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A Commentary on Professor Fisher's Thesis: Ideology, Religion, Private Property and the Supreme Court 1987-88

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A COMMENTARY ON PROFESSOR FISHER'S THESIS: IDEOLOGY, RELIGION, PRIVATE PROPERTY, AND THE SUPREME COURT 1987-1988[1]

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The most important lessons to be learned from Professor Fisher's paper[2] are that the ideologies central to American law have roots in religious thought and that the influence of ideologies can be found throughout American law, perhaps most especially in judicial decisions. To these lessons we can add a third: the ideologies embodied in judicial decisions concerning private property in the period from the American Revolution to the Civil War are still with us. Three recent decisions of the United States Supreme Court[3] illustrate the continuing importance of the constitutional and ideological protection of private property, while offering an interesting interplay of the theories of "public easement" and "off-setting gains" as defined by Professor Fisher.[4] There are differences, to be sure, between the property and takings issues considered recently by the Supreme Court and those contemplated in the cases discussed by Fisher — the contemporary cases lack the drama of slavery hovering in the background. Hardly any property case could have been decided prior to the Civil War without a concern for the impact of the decision on that most notorious of American institutions. More striking than the differences, however, are the similarities in tone, argument, and substance.

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[1] This is a revised version of comments that the author presented as a response to Professor Fisher's paper at the Conference on Religious Dimensions of American Constitutionalism, Emory University School of Law, April 7-8, 1988.

[2] Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65 (1990).

[3] Pennell v. City of San Jose, 485 U.S. 1 (1988); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First Evangelical Lutheran Church of Glendale v. County of Los Angeles (Lutherglen), 482 U.S. 304 (1987).

[4] *See* Fisher, *supra* note 2, at 112, 115.

I. LUTHERGLEN AND NOLLAN: FLOODS, BEACHES, AND THE SANCTITY OF PRIVATE PROPERTY

In *First Evangelical Lutheran Church of Glendale v. County of Los Angeles* (*Lutherglen*), a Lutheran church in Glendale, California, owned a 21 acre tract known as "Lutherglen" along the banks of Mill Creek in Los Angeles County. The church had built a small chapel and other structures on Lutherglen and used it as a recreational area for handicapped children. In 1977, a fire destroyed several thousand acres of forest in the upstream watershed and, during the following winter, there was a flash flood after a heavy rain. The flood destroyed all the buildings in Lutherglen. Shortly thereafter, the County enacted an ordinance that prohibited any construction in the Mill Creek flood plain until the watershed had recovered enough to remove the flood danger.

The church wanted to rebuild its recreational center at Lutherglen, and, frustrated by the ordinance, filed an inverse condemnation action. The California courts were unsympathetic and held the ordinance to be a regulatory taking that did not trigger the just compensation clause.[5] The issue that made its way to the United States Supreme Court was a relatively minor and deceptively simple one: if a court in an inverse condemnation action determined that there had been a compensable temporary taking, did the time for measuring the taking relate back to the original legislative action? The California courts had consistently ruled in the neg-

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[5] For a brief description of the California litigation, see *Lutherglen*, 482 U.S. at 306-11.

There is a lengthy history to the development of the distinction between a "taking" for which the government must pay and a "regulation" that is within the police power of the government to enact without a concomitant obligation to compensate the property owner subjected to the regulation. The United States Supreme Court, for example, has distinguished a physical invasion by the government — a clearly compensable taking (*see* United States v. Causby, 328 U.S. 256 (1946)) — from a regulatory interference with the use of property which "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See also* Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom.* Christy v. Lujam, 109 S. Ct. 3176 (1989). Contemporaneously with the California cases discussed in this Article, the Supreme Court held that a Pennsylvania law limiting the removal of coal in certain mines to 50% of the deposits was a noncompensable, regulatory taking enacted for the purpose of preventing dangerous and damaging subsidence. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). In a classic statement of offsetting gains, the Court said, "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.* at 491.

ative on this question; the time of the temporary taking was measured from the date of a final judicial decision favorable to the property owner, not from the effective date of the regulation.[6] However, the Supreme Court ruled otherwise and held that a temporary taking is a taking that requires compensation from the moment it takes effect. " '[T]emporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[7]

The narrow holding of the Court was no great surprise. It clarified a minor issue and struck a balance that was consistent with a more libertarian view of property rights. More interesting was the use of language that implied a possible reconsideration of the "regulatory taking" doctrine. The ordinance at issue did not prohibit all uses of the land; it only prohibited construction in the flood plain until the upstream forest recovered. In his dissenting opinion, Justice Stevens argued that the Court was opening the door to an inappropriate takings analysis of ordinary regulatory schemes. His argument echoed themes of the "offsetting gains" theory by treating regulatory limitations on the use of land as one of the costs of living in a civilized society, a cost that would be reimbursed by general improvements in the quality of life:

> While virtually all physical invasions are deemed takings, . . . a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value . . . . This diminution of value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless

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[6] The leading case was Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). The California rule was favorable to local governments because they could choose to avoid or to minimize liability by repealing or amending a regulatory statute after an adverse decision. If the taking was temporary, the local government avoided liability altogether for the impaired use value between the time of the original action and the subsequent judicial decision. The *Lutherglen* decision did not necessarily change the impact of *Agins* on what is a compensable "taking" as opposed to a noncompensable "regulatory taking." The *Lutherglen* Court assumed a taking and discussed the time for measuring the compensation. *See also* Smith v. City of Brenham, 865 F.2d 662 (5th Cir. 1989).

[7] *Lutherglen*, 482 U.S. at 318. Chief Justice Rehnquist wrote the Court's opinion. He was joined by an interesting cross-section of the Court: Justices Brennan, White, Marshall, Powell, and Scalia.

> ways, and only the most extreme regulations can constitute takings. Some dividing line must be established between everyday regulatory inconveniences and those so severe that they constitute takings.[8]

Justice Stevens' concerns were validated three months later when the Court, in *Nollan v. California Coastal Commission,*[9] dealt more directly with a regulatory takings kind of problem. The Nollans had applied for a building permit to raze a small dwelling on a beachfront lot in Ventura, California, and to replace it with a much larger house more in keeping with the neighborhood. The permit was issued on the condition that the Nollans grant a permanent access easement to the public across that portion of their privately-owned beach between the mean high water mark and high land (this amounted to a strip about 8 to 10 feet wide by 100 feet in length, the width of the Nollans' lot). The Nollans' property was located along a crescent of beach between two public parks. The purpose of the easement was to facilitate pedestrian access from one public park to another. The same condition had attached to numerous prior permits, and there was a history of public transit, easements or not. The Nollans, however, were unhappy with the condition and sued for a writ of mandamus to strike it from the permit. The trial court granted the writ, but the California Supreme Court reversed.[10] The United States Supreme Court agreed with the Nollans and reversed the California Supreme Court. Writing for the Court, Justice Scalia stated:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennan contends) "a mere restriction on its use" is to use words in a manner that deprives them of all their ordinary meaning . . . . We think a "permanent physical occupation" has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[11]

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[8] *Id.* at 329 (Stevens, J., dissenting).

[9] 483 U.S. 825 (1987).

[10] *See* Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986).

[11] *Nollan*, 483 U.S. at 831-32 (citations omitted). The other members of the majority were Chief Justice Rehnquist and Justices White, Powell, and O'Connor. With regard to their previous positions in the *Lutherglen* case, Justices Brennan and Marshall defected to the dissenters, while Justice O'Connor moved to the majority.

After assuming that a direct condemnation of an easement across the beach would be a taking, the Court addressed the question of whether this condition upon the permit was essentially the same. The standard regulatory taking rule is that a land use regulation is not a taking if it "substantially advance[s] legitimate state interests" and does not deny "an owner economically viable use of his land."[12] The Court earlier had sustained a California decision that the speech rights of a speaker outweighed the property rights of a shopping center owner, including the right of exclusion, in *Pruneyard Shopping Center v. Robins*.[13] Justice Scalia distinguished the *Pruneyard* case by saying that the property owner's right to exclude in that case had been severely attenuated by the property owner's open invitation to the public to come onto his property. Therefore, sustaining the speech rights of a visitor to the shopping center had a de minimis effect on the property owner's right of exclusion.[14]

Further, Justice Scalia argued that the condition did not substantially advance a legitimate state interest in connection with the state power being used. He contended that the permit authority was based upon a state interest in protecting the general quality of development, including adherence to building codes, the aesthetic environment, and the public's ability to see the beach and the ocean. He conceded that the Coastal Commission could have conditioned the permit on a viewing easement and thereby limit the height of the structure or require provision of a viewing spot. But he did not believe that the beach-walking easement was sufficiently tied to the interests said to be advanced by the legislation that required a building permit.[15]

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[12] Agins v. Tiburon, 447 U.S. 255, 260 (1980). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

[13] 447 U.S. 74 (1980).

[14] There are obvious holes in this line of argument. The shopping center owner made the invitation conditional upon, among other things, no protests, demonstrations, picketing, and other related activities. The invitation was to visit the property, to browse, and perhaps to buy, but not to use the property as an open political forum. Furthermore, the impact on a shopping center of a decision that makes it essentially a public forum for all manner of speech activities could be greater economically than a decision that the public may walk across, but not sojourn upon, an eight foot wide strip of beach in addition to walking across — and sojourning upon during low tide — the rest of the beach down to the low water mark.

[15] There is an interesting problem of federalism lurking in this case. Land use regulation historically has been a matter left to the states and, more specifically, to the political branches of state government. By federalizing what was essentially a matter of local land use regulation, Scalia and the Court ignored one of the principal justifications of federalism — the opportunity for local communi-

The dissenters argued that the Court's decision was an improper intrusion into the police powers of states and local communities, that it imposed a standard of precision upon local governing authorities that was impossible for them to meet,[16] and that the impact on the Nollans was so slight that it could not be considered a taking.[17] Perhaps the dissenters' two sharpest arguments were that prior custom established an expected usage of the beach, and that the construction permit was a government privilege of great economic value conditioned upon an easement of minor economic consequence.[18]

Despite their strongly articulated differences of opinion in these two cases, all members of the Court agreed on the basic principle that the government's power to restrict the enjoyment of interests in private property without compensation is strictly limited. The Court's own debate over whether the California Coastal Commission could condition the Nollans' permit on their dedication of a public easement or whether Los Angeles County could prohibit construction in the Mill Creek flood plain is strikingly similar to the debate Fisher describes between the Whigs and the Jacksonian Democrats in the 1830s.[19]

Inherent in this basic limiting principle are a mistrust of governmental powers and a fundamental respect for private property. Yet all members of the Court (as well as perhaps all but the most extreme libertarians) agree that the government can convert private property to public use.[20] The question that separates the members of the Court is to what extent may the government tell a property owner how to use or not to use prop-

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ties to experiment with different ways of regulating and organizing their lives. Scalia also failed to consider the question of deference to the political judgment of a political body — a local commission — that is subject to the usual political process. The disdain in the majority opinion for locally made political decisions echoes the disdain that one can find in many of the substantive due process cases for similar kinds of locally made political compromises.

[16] For example, in his dissenting opinion, Justice Blackmun stated, "The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based." Nollan v. California Coastal Comm'n, 483 U.S. 825, 865 (1987) (Blackmun, J., dissenting).

[17] *See id.* at 853 (Brennan, J., dissenting).

[18] *See id.* at 856.

[19] *See* Fisher, *supra* note 2, at 75-78.

[20] Although seemingly obvious, it is important to note that the issue is not the power of the government to resort to brute strength, but rather the power to condemn property legally, constitutionally, and peacefully.

erty without compensating the owner for any resulting use limitations. This question reflects some initial ambivalence about the theoretical source of governmental power. For example, consider the nature of the "public easement" theory, described by Fisher as a Whig concept.[21] If a public easement exists, there must be a basis for arguing that the property owner's right in specific property derives from a grant by the sovereign, which retains the power to amend that granted right in some way. When the prevailing political ideology posits a system of dominion and control vested in a single sovereign (for example, the English Monarch), then the concept of a grant, conditioned upon future limitations by the grantor, is straightforward.

The American experience complicates this analysis in two ways. First, the ideological background of American law, which contains many elements of the individualism associated with various schools of Protestant theology, lends support to the notion that individual property owners derive their rights in property from sources other than a sovereign's grace. Second, the positive laws of the fifth amendment to the United States Constitution, various state constitutions, and various statutes impose limitations on the government's power to encumber the full enjoyment of private interests in property.[22] Thus, the ideological background and positive law limitations are consistent, and impose severe limitations on governmental power to control private property.

Nevertheless, the recognition that the government can take property, even in the face of these ideological and legal constraints, adds credence to the argument that something akin to the "public easement" theory continues to have vitality. A private property owner can be forced to "sell" his property to the government if the government uses it for a public purpose. This suggests that all property is held subject to a public use servitude. The ideology and the law of private property are nonetheless satisfied, both directly, by compensatory payments, and indirectly, by the general

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[21] *See* Fisher, *supra* note 2, at 112.

[22] One might argue that limitations imposed by the positive laws are transitory because they may be changed by legislative action. Although true of statutes, state constitutions may not be truly transitory, for greater formalities are usually required for amendment. Amending the federal constitution is even more difficult, and requires a procedure that involves significant participation by a substantial proportion of the national population. If a constitutional provision is consistent with broadly accepted and strongly supported ideologies, it is unlikely that a proposal to repeal that provision would be approved.

improvements enjoyed by all citizens as a result of the public use of the property.

In *Lutherglen*, the majority forcefully stated the libertarian case for minimal governmental power to regulate property without compensation to the owner. The majority treated the Constitution as a bulwark against the natural excesses of government, protecting the individual from a misallocation of social costs, unfairness, ineptitude, corruption, or whatever else may be within the government's exercise of power. Underlying this view is a thinly veiled sense of government as inherently antagonistic, if not downright evil, to individual liberty. "It is axiomatic," Chief Justice Rehnquist wrote, "that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[23] According to Rehnquist, the Constitution provides a means to vindicate individual rights and to collect money from the government, and is not simply a means to prevent governmental action.[24]

In *Nollan*, Justice Scalia continued this theme and dismissed the argument that the easement condition was a legitimate trade for the building permit. Instead, he argued that the two were unrelated. If the Nollans had met the established conditions for the construction of a building at that location, they were entitled to a permit. Scalia concluded that the regulation offered no offsetting gain because the Nollans could not receive anything, namely the building permit, more than they were entitled to get. But the argument does not end there. The Coastal Commission was engaged in a systematic effort to regulate coastal land use, and the fruits of that effort would inure to the benefit of the Nollans in the long run by improving the value of beachfront property in general. The Nollans also would enjoy public easements across neighboring beachfront lots, permitting them to travel to and from the nearby public parks. This might not seem to be much, and it might be argued that condemnation of land for a road or a sidewalk is the better analogy. Nevertheless, there is a basis for an "offsetting gains" argument in *Nollan*, an argument contained in one form or another within the various dissenting opinions.

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[23] *Lutherglen*, 482 U.S. 304, 318-19 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[24] *See id.* at 315.

The dissenters' arguments in *Lutherglen* and *Nollan* borrow from the "offsetting gains" theory and a more communitarian vision of property ownership and use. For example, the owners of Lutherglen profited from the prohibition of construction in the Mill Creek flood plain because that regulation improved the chances of more rapid improvement in the watershed, lessened the danger of run-off, and reduced the possibility that another flood would carry along large quantities of destructive debris. Did these benefits outweigh the costs of a temporary restriction on use?[25] That is hard to say, but all flood plain landowners did share an identifiable benefit such that an offsetting gain may have been realized.

The dissents also reflect a conflicting ideology of property ownership and use. Justice Stevens wrote in *Lutherglen* that " 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' "[26] This view is similar to the old doctrine of tort law that a property owner is subject to suit for using property in a way that injures or endangers others. In a variation on the public servitude theme, Justice Brennan argued in *Nollan* that the private property right asserted by the Nollans disrupted the fair and reasonable expectations of the larger community regarding the legitimate use of land.[27] Both of these opinions reflect a view of property rights that is closer to a public trust than that expressed by Justice Scalia's view in *Nollan*. The private property owner never has complete dominion and control, but is always subject to the general interests and concerns of the community in which the property is located. In this respect, the dissenting opinions echo the opinion of the Tennessee Supreme Court in the 1845 case of *Mayor & Alderman v. Maberry*,[28] cited and discussed by Professor Fisher.[29]

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[25] There are difficulties inherent in the determination of the monetary equivalent of the loss associated with a limitation on the ability to engage in charitable works.

[26] 482 U.S. at 325 (Stevens, J., dissenting) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987)).

[27] *Nollan*, 483 U.S. at 847-48 (Brennan, J., dissenting).

[28] 25 Tenn. (6 Hum.) 275 (1845).

[29] *See* Fisher, *supra* note 2, at 117.

II. The Third Decision: Distributive Justice Defeats Private Property

The Supreme Court is rarely short of surprises. A few months after the majority flirted with expansive libertarianism in *Nollan* and *Lutherglen*, there was a resounding victory for communitarian virtues in yet another case from California.[30] The city of San Jose enacted a rent control ordinance that basically limited annual increases to eight percent for tenants in possession. If a landlord exceeded the eight percent ceiling on increases, a tenant could complain to a hearing officer who had the authority to determine whether the increase was reasonable. Reasonableness depended on the financial status of the *tenant*, not on the landlord's cash flow demands or on the market. Landlords challenged the ordinance on a number of grounds, one of which was that the ordinance was a form of "taking" that condemned one portion of the landlord's control of the fee to subsidize rents for poor tenants. The landlords argued that this was an impermissible imposition of the cost of a wealth redistribution program upon them. Futhermore, if there was to be such a redistribution program, San Jose should socialize the cost by instituting taxes and grants, rather than impose the cost on a single class of property owners.

In his opinion for the Court, Chief Justice Rehnquist sustained the ordinance against the landlords' several constitutional challenges. The precise holding on the takings issue was that the record failed to "present a sufficiently concrete factual setting for the adjudication of the takings claim."[31] This left the door open for a possible subsequent attack on the ordinance from the direction of the takings clause, but a careful perusal of this opinion suggests that the Court is not inclined to proceed further along the path of *Nollan* and *Lutherglen*. Indeed, the Chief Justice explicitly rejected the argument made by some *amici* that "rent control is *per se* a taking"[32] and reaffirmed an earlier holding that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."[33] In fact, the Chief Justice

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[30] *See* Pennell v. City of San Jose, 485 U.S. 1 (1988).

[31] *Id.* at 10. The Court's concern with the development of the record also was apparent in the somewhat less than enthusiastic conclusion that the landlords had standing.

[32] *Id.* at 12 n.6.

[33] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982)). *See*

went on to state that the protection of consumer welfare is a rational and legitimate policy goal that can justify state regulation of prices, including rents.[34]

Justice Scalia recognized that the majority opinion, despite its careful tone, rejected the libertarian ideology of private property and accepted the legitimacy of an ideology that attaches public servitudes to the exercise of property rights. It was a retreat from the course he wanted the Court to follow in *Nollan*, and he answered the majority's opinion with a clarion call for the protection of property from the state. He wrote, "the tenant hardship provision of the Ordinance effects a taking of private property without just compensation."[35] Justice Scalia argued that a regulatory taking without compensation is permissible when the property owner's actual or potential use of the property is a social evil that the state may regulate.[36] For example, a setback requirement is a zoning ordinance that may be justified because, without a setback, one property owner could block light and air from other property owners. In other words, there must be a cause and effect relationship. But the San Jose ordinance failed, in his view, because it imposed on some landlords the cost of subsidizing some poor tenants. The complaining landlords were not the cause of their tenants' poverty. Instead of imposing the cost of the problem of poor tenants on some landlords, Justice Scalia argued that it was a general social problem whose cost should be socialized through a more generalized form of wealth redistribution.[37]

According to Justice Scalia, the importance of the takings clause and similar constitutional provisions in cases such as this is that it imposes a discipline of virtue upon a government that is tempted by corruption. Raising taxes to subsidize the rent obligations of the poor may be difficult politically. A rent control law that imposes the cost on a few landlords may be easier to enact and may preserve the political popularity of the local legislators among the large majority of taxpayers who are not landlords.

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also FCC v. Florida Power Corp., 107 S. Ct. 1107 (1987).

[34] *Pennell*, 485 U.S. at 13.

[35] *Id.* at 15 (Scalia, J., concurring in part and dissenting in part). Justice O'Connor joined his opinion. Justice Kennedy did not participate. Justices Brennan, White, Marshall, Blackmun, and Stevens joined the Chief Justice in the majority.

[36] *See id.* at 20.

[37] *See id.* at 21-22.

> Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.
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> That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription — perhaps accidental, perhaps not. Its essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.[38]

This is a vision of the Constitution as Virtue ever ready to protect the individual and to correct the erring ways of government, which is seen as a necessary but inherently evil institution. This vision, interestingly, makes judges the guardians of Virtue and casts legislators in the roles of corrupters who must be kept in check by the guardians. This is hardly a prescription for judicial restraint or for deference to the legislative process. Justice Scalia's opinion, however, is a brilliant example of the role of ideologies — in this case, the ideologies of individualism and private property — in shaping judges' views of the Constitution and of the nature of government itself.

Conclusion

These three property cases from California are far from the most important decisions of the current Supreme Court, but they do illustrate the continuing importance in American law of the ideological debates that took place during the formative years of the Republic. To understand these cases, as well as many others, and be able to fairly criticize judicial opinions, we must be aware of the ideological history that forms the background for these and similar decisions. The value of Professor Fisher's paper to lawyers and scholars is that it helps identify the distinctions

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[38] *Id.* at 23.

among various important ideologies in American life, and the differences in the consequences that flow from adherence to those ideologies.