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THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK. By Bernard Schwartz.¹ Boston: Northeastern University Press. 1990. Pp. x, 310. \$32.50.

*David P. Bryden*²

Professor Bernard Schwartz is best known as a prolific historian of the deliberations of the modern Supreme Court. In this book, he turns from history to jurisprudence, sounding an alarm against the ideas of conservative legal scholars and judges. His chief targets are Robert Bork, Lino Graglia, Richard Epstein, Richard Posner and Antonin Scalia. Their ideas, he asserts, "have come to dominate the legal landscape." Yet they "would turn back the constitutional clock by a century," with the result that "Jim Crow, child labor, the third degree, and destructive individualism may once again characterize American society."

Professor Schwartz does not pretend to be an original jurisprudential thinker, and it would be easy to dismiss this book as patently hyperbolic. Certainly it will be news to Judge Bork and Professors Epstein and Graglia, if not to the other villains in Schwartz's drama, that their ideas are now "dominant." It will also be news, to anyone who hasn't been living on Mars, that Jim Crow and child labor may soon reappear.

Nevertheless, I found the book most interesting, chiefly because Schwartz attacks two different types of conservatives: "original intention" restraintists like Bork, plus "law and economics" activists like Epstein. This is not necessarily a self-contradictory project, but it is one that requires a degree of dialectical flair. The task, of course, is to show that Bork and company are wholly wrong without showing that Epstein and company may be at least partly right. If the Constitution is as flexible as liberal jurisprudents usually contend, then why not flex it in the direction of substantive economic due process? Throughout the world, market solutions are proving superior to socialism. Should constitutional law reflect that modern reality? I read the book in order to gain enlightenment on this topic.

Whatever else one may say about Professor Schwartz, there's no denying that he is a mainstream constitutional scholar. As such, he is in some ways more interesting than a highly original jurisper-

1. Edwin D. Webb Professor of Law, New York University.

2. Professor of Law, University of Minnesota. I want to thank my colleague John Cound for reading this review and making several helpful suggestions.

dent. The original thinker may be more impressive, but is unlikely to reveal quite as much about the dilemmas and contradictions of ordinary constitutional thought.

I

Concerning the intentions of the framers, Schwartz makes most of the usual points: their intentions are often hard to discern; Madison may have thought one thing, another delegate something else, and a state ratifying convention something different still; the framers wisely left much of the text vague; and in any event a "living Constitution" is superior to "machinelike exegesis of a fundamental text." Adherence to the framers' intentions, Schwartz adds, would lead to some horrendous results: for example, paper money would be unconstitutional, and barbaric punishments for crime would be upheld. Substantive due process would disappear, which would "remove the great safeguard that our courts have developed against arbitrary governmental action." *Bolling v. Sharpe* would be overruled, and so the federal government would be allowed to impose racial segregation. Indeed, "Since the Fourteenth Amendment's framers did not intend it to prohibit school segregation, reliance on original intention as the determinative factor could have meant a different decision in the *Brown* case." Likewise, an originalist approach to the establishment clause could lead to results that, however appropriate in an eighteenth-century context, would be "irrelevant to the needs of our society two centuries later."

Even on their own terms, says Schwartz, the conservatives are often wrong about the Constitution. They condemn *Griswold*, for instance, as a revival of natural law, yet "natural law itself has been an essential element of American constitutionalism." Furthermore, "Both the history and the language of the Ninth Amendment indicate that there are individual rights requiring protection even though they are not enumerated in the Constitution or Bill of Rights." "Above all," the framers "would have emphasized the right of property as one that depended more on the nature of man than specific constitutional guaranty." By the same token, although no constitutional provision specifically protects marital rights, "few will disagree that there are such rights and that they are beyond the reach of government."

Schwartz believes that it is a mistake to assume "that the conception of nontextual rights must rest wholly on the unfettered discretion of the judge . . ." When the Court creates or expands a nontextual right, it is only doing what common law courts have

done for centuries. In determining which rights are fundamental, judges "are not left at large to decide cases in light of their personal and private notions." Instead, they look to "the traditions and collective conscience of our people." "By training and tradition, the Justices are well-equipped for this task; they can be expected both to be keenly perceptive to violations of personal rights and to be sufficiently detached to avoid imposing their purely personal notions, not shared by others, upon society." After all, "Our judges are products of our society, and . . . they will generally think along with the beliefs of some substantial segment of the citizenry." Therefore, Bork's concern about judicial creativity is misplaced.

It would be impossible, in the narrow compass of a book review, to respond fully to each of these arguments. In any event, I have no fundamental quarrel with many elements of the standard liberal brief against originalism. I do object to some arguments—for instance, the strained effort to derive *Griswold* and *Roe* from the ninth amendment,³ and the analogy between the role of ordinary judges in making common law, or interpreting statutes, and the role of the Supreme Court in fashioning rules that not even Congress can repeal. But I have at least as many reservations about standard conservative "originalist" analyses as I do about the liberals' arguments.

Like most authors, conservative as well as liberal, Schwartz equates judicial restraint with originalism. Since the case for judicial restraint is commonly couched in legalistic terms, this is an understandable response: A legalistic brief for restraint begets a legalistic refutation. But as Robert Nagel⁴ and others⁵ have suggested, the case for judicial restraint need not be overly legalistic. Even if we wholly ignore the constitutional text and the intentions of the framers, we must still decide whether, for example, we want every state to be free to devise its own prophylaxis against coerced confessions, or whether we prefer to have a national rule fashioned by the Supreme Court. Since no one professes to favor turning all governmental decisions over to the Court, even the freest of free interpreters needs a theory of judicial restraint, or at least criteria for selecting the Court's agenda. Quite apart from whether the

3. For a good analysis, see Alexander, Book Review, 7 CONST. COMM. 396 (1990). However much the framers may have wished to *retain old* unenumerated rights, I see no reason to conclude that they wanted to delegate to the Court the quite different task of creating new ones.

4. R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989).

5. E.g., Bryden, *Politics, the Constitution, and the New Formalism*, 3 CONST. COMM. 415 (1986).

Constitution requires it, there is much to be said for the federalist values of pluralism, diversity, and local responsibility, even though the price of advancing these values is often high, and sometimes too high. If freedom means anything, it means freedom to err. So instead of beating the dead horse of originalism, let's ask how much freedom and diversity we want. It's a tough question, which is all the more reason to discuss it.

The liberal brief against originalism is, I believe, basically sound, but I object to its injudicious, debaterish quality. (Here again, the same criticism could be made of most conservative jurists.) Perhaps the best example of this phenomenon, in Schwartz's book, is his argument that the Justices, though not truly bound by law, are adequately constrained by the fact that they wouldn't be on the Court if they were idiosyncratic thinkers, and by their obligation to justify new rights by reference to "the traditions and collective conscience of our people." Therefore, reasons Schwartz, the Court's innovations are not simply subjective political preferences. Surely Professor Schwartz would scornfully reject these arguments if they were offered by a conservative as justifications for, say, *Lochner*, or for a decision holding that all affirmative action is unconstitutional. It's not much solace to a conservative who is appalled by a Blackmun opinion, or a liberal who can't stand Rehnquist, to know that their life-tenured tormentor isn't "idiosyncratic." Isn't it obvious that in any constitutional dispute worth discussing, from pornography to the tenth amendment, *both* sides can draw from deep reservoirs of tradition and popular feeling? Even in *Griswold*, where the law was far more arbitrary and unpopular than most, Connecticut was on the side of some powerful American traditions—if nothing else, democracy.

My most basic reservation about the brief against originalism is that it's an unreal issue, like debating whether the United States should adopt pacifism as our national policy. The notion that there is a constant battle between originalist and nonoriginalist Justices, though widely accepted by both sides in the Great Debate, rests on a confusion between two radically different senses of the word. There are indeed many "originalist" decisions in the sense of decisions that one supposes the framers would have approved as interpretations of the Constitution. In this weak sense, every Justice is an originalist from time to time. For example, most of the framers probably would have thought it absurd to say that the first amendment protects nude dancing. A Justice who declines to protect nude dancing shares the original attitude, and should be applauded (or condemned) on policy grounds for doing so. But this does not

necessarily mean that he is an originalist in the strong sense of being prepared to follow wherever the framers lead: he may merely disapprove of nude dancing. After all, Justice Brennan sometimes cited the framers' intentions when it suited his purposes, yet he disavowed originalism. As a theory of *legal obligation*, "originalism" must mean let-the-chips-fall-where-they-may originalism. In this strong sense, how many originalist decisions have been handed down? In other words, how often have the Justices interpreted an ambiguous constitutional phrase in a way that appears to depart from their own political preferences, because of a sense of obligation to follow the framers' intentions (whether narrowly or broadly defined)? Obviously, we cannot say for certain, but after reading Supreme Court decisions for many years I have found none that seem to have been reached by consulting the ideas of the framers, where those ideas plainly contradicted the Justices' own political tendencies.

Brown v. Board of Education, for example, may or may not be consistent with the framers' beliefs about equality, expressed at some appropriate level of generality. But it surely was not an originalist decision in the strong sense that I have described. If the Justices had paid no attention to the fourteenth amendment, they would, no doubt, have reached exactly the same result.

I see evidence that the clear language of the text of the Constitution has sometimes affected results, for instance in fixing the length of the president's term of office, but I know of hardly any evidence that, where the text is thought to be ambiguous, Justices' votes are determined by the results of research into the framers' intentions. Perhaps some individual votes can be found, but I doubt that the Court as a whole has ever decided a controversial case in this manner, reaching a result that the Justices would not have reached if they had been a Council of Revision. Originalism is a wonderful academic plaything, the most delightful toy in the sandbox of constitutional jurisprudence, but it's not the way the world works, or can be made to work. The pretense to the contrary is the main defect of conservative constitutional thought.

II

Like most liberal constitutional thinkers, Professor Schwartz regards himself as an anti-formalist, opposing the "mechanistic" theories of conservative strict constructionists. But once he turns from Bork on original intention to Graglia on school busing, Schwartz himself becomes what might be called a liberal legal formalist. Notwithstanding his strictures about the "living Constitu-

tion," Schwartz manages to discuss school busing for racial integration without assessing—or even acknowledging the importance of assessing—the effects of busing on education, race relations, poverty, and the decay of our cities. Professor Graglia has depicted court-ordered busing as “disaster by decree”; this appraisal, though it may be mistaken, is not implausible.⁶ Given the anti-legalistic stance of his chapter on Bork, one would expect Schwartz to respond to Graglia by weighing the evidence on school busing’s effects, in order to arrive at a good public policy for the courts to enforce. Instead, he treats cross-district busing for integration as an irresistible deduction from *Brown v. Board of Education*.

Busing, he says, has been a “remedial” measure. The meaning of this characterization is unclear. At times, Schwartz seems to be talking about the need to deal with segregationist stratagems in the aftermath of *Brown*. But at times he seems to mean that the integrationist purpose of *Brown* will be defeated if neighborhood schools are maintained, inasmuch as urban neighborhoods tend to be divided along racial lines. Neither of these arguments is wholly unfounded, but they are far from being a judicious reading of *Brown*’s ambiguities or a pragmatic appraisal of whether busing for integration is good social policy, in a city like Seattle, in 1991. If indeed we have a “living Constitution,” it will not do to invoke *Brown v. Board*, mechanically, as a solution to problems arising nearly forty years afterwards.

Liberal legal formalism also provides a mechanical answer to Epstein, Siegan, and Posner. Their theories, explains Professor Schwartz, run counter to several decades of “settled law” and would “resurrect *Lochner*.” Q.E.D.

Concerning *Lochner*, Schwartz sounds like Thayer, Holmes, or Frankfurter. “In holding the *Lochner* law invalid,” he explains, “the Court in effect substituted its judgment for that of the legislator, and decided for itself that the statute was not reasonably related to any of the social ends for which the police power might validly be exercised.” Schwartz prefers the approach taken by Justice Harlan in dissent: where the reasonableness of a regulation is debatable, it should be upheld.

The next question, obviously, is why this sort of judicial restraint, long since abandoned by most liberals in civil liberties cases, still makes sense in economic regulation (and affirmative action) cases. “The Siegan posture,” Schwartz reminds us, “is, of course,

6. See, e.g., Feldman, Book Review, 3 CONST. COMM. 644 (1986).

contrary to the now settled jurisprudence on the subject." Schwartz does concede, however, that this "settled jurisprudence" is a relatively recent development: the framers regarded property rights as central, and until the late 1930s the Court did not wholly reject this view.

At bottom, Schwartz's reason for rejecting property rights is not legalistic. He argues instead that property rights reflect outmoded laissez-faire, Spencerian notions that grind down the poor. He invokes Brandeis as a kind of substitute Founding Father: "Compare the Brandeis brief, with its emphasis throughout on the economic and social conditions that called forth the challenged statute, with *Lochner*, where those factors were all but ignored. The difference is as marked as that between the poetry of T.S. Eliot and Alfred Austin." Well, I suggest that Professor Schwartz re-read some of those Brandeis briefs. I assure him that if he reads the "expert evidence" in the *Muller* brief to a law school class next year, and tells the class that he agrees with Brandeis's experts' opinions about women, the students will either laugh at him or lynch him. Brandeis was a fascinating thinker and an extremely talented lawyer, but his briefs do not deserve the lavish and uncritical adulation that progressives have bestowed on them.⁷

To illustrate the difference between Brandeis and his ignorant brethren, Schwartz mentions *New State Ice Co. v. Liebmann*. At issue was a state law requiring a certificate of convenience and necessity for entry into the business of manufacturing and selling ice. Licenses were to be issued only upon proof of the necessity for a supply of ice at the place where the applicant wished to establish the business; the application was to be denied if existing licensed facilities "are sufficient to meet the public needs therein." The Supreme Court struck down this licensing requirement. Rejecting this decision, Schwartz cites Brandeis for the proposition that duplication of ice plants is wasteful and leads "to destructive and frequently ruinous competition," which is "ultimately burdensome to consumers," evidently because it may lead to a monopoly. Having described Brandeis's view, Schwartz then sets forth the contrary view of Judge Posner, who believes that, "The people actually wronged by the statute were the poor, who were compelled to pay more for ice; the well-to-do, as Brandeis pointed out, were more likely to have refrigerators."

How does Schwartz decide between Brandeis and Posner? By asserting that the Chicago school of economists, on whose theories Posner relies, "has never reconciled itself to the fact that, in this

7. See generally, Bryden, *Brandeis's Facts*, 1 CONST. COMM. 281 (1984).

century, the invisible hand of Adam Smith has increasingly been replaced by the 'public interest' as defined in regulatory legislation and administration." He accuses such economists of trying "to immunize the economy from interference by the machinery of the law." They want to resurrect "the doctrine of laissez-faire that dominated thinking at the turn of the century." In short, Professor Schwartz evaluates the Brandeis-Posner dispute about *New State Ice* without even trying to assess the effects of the law on the poor. He relies instead on name-calling, invoking scarewords like "Legal Darwinism," "laissez-faire" and "individualism" that he knows are anathema to his politically correct readers. It's like denouncing the income tax as "communistic" at a Rotary Club luncheon in 1900.

The same evasive quality permeates Schwartz's discussions of other cases raising economic issues. He rarely or never discusses empirical evidence about the effects of individual laws, relying instead on familiar formulas and catchwords, all the while criticizing turn-of-the-century conservatives for doing exactly the same thing.

III

Most of us tend to spend our lives repeating the political and jurisprudential shibboleths that we learned long ago in school, and Professor Schwartz is, to say the least, no exception. This is perhaps most apparent in his discussion of takings and just compensation. Here again, Schwartz warns that the New Right are radicals who "aim to uproot established doctrine and replace it with principles long repudiated by a settled line of case law." I'm shocked. "To Epstein," he intones, the takings clause "is far broader than its literal language." Imagine that!

One of Epstein's theses is that the courts should revive the requirement that takings be for a "public" rather than a "private" use. I have not studied that problem, but it seems to raise three basic issues. Are there some takings that should be criticized, even if accompanied by compensation, on the ground that they are unwise or unjust? I suppose that the answer to that question is yes: if the Minnesota Legislature confiscates my property and awards it to the Governor's nephew, for no apparent reason except that he wants it, probably even Professor Schwartz would be moved to criticize the politicians. The next question is whether the courts should have some role in preventing this sort of thing. And the third question is whether they should have as large a role as Professor Epstein desires. I had an open mind on these last two questions when I began to read Schwartz's discussion, and I regret to say that it is

equally open today. Here is a typical passage from Schwartz's treatment of the subject:

It should not be forgotten that both the police power and the eminent-domain power are only different weapons in the governmental arsenal, all of which are intended to enable government to serve the great public needs that the prevailing thought of the day deems essential to the welfare of society. In an era dominated by an ever-expanding police power, it would be anomalous if an equally vital governmental power were confined within the narrower range permitted to it when the police power itself was more rigidly construed.

A nice debater's point, perhaps, but not very helpful if one is trying to decide whether there are real abuses that need judicial correction. Perhaps the police power also needs to be supervised more aggressively by the courts; if so, any "anomaly" will vanish. Certainly many state zoning cases, applauded by liberals, have endeavored to second-guess the police power, in order to combat "exclusionary zoning." (Of which more in a moment.) In any event, I see nothing anomalous in stricter scrutiny of a law that expels me from my land (albeit with compensation) than of a law that merely reduces the value of the land somewhat (albeit without compensation). I know that some specialists think that urban redevelopment ("slum clearance") is beneficial, while others have tried to prove the contrary. Yet Professor Schwartz has only this to say about *Berman v. Parker*: "Slum clearance bears a reasonable relationship to the ends that may be attained by the state's police power; hence the land involved is being taken for a public use." Now that may indeed be the proper *conclusion* in cases like *Berman*, but what I need are reasons, not musty formulas from the first edition of *Corpus Juris*. Specifically, I need to know whether the takings that Epstein condemns are good public policy and, if not, whether there are nevertheless good reasons for the courts to uphold them.

Instead of analyzing the realities of eminent domain, Schwartz discusses the original meaning of the just compensation clause, to determine "whether it supports Epstein's interpretation"! He quotes Bork to the effect that Epstein goes too far, apparently forgetting that, in his effort to refute Bork in an earlier chapter, he gave property rights as the main example of a right that the framers considered to be independent of any mere textual provision. After reviewing the history of protections against takings without compensation enacted before the fifth amendment was adopted, he concludes that the original intent was limited to physical seizures; it did not extend to regulatory "takings." Schwartz then proceeds to argue that the concept of regulatory takings is inconsistent with the "ordinary meaning" of "taking" and, finally, that Epstein's argu-

ment for enlargement of the concept is “completely contrary to the established law on the matter.”

The “established law,” as Schwartz correctly notes, generally upholds police-power regulations against takings challenges except in some cases where the regulation has prevented the landowner from making any beneficial use of the property. Even then, regulations prohibiting nuisance-like activities are usually upheld.

Although the law on regulatory takings has not changed much over the decades, the courts in heavily-developed states like Pennsylvania and New Jersey have often invalidated large minimum lot sizes and some other zoning techniques that increase the cost of housing and thereby exclude less affluent purchasers from suburban enclaves. Zoning is no longer regarded, by most land use specialists, as a “progressive” type of regulation, resisted only by blind adherents of laissez-faire. Long ago, authors like Seymour Toll and Richard Babcock brilliantly exposed the role that zoning plays in segregation by class. So even if Epstein is mistaken about takings, there is a growing scholarly consensus in favor of aggressive judicial intervention to protect the interests of moderate-income families in affordable housing. Most often, the landowner-developer is the party best able to vindicate that interest, given the cost of litigation and other constraints on “public-interest” plaintiffs.

What does Schwartz say about all this?

Epstein’s animadversion notwithstanding, the *Euclid* decision remains a landmark in the legal transformation of property that has taken place during this century, under which the virtually absolute right of the owner to use his property as he chooses has given way to the principle of reasonable use, as defined by the relevant authorities.

Schwartz fixes his eyes on the parties: the government (which in his view always represents the public interest) and the developer, who is of course a greedy landowner from Central Casting, asserting an “absolute right” to “use his property as he chooses.” In Schwartz’s world, nonparties have no stake in this contest. In particular, he seems oblivious to zoning’s role in keeping out the unwashed—the sort of people who live in mobile homes on quarter-acre lots. “The principal concern in typical zoning and town-planning regulation,” he blandly assures the reader, “is how an area looks.” “Aesthetics,” he informs us, is the chief motive behind “zoning restrictions laying down minimum lot size and minimum floor space.” Schwartz is apparently unaware of the massive literature published during the past several decades, largely written by his fellow liberals, which documents the exclusionary purposes and effects of excessively strict “density controls” in suburban zoning.

He is equally dogmatic in defending rent control. As with zoning, he accepts the ostensible purpose of the regulation at face value and ignores nonparties. Rent control, he believes, functions to "eliminate exorbitantly priced housing." Justice Scalia, he notes, objected to a rent control regulation, on the ground that if poor tenants are to be subsidized then the general public should foot the bill, through taxation. In another rent control case described by Schwartz, plaintiffs argued that, by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transferred to them a possessory interest in the land on which their mobile homes were located. Plaintiffs asserted that the rise in prices of mobile homes in parks subject to this Santa Barbara ordinance reflected the transfer of a valuable property right to occupy mobile home parks at below-market rates. The ninth circuit upheld this complaint against a motion to dismiss.

One might expect a devotee of the living Constitution to analyze such cases by discussing the impact of rent control on the supply and cost of housing. But instead Professor Schwartz chastises the ninth circuit for treating an "economic regulation" as if it were a physical invasion (p. 135), "a notion that is supported neither by logic nor precedent." Logic? Precedent? What became of the living Constitution? Oblivious to his own strictures about mechanical jurisprudence, he observes that "limitation of the landlord's profit has never been held a taking, so long as a reasonable return on investment is allowed."

Discussing another Scalia opinion, Schwartz says it is so bad that it is reminiscent of *Adkins v. Children's Hospital*, the case in which the conservative Court of the 1920's invalidated a minimum wage that was limited to women. Having made this analogy, Schwartz clinches his argument: the New Right jurisprudence "means a return to the public law of the first part of this century, with all the abuses that accompanied it—abuses before which government was legally powerless under the prevailing jurisprudence of the time."

Maybe so, but *Adkins* is not an apt illustration. Even on the left, the type of law at issue in *Adkins*—protective labor legislation for women—is no longer regarded as an unmixed blessing: feminists often bemoan such "paternalism." On this, as on so many issues, Schwartz is resting on the formulas of the 1930s. More fundamentally, Schwartz seems unwilling to consider the possibility that even a sex-neutral minimum wage is harmful. The Brandeis-Frankfurter briefs in *Adkins* and other minimum wage cases sought to make light of unemployment caused by the minimum wage. But

more recently even some liberal economists—Paul Samuelson, for example—have argued against the minimum wage on the ground that its effects are perverse: although ostensibly designed to help the poorest workers, it reduces their employment. I'm not saying that it's impossible for a rational scholar to defend the minimum wage, only that the case against *Adkins* needs to be argued, not presumed.

Although Schwartz implies otherwise, the conservative Court of yesteryear upheld most of the economic regulations that came before it, including some questionable ones. Conceding *arguendo* that some of their property rights decisions were erroneous, that hardly distinguishes property rights from any other rights.

I wish I knew whether on the whole substantive economic due process did more harm than good, and if so whether this was for reasons that are intrinsic to the doctrine, so that if the Court revives it the public will once again suffer. One way to avoid the question is by some sort of process-oriented theory: if not Bork's legalism, then Thayer's or Nagel's more political brief for judicial restraint. Several decades ago, Robert G. McCloskey—that most judicious of scholars—examined the usual jurisprudential objections to economic due process, and found them unconvincing. He concluded, however, that—given the Court's responsibilities in other areas—the Justices simply did not have time for a major, new undertaking. I do not find this conclusion wholly persuasive, but it does have the virtue of disposing of the issue without trying to wander through the unfamiliar swamps of economic analysis.

Although *Lochner* is a convenient pedagogical and polemical shorthand for the era, there is no reason to assume that its practical consequences were either drastic or typical. Even if we could somehow calculate that *Lochner* had terrible effects on the lives of thousands of workers, other property rights decisions may have helped thousands of common folk, for example by fostering price competition. Although Schwartz and other constitutional scholars often imply that what's good for General Motors is bad for the country, no one with even the slightest economic sophistication would endorse such a silly presumption. A decision in favor of a developer who wants permission to erect relatively cheap housing is a decision in favor of moderate-income consumers, not just a victory for "a rich landowner," or "dog-eat-dog individualism." A decision in favor of a company that wants permission to sell a product in an area where the politicians wish to protect other producers against competition is, again, a decision in favor of consumers, not

just a victory for “a corporation,” or “the privileged few,” or “blind adherence to outmoded Spencerian dogmas.”

Several years ago I asked a friend of mine, an economist but a liberal, to write an essay for *Constitutional Commentary* evaluating the Supreme Court decisions involving New Deal legislation between 1932 and 1937. I told him that we would furnish abstracts of the cases, and he would appraise the economic consequences of the decisions. He recoiled in horror, saying that the project was much too vast for a single economist. He would need, he informed me, a team of specialists. I replied with a smile that economists must be dumb: “Every professor of constitutional law knows that the Nine Old Men hurt the poor.”

The same dumb economist later reviewed Epstein’s *Takings* for me. Although he disagreed with Epstein on some points, he concluded that “much of what he says will make sense to economists of various political inclinations.”⁸ Law professors, by contrast, “know” that property rights help the rich and hurt the poor, and we know it so well that, unlike my economist friend, we don’t even feel the need to prove it. Why bother to prove it? Our readers know it too.

* * *

I once was invited to attend the bat mitzvah of a friend’s daughter. As part of the celebration, the presiding rabbi led a discussion of the concept of the chosen people, soliciting interpretations from the audience. Some of those interpretations were not quite as ecumenical as one might have wished, and eventually the rabbi decided to tell a cautionary story. The MacPhersons, it seems, lived in a neighborhood that contained Jewish as well as gentile families. One day little Johnny MacPherson came running home, in tears, to his mother. “Mommy, is it true that Jesus was a Jew?” he asked in anguish. Mrs. MacPherson thought for a moment, then replied: “Yes dear, but don’t you worry: *God* is a Presbyterian.”

Constitutional jurisprudence, in the sense of grand theories about the role of the Supreme Court, consists by and large of earnest efforts to prove that *God* is a Presbyterian. That’s why constitutional jurisprudence is so unsatisfying—except, of course, to Scots.

8. Foster, Book Review, 4 CONST. COMM. 443, 448 (1987).