How Undermining Property Rights Has Increased Economic Inequality: A Paradox Explained

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Following is a speech given on April 9, 2019 in Albany, New York, to mark the 25th anniversary of the Property Rights Foundation of America. Roger Pilon is the inaugural holder of the Cato Institute’s B. Kenneth Simon Chair in Constitutional Studies and is Vice President Emeritus and the Founding Director Emeritus of Cato’s Robert A. Levy Center for Constitutional Studies in Washington, D.C.

Thank you, Carol, for that kind introduction. I’m honored that you’ve invited me to speak before your audience this evening as we celebrate the 25th anniversary of the Property Rights Foundation of America. I’m sure you and Peter are proud of what you’ve accomplished. You have every right to be. In a world where organizations like yours come and go, struggling against powerful forces, what you’ve done is extraordinary. In your annual conferences you’ve drawn together some of the nation’s leading defenders of property rights. And when not organizing conferences or publishing reports, you’ve brought your own and other voices of reason and justice to the legislative, judicial, and public arenas. So congratulations on a job well done.

Because we’re celebrating a milestone event this evening, I thought it would be a good occasion not simply to talk about the property rights movement in which we’ve all played our parts, but to step back a bit and reflect more broadly on the larger context in which our struggle has taken place. That’s what I’d like to do this evening, because in important ways the debate today is broader and more sharply defined and intense than it was a quarter of a century ago when the Foundation was just starting.

Back then, you’ll recall, we were in the wake of the Reagan Revolution in which I was honored to play a small part. We were enjoying renewed respect for America’s founding principles: liberty, private property, free markets, and constitutionally limited government. The Berlin Wall had fallen, and hope was in the air that liberal democracy would spread around the world. But as many of us who were in the thick of those events would
soon come to see, both here and abroad, fidelity to those principles was too often only skin deep, when not absent entirely. At home, the ethically-challenged Clinton administration was attempting to nationalize health insurance, even as it would later invite us to believe that the era of big government was over. And abroad, especially in nations recently released from the grasp of the failed Soviet Union, we saw a mixed group of Western crusaders, some of us carrying the gospel of freedom, but many others, from the academy, the big foundations, and guilds like the American Bar Association, promoting the progressive ideas that had been corrupting our own institutions for nearly a century.

Today, so ubiquitous and deeply rooted in our culture have those progressive forces become that they determine the very terms of our public discourse. I believe I’m safe in assuming that those of us celebrating here this evening take liberty as our bedrock political principle—as manifest in our sovereignty over our property in our “lives, liberties, and estates,” as famously stated by John Locke, the philosophical father of the American Revolution. Yet it’s that very bedrock principle, liberty, that progressives are attacking today, because liberty is inconsistent with the version of “equality” that informs and drives their political agenda—not equality before the law, which hundreds of thousands in the Civil War generation gave their lives to constitutionalize, but a far-reaching equality that enlists government at every turn to restrict liberty in its name.

Because respect for property rights is what brings us together this evening, and because equality—more precisely, a deeply seated animus toward economic inequality—is the force that so animates progressives as they rail against private property and the “one percent,” I’ve taken as the title of my remarks, “How Undermining Property Rights Has Increased Economic Inequality: A Paradox Explained,” the idea being to hoist those progressives on their own petard by showing that the means they promote—undermining property rights, broadly conceived—will result in greater inequality, the very opposite of what they claim they want.

The paradox arises, of course, from the idea, far older than Robin Hood, that if you take from the rich and give to the poor, you would seem to be reducing economic inequality, not increasing it. How then would that not be the case? How do the countless redistributive schemes of modern government—today’s Robin Hood—actually increase economic inequality?
To answer that, I can do little better than to start with a quote from the great 18th century English philosopher David Hume. “[H]istorians and even common sense,” Hume wrote:

may inform us, that, however specious these ideas of perfect equality may seem, they are really, at bottom, impracticable; and were they not so, would be extremely pernicious to human society. Render possessions ever so equal, men’s different degrees of art, care, and industry will immediately break that equality. Or if you check these virtues, you reduce society to the most extreme indigence; and instead of preventing want and beggary in a few, render it unavoidable to the whole community. The most rigorous inquisition too is requisite to watch every inequality on its first appearance; and the most severe jurisdiction, to punish and redress it. But besides, that so much authority must soon degenerate into tyranny, and be exerted with great partialities; who can possibly be possessed of it, in such a situation as is here supposed? Perfect equality of possessions, destroying all subordination, weakens extremely the authority of magistracy, and must reduce all power nearly to a level, as well as property.

Sound familiar? Government may achieve economic equality in one fell swoop, Robin Hood style—that’s what communist governments have tried to do. But let there be the least bit of liberty and, as Hume wrote, “men’s different degrees of art, care, and industry will immediately break that equality.” That’s why liberty too must be stamped out—not once, but over and over again. Poverty and tyranny soon follow, as history makes clear—indeed, as we see before our very eyes today in Venezuela. And the paradox, of course, is that while equal poverty may be achieved, a new perverse inequality arises—between those with the power to redistribute wealth and stamp out liberty and those who are their victims.

But if the full-blown pursuit of economic equality is a perverse chimera, is the more modest version parading today under the label “democratic socialism” on any better footing? Indeed, because it purchases its hold on our political consciousness in smaller steps and under the guise of democratic legitimacy, democratic socialism may be more sinister than the genuine article. Yet as modern public choice economists have explained, building on the insights of Hume and other Enlightenment thinkers, the principles at play are the same. For try as they might to reorder society and the economy according to their egalitarian ideal, progressives succeed only
in establishing a set of incentives that result in greater inequality, larger government, and reduced social welfare. In a nutshell, while those incentives work in the long run to the disadvantage of all by reducing aggregate social welfare, in the meantime they enable large, organized, and concentrated interests to work the political system to their advantage and the disadvantage of small, disorganized, and dispersed interests, leading to greater economic inequality.

To illustrate this dynamic in a very general way, we can see it play out in real time today by noting first, by way of context, how fortunate we are that our Founders established a federal system of government, and then by noting that the egalitarian progressive policies I’ve so far simply mentioned have been instituted more in some states than in others. When so instituted, as the greater inequality, larger government, and reduced social welfare set in, we see people assessing their own interests and voting with their feet, which they’re still free to do. As redistributive taxation and regulation grow, the wealthy who can afford those taxes and avoid those regulations remain, as do the poor who benefit from those policies, while the middle class leave, resulting in net economic inequality. Do we need any better example than in the states of the Northeast—or right here in New York?

But let me illustrate more fully and specifically how undermining property rights has increased economic inequality by developing that conclusion within the basic moral, political, and legal context America’s Founders established. For that, I’ll draw on our founding documents, set forth the principles they secure, and outline how we were meant to go about our everyday affairs under those principles and the law they established. My aim is to show how equality was understood and meant to operate in that world and to contrast that understanding and practice with the way modern progressives treat equality.

We start, of course, with the Declaration of Independence, America’s political birth certificate, in which the Founders set forth their philosophy of government. To understand that vision properly, however, the first and most important thing to notice is how Thomas Jefferson and the other Founders went about justifying the moral, political, and legal claims they asserted. They did that by setting forth the moral order first. Only then did they turn to the political and legal implications of that order.
In other words, they were doing what has come to be called “state-of-nature theory” in the tradition of Thomas Hobbes and, especially, John Locke. The idea was to show—based on reason, custom, and experience, as English and early American common law judges had done over the centuries—what rights and obligations we have regarding each other prior to the creation of government, which in turn would tell us what rights we have to bring a government into being and what powers we have a right—and no right—to give government once we create it. They were concerned, in short, with creating a legitimate government with legitimate powers.

The implications of that approach to moral, political, and legal legitimacy are far-reaching and profound. First among them is this: We don’t get our moral rights from government. On the contrary, we give government whatever powers it legitimately has. And the moral rights we first have are of two basic kinds. First, are our natural rights, the rights we have as human beings simply to be free, free from the interference of others to plan and live our lives as we wish, provided we respect the equal rights of others to do the same. Second, are the created rights, the moral rights we bring into being as we work our way through life. And there are two basic ways we create such rights: either through contracts or through right violations. Through contracts we create whatever rights we agree to create—consistent, again, with the rights of outsiders. Through right violations, as when we commit torts or crimes, we create rights in our victims to be made whole and obligations in ourselves to do that.

At bottom, then, the basic obligation we have toward common-law strangers, as we say, people unrelated to us, is to refrain from taking what belongs free and clear to them, their property in their “lives, liberties, and estates.” And the basic obligation we have toward people with whom we are related is to keep our promises or to repair the damage we may have caused them.

Thus, the theory of rights implicit in the Declaration can be reduced to three simple rules, so simple that children on the playground can understand them:

Rule one: Don’t take what belongs to someone else. That’s the world of property.
Rule two: Keep your promises: That’s the world of contracts and associations.

And rule three: If you fail in rule one or two, give back what you’ve wrongly taken or wrongly withheld. That’s the world of remedies.

There, in a nutshell, is the theory of rights, recast as correlative obligations, that is implicit in the Declaration of Independence. In a world in which everyone knew what his rights and obligations were and abided by them, we wouldn’t need government. But that’s not the world we live in, of course. Locke spoke, for example, of the “inconveniences” of life in the state of nature. To start, we may disagree about what rights we have. How much nuisance or risk can we impose on our neighbors, for example? Or if we injure someone, what is the value of the loss we’ve caused? And what rights do we have if someone wrongs us, but we’re not sure whom it was? What process is due us to discover that, or due someone we only suspect is the wrongdoer? If we can’t resolve those differences, we’ll need to turn at least to third parties for answers, but eventually to government to enforce those rights. Otherwise we’d be left with Hobbes’s famous description of life in the state of nature: solitary, poor, nasty, brutish, and short.

After setting forth the moral order, the Declaration addresses that problems when it says, “That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” Notice in that statement that government is twice limited. First, government’s purpose is limited—to securing our rights, as just outlined. By implication, it’s not the purpose of government to do all manner of other things. And second, the powers it employs toward that end are limited—to be just, they must be derived “from the Consent of the Governed.”

But that second limitation raises a well-known problem, for if the consent of all of us is required for government’s powers to be just or legitimate, rarely if ever do we find it. Instead, on any given proposal, including a proposed constitution, we get majorities and minorities and hence are faced with the prospect of the tyranny of the majority—no different in principle, save for the numbers, than the tyranny of the king. And if you think the Constitution’s Framers were insensitive to that problem, just look at the document’s Ratification Clause, which says that once nine states ratify the Constitution, it shall be established “between the States so
ratifying the Same.” In other words, had the remaining four states not consented, they would not have been bound by the Constitution.

Thus, the Framers took the need for unanimous consent seriously as a ground for political legitimacy, at least as it concerned constitutional ratification by the states. More broadly, however, the implication to be drawn from the Declaration, from the Constitution’s Ratification Clause, and from the Constitution generally, as we’re about to see, is again far-reaching and profound. It is—and mark this well—that because consent to be bound is crucial for political legitimacy, but because universal individual consent cannot be achieved in any deeply satisfying way, government at bottom, unlike private associations, has at least an air of illegitimacy about it. It is a forced association—a “necessary evil” in the parlance of the 18th century—which means that there’s a presumption against doing things through government, against forcing people into collective undertakings, and the burden is on those who want government to undertake such projects to show why they must be done by government rather than left to the private sector, where they can be done freely, in violation of the rights of no one.

We see that presumption against government throughout the Constitution, starting with the Preamble. To be sure, the Preamble says that “We the People … do ordain and establish this Constitution” in order to, among other things, “form a more perfect Union,” which the infirmities of the Articles of Confederation made necessary. But beyond the other ends listed for forming that union, including “to secure the Blessings of Liberty,” the basic point to be noticed about the Preamble is this: All power rests initially with we the people. We ordain and establish this Constitution, which once ratified enables the government to be created. We give the government its powers. The government, again, does not give us our rights. We already have them. Government’s business is to secure those rights, to secure the blessings of liberty.

Moreover, when we look beyond the Preamble to the Constitution itself, we see the many ways the Framers limited power: the division of powers between the federal and state governments, with most power left with the states; the separation of powers among the three branches of the federal government, each defined functionally; provision for a bi-cameral legislature, the two chambers constituted differently; provision for a unitary executive with the power to veto legislation, and the power of Congress to override a veto by a supermajority vote in both chambers; provision for an
independent judiciary with implicit power to check the political branches and, later on, the states—a novel institution for its time; and provision for periodic elections, not to expand the government’s powers, but simply to fill the offices set forth in the document.

But the main constitutional restraint on overweening power was the doctrine of enumerated powers. And I can explain it no more simply than this: If you want to limit power, don’t give it in the first place. Remember, the founding generation had just fought a war to rid itself of overweening power; it wasn’t about to impose such power on itself. We see the doctrine in the very first sentence of the Constitution: “All legislative Powers herein granted shall be vested in a Congress.” By implication, not all legislative powers were “herein granted.” When we look to Article I, section 8, where Congress’s legislative authority is spelled out, we see that we’ve authorized and granted Congress only 18 ends or powers. And when we look to the final documentary evidence from the founding period—the Tenth Amendment in the Bill of Rights that was added to the Constitution two years after the original document took effect—we find the doctrine of enumerated powers stated expressly: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In other words, the Constitution establishes a government of delegated, enumerated, and thus limited powers.

But if that were not enough to show how the Framers meant to limit federal power, we need only look to the Ninth Amendment, which reads: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The history that led to that amendment speaks volumes about its meaning, for it became clear during the state ratification debates that the Constitution would not be ratified unless a bill of rights were added. But there were objections to doing so—two main objections, in particular.

First, it would be unnecessary to add a bill of rights, said Alexander Hamilton, James Wilson, and others. “Why declare that things shall not be done, which there is no power to do?” said Hamilton. Notice that he was alluding to the doctrine of enumerated powers as the main protection for our liberties; for where there is no power, by definition there is a right. And second, it would be dangerous to add a bill of rights; for it’s impossible to enumerate our infinite number of our rights, yet by ordinary principles of legal construction, the failure to do so would be construed as implying that
only those rights that were enumerated were meant to be protected. To guard against that, the Ninth Amendment was written. It reads, again, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Notice: “retained by the people.” You can’t retain what you don’t first have to be retained. The allusion is to our natural rights, which we retained when we left the state of nature, save for those we gave up to government to exercise on our behalf, like the right to enforce our rights, except for when self-help is necessary.

Thus, for a proper understanding of the Constitution, the importance of the Ninth Amendment, which speaks of retained rights, and the Tenth Amendment, which speaks of delegated powers, cannot be overstated. Taken together, they restate the vision of the Declaration, making it clear, first, that our moral rights are now recognized as legal rights, and, second, that the federal government’s powers are limited to those that are enumerated in the Constitution. Natural law had thus been recognized as positive law.

But there was a problem, and it was serious. Quite apart from our failure too often to live by that vision, there was a structural flaw in the original design. In particular, the Bill of Rights applied only against the federal government, not against the states, where most power had been left. Thus, there were too few checks on the states, especially on the states’ general police power, the basic power of government to secure our rights. And the reason was simple: slavery. To achieve unity among the states, the Framers had made their Faustian bargain. They knew that slavery was inconsistent with their founding principles. They hoped it would wither away over time. It did not. It took a brutal civil war to end slavery and the ratification of the Civil War Amendments, plus the later Nineteenth Amendment securing female suffrage, to “complete” the Constitution by incorporating at last the Declaration’s promise of equality before the law.

The Thirteenth Amendment, ratified in 1865, rendered slavery unconstitutional. The Fifteenth Amendment, ratified in 1870, protected the right to vote from being denied on account of race. And the Fourteenth Amendment, ratified in 1868, defined federal and state citizenship and then, at last, brought the Bill of Rights to bear against the states. In relevant part, the Fourteenth Amendment said. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the
equal protection of the laws.” Thereafter—in principle, at least, quite apart from practice—we would have federal remedies when our own states violated our rights.

That completes our outline of the moral vision implicit in the Declaration and the political and legal institutions for securing it as set forth in the Constitution once it was revised by the Civil War Amendments. We’re now in a position to consider, as I noted earlier, how we were meant to go about our everyday affairs under the principles and law those documents established. Again, my aim is to show how equality was understood and meant to operate under that regime and then to contrast that understanding and practice with the way progressives treat equality today.

The first thing to notice in that regard is how liberty was meant to be the bedrock principle, but not liberty alone: rather, liberty coupled with rights and property. Thus, we can say that we were meant to be free—to have a right—to do what we wish, provided only that we not take what belongs free and clear to another. Stated in that way, we can distinguish between wrongful acts—murder, rape, and robbery, for example, acts that take the lives, liberties, and property of others—and rightful acts like engaging in market competition; for even though such competitive acts are said sometimes to “harm” those who lose out in the competition, they take nothing that belongs free and clear to the losers. A right to compete—for everything from customers to marriage partners and more—is not a right to win in the competition.

Thus, the role of property in a free society is fundamental, not simply because it encourages economic efficiency and prosperity, which it does, but because, as a moral matter, it draws lines between us, one from another, telling us what we may and may not do, a point the Founders understood far better than we do today. James Madison, the principal author of the Constitution, spoke directly to that issue in his 1792 National Gazette essay entitled, simply, “Property.” “In its larger and juster meaning,” Madison wrote, property “embraces everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage.” He then listed some of the things in which a man can be said to have “a property,” starting with land, merchandise, and money, but extending to opinions, especially religious opinions and their profession and practice, the safety and liberty of his person, and the free use of his faculties and free choice of the objects on which to employ them.”
And he famously summed this up as follows: “In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights,” adding that “government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.”

Notice that last sentence, written three years after the Constitution took effect. The basic function of a just government, Madison said, is to secure impartially to every man whatever is his own—his property, that is, including his property in his life and liberty. And a just government must secure that property impartially. It must treat us all as individuals, applying the law equally, with neither favor nor disfavor to any of us.

Here, we see the Founders’ understanding of equality. It’s important to grasp it, especially as it contrasts with the modern progressives’ understanding, as we’ll soon see. Notice that Madison says not only that a just government applies the law impartially—secures the equal protection of the laws, that is, as in the Fourteenth Amendment—but that it does so to secure to every man “whatever is his own.” Well, what is it that is “his own.” For that, we need to reach back to the Declaration’s “self-evident truths”: first, that “all Men are created equal.” But second—for the Founders could not have meant that literally—that we’re all equal only in having been endowed with equal rights to “Life, Liberty, and the Pursuit of Happiness.” Right there is the most fundamental sense of equality—that we all have equal natural rights that must be secured impartially.

But we can’t stop there, because life doesn’t stop there. As we saw earlier, when men exercise their equal natural rights, when they pursue happiness as they think best, they acquire property, enter into contracts with each other, and sometimes commit torts and crimes. And inevitably, as we exercise our “different degrees of art, care, and industry,” as Hume put it, the freedom to do so results in a distribution of property that is unequal. But if no rights have been violated in the process, if nothing has been wrongly taken, there is no injustice in the fact that, at any point in time, some people end up rich and others poor. In short, where is the injustice if economic inequality arises without violating anyone’s rights? What grounds have I got
to complain *against you* if you work hard or have good luck and get rich and I spend my days in idle contemplation or have bad luck and end up poor?

Clearly, the vision of everyday life that the Founders contemplated was one in which most of life was meant to be lived in the *private* sector, peacefully pursuing happiness alone or with others in the many ways we ordinarily think of, including in voluntary charitable activities. We were *not* meant to be pursuing happiness mainly through *public* projects, covering everything from retirement security, to health care, child care, and so much more—a life in which “we’re all in this together,” as our most recent former president was so fond of saying, dependent on government for our every need and want. In particular, it was not meant to be a world in which *politics* was everything and everywhere.

So what happened? How did we go from a vast *private* to a vast *public* world? It came in small steps at first, and, truth to tell, came right from the start, because the press for more government—the wish to get something for nothing, or at the expense of someone else—is always with us. But for our first 150 years, that temptation was largely resisted—not entirely, but to a large extent—and resisted often on *constitutional* grounds. Public subsidies for canals, then for railroads, often leading to economic dislocations and even recessions, were not uncommon, to say nothing of special-interest dealings and the corruption that goes with them. And rights also were too often little respected, especially when Reconstruction was abandoned shortly after the Civil War ended and Jim Crow laws and far worse followed in the South.

But setting aside our failure so often to live up to our founding principles, at least we continued to respect them *nominally*—until the rise of Progressivism at the end of the 19th century. Progressives like Woodrow Wilson fundamentally rejected those principles. Wilson saw the Constitution as a “straightjacket” that kept him as president from expanding the role of federal government in our lives. Coming from the elite universities of the Northeast, progressives were social engineers, enamored of the new social sciences. They looked longingly to European models of active government. They wanted not simply to *supplement* private charity, for example, but to *replace* it with *public* charity, conducted by “professionals” like those trained at Columbia University’s School of Social Work—a point we hear echoed today by Bernie Sanders. Indeed, to see the world progressives like Senator Sanders have in mind for us, we need look only to the lead editorial
in this morning’s *Wall Street Journal*, where members of the senator’s staff mince no words in telling us where they stand.

Not everything progressives did was misguided, of course. There was plenty of corruption to be rooted out, and public health and safety measures to be taken. But planning well beyond that was their main motif, especially economic planning by elites and government bureaucrats, a view stated succinctly in 1932 by Rexford Tugwell, who would become one of the principal architects of the New Deal that was soon to unfold: “fundamental changes of attitude,” he wrote, “new disciplines, revised legal structures, *unaccustomed limitations on activity*, are all necessary if we are to plan. This amounts, in fact, to the abandonment, finally, of *laissez faire*. It amounts, practically, to the abolition of ‘business.’” One could add, in fact, that in its fullest form, it amounts to the abolition of private property.

It was during the New Deal, of course, that many of those ideas were finally instituted—not at first, for the courts, as in earlier decades, continued to check the progressive juggernaut to a significant degree, though far from entirely. But after the Supreme Court blocked several of President Franklin Roosevelt’s major measures late in his first term, and he then won reelection in a landslide in 1936, he unveiled his infamous Court-packing scheme, his plan to pack the Supreme Court with six new members. The scheme failed politically, producing uproar across the nation. But the Court saw the light, and in 1937 it began, in effect, to rewrite the Constitution.

It did that in three main steps. First, it eviscerated the very foundation of the Constitution, the document of enumerated powers, opening the floodgates for the modern redistributive and regulatory state. Then a year later, in 1938, it bifurcated the Bill of Rights and gave us a bifurcated theory of judicial review. If a law implicated a “fundamental right” like speech or voting, the Court would apply “strict scrutiny” and the law would likely be found unconstitutional. By contrast, if “nonfundamental rights” like economic liberty or property rights were at issue, the Court would apply the so-called rational basis test, which held that if there were *some* reason for the law, if you could *conceive* of one, the law would be upheld. Thus were economic liberty and property rights reduced to a second-class status. None of this is found in the Constitution, of course. The Court invented these doctrines from whole cloth to enable the New Deal programs to sail through.
Finally, in 1943 the Court jettisoned the Constitution’s nondelegation doctrine, which arises from the very first word of the document, after the Preamble: “All legislative Powers herein granted shall be vested in a Congress.” Not some; all. As government grew during the New Deal and after, Congress began delegating ever more of its legislative power to the executive branch agencies it was creating to carry out its programs. Some 450 such agencies exist in Washington today—nobody knows the exact number—but right there is the origin of the modern executive state where most of the rules and regulations we live under today are made.

Since the New Deal constitutional revolution, government has only grown, of course, federal state and local. And with that growth, so too has inequality of income and wealth, since those in a position to work the new system, whether due to size, knowledge, or connections, do so, as noted earlier, while those not so situated are disadvantaged in that. The economic literature is replete with case studies showing, for example, how large organizations, from firms to farms, are better able to handle the regulatory onslaught than small ones. At the institutional level, do we need any better example than the banking regulations that followed the recent great recession, which have led to the largest banks growing even larger, while many small community banks, no longer able to compete, have been taken over by their larger brethren?

But at the level of the individual, as progressive programs have led to ever greater inequalities in income and wealth, progressives have called for even more programs to address that problem—a problem of their own making and a very different “problem” than the one that arises naturally when people are otherwise free, as noted earlier. Since today’s inequality arises often from the redistributive programs progressives put in place to try to mitigate the non-problem of inequality arising from freedom under the rule of law, their sense of “equality” is not the Founders’ “equality before the law.” It’s an “equality” that aims at producing, in its extreme form, not simply equal opportunity but equal results, one program at a time, program after program, leading to ever more dependence on government and hence to an ever-greater loss of independence—and freedom.

Let’s illustrate how this works with a few prominent economic liberty and property rights cases, starting with a decision the Supreme Court got right early in the 20th century when the progressive regulatory juggernaut was just getting started, *Lochner v. New York*. Decided in 1905, this case
arose from a New York statute that limited the hours that bakers might work. Never mind that the bakers in this case wanted to work those longer hours and, along with their Utica, New York, employer, were part of a sweetheart suit, as Professor David Bernstein’s comprehensive recent book has shown. The statute at issue arose after the big, often unionized bakeries went to the state legislature to get a bill passed, the effect of which was to protect them from competition from the state’s small, often immigrant-owned bakeries. In the end, the Court rightly held that the statute interfered with the baker’s and employees’ freedom of contract.

One might add, as Madison would have, that the statute at issue took “a property” the baker had in his business, a right to run it as he wished; and it took “a property” the employees had in their labor, a right to negotiate fully over the terms under which they would engage it. Were the decision to have gone the other way, the small bakeries would have been deprived of the competitive advantage the free market afforded them and might have been unable to compete against the large bakeries. Closed businesses and lost jobs would have followed, producing increased inequality between the losers and winners. And this restriction on property rights would have produced higher prices for bread and hence a decrease in net social welfare.

Indeed, this last point brings to mind to old broken-window theory for increasing social welfare. Since a broken window makes work for the glazier, the carpenter, and others, the theory goes, let’s break more windows to provide that work and help boost the economy. In fact, we see a variation of that theory in the current push for increasing the minimum wage, where it’s said that doing so will be good for the economy by putting more money to spend in workers’ pockets. In my own state of Maryland, less than two weeks ago, the legislature passed a bill over the governor’s veto that enacted a state-wide $15 minimum wage, despite objections from the poorer parts of the state that businesses there, unlike in Washington’s wealthy suburbs, would fail. When that happens, as mountains of evidence show it will, only the upscale businesses and employees survive, once again increasing inequality.

But let’s move to a decision involving ordinary property, an early 20th century rent-control case, Block v. Hirsh, where the Supreme Court in 1921 held against the owners who wanted to rent their properties at market rates. Here again, the same principles are at play—and a similar set of incentives. The owners have invested capital in their property in the expectation of
rental returns at market rates. If their returns are reduced by rent controls, they and future investors have an incentive to move their capital to where it can get a better return. That means fewer rental units will be produced. And if the controls are onerous enough, upkeep will suffer; and, in the worst case, owners will simply abandon their properties, as happened conspicuously years ago in the South Bronx. As investors enjoy higher returns elsewhere, renters and prospective renters pay the price of these controls, resulting once again in greater inequality. Proponents of rent controls thought they were helping the tenants—and in the short run they were helping those already in place. But even those tenants suffered in the longer run—to say nothing of the people who could find no affordable housing at all, due to the lack of new building, or housing only far removed from their employment.

A similar dynamic occurs with zoning, a practice the Court upheld in 1926 in Euclid v. Ambler Realty, another regulatory takings case and a paradigmatic example of hubristic progressive planning. One problem here, among many others, is that while zoning takes rights of owners to use their property except as permitted, the regime it locks in place has the effect often of raising the values of the zoned property and thus excluding outsiders who, were market forces allowed to work, would be afforded opportunities the zoning regime forecloses. Here again, there are parts of the country today where service providers have to live far away from where their services are needed. Here too, zoning leads to more inequality.

Let me conclude with a more recent eminent domain case that also illustrates how this dynamic works, the infamous Kelo v. City of New London decision of 2005. If ever there were a case that exhibits progressive planning trumping the interests of the poor, producing more inequality, this is it. Recall that the City of New London, Connecticut, wanted to attract upscale interests like the Pfizer pharmaceutical company and the facilities that would surround it in order to increase its tax base, so it used eminent domain—known in the 17th and 18th centuries as “the despotic power”—to condemn the homes of Susette Kelo and her neighbors, who were said to receive “just compensation” for their properties. But the compensation owners receive is rarely “just.” At best, owners receive market value. But that cannot be just compensation. For the fact that the owners don’t have their property on the market means that it’s worth more to them than the property would fetch on the market.
What we have here, in short, is an effort by the city and Pfizer to get the property “on the cheap.” They likely could have gotten the property legitimately, but they would have had to pay what the owners were willing to accept—for as economists are fond of saying, “every man has his price.” Forcing the exchange through eminent domain as practiced today, however, not only takes what the owner is unwilling to give but gives a windfall to those who employ the power. Here, the city and Pfizer got their windfall while Susette Kelo and her neighbors saw their assets devalued, resulting again in greater inequality.

I could go on with example after example, but the point should be clear by now. The Founders established a moral, political, and legal system in which free markets would enable people not only to enjoy their liberty but to maximize their well-being, because when people make exchanges voluntarily, by definition they move goods to higher valued uses. Why else would they make an exchange if what they got was not more valuable to them than what they gave up? When progressives intruded on this simple method for ordering our private affairs, they did so in the belief that they could order our affairs better than we ourselves could. They have generally made a mess of things, creating schemes that raise problems for which, they say, only more schemes are the solution. Exhibit A is our health care system, which is neither free nor fair nor rational. And at a macro level, their programs have given us a national debt exceeding $22 trillion dollars and growing and unfunded liabilities, federal, state, and local, vastly exceeding that, with no way in sight to address that looming problem.

The Founders understood these issues because they understood the principles, the rejection of which has brought us to where we are today. We need to revive their vision and the principles that inform it. Thank you.