) government clashes directly with the expressed will of the electorate calling for a capitalist system allowed to operate successfully. This failure again conflicts with the democratic principles on which the Constitution is constructed.

CONCLUSION

Over the past hundred years, liberals and conservatives have each defined the Supreme Court's role broadly or narrowly depending on which side controlled the Court — and constitutional doctrine was adjusted accordingly. As we come to appreciate that the Supreme Court is not permanently liberal or conservative, that the political process may shift the Court's power in any direction, we can hope for a new maturity. Power looks different in the hands of the "other guys."

In this light, we can hope we have seen the last of the Great Switcheroos. And the last of asymmetries tantamount to arbitrary suspension of fundamental guarantees contained in the Bill of

77. Indeed, it was a matter of concern for the Court in 1905 when *Lochner* was decided. *See supra* note 36.

Rights. We can hope that, as liberals and conservatives discover the extent of their agreement, there will emerge a stronger consensus on essential principles. Finally, we can hope that the interrelated paradoxes reviewed in this essay will generate a fresh perspective on the Constitution faithful to its spirit and dedicated to its guiding principles.