

The Indivisibility of Economic Rights and Personal Liberty

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I. Introduction

It is an honor to have been asked to give this lecture in memory of the man for whom this series of lectures has been named, Ken Simon, whose generosity has made possible today's annual Cato Constitution Day Conference. With much of what I have to say, I believe that Mr. Simon would have found himself in congenial agreement. From some other parts of my remarks, he would perhaps have dissented. But what he has shown by his life and by this lecture series is that he was committed both to libertarian values and to lively, engaged debate. If at times this evening I fall short of advancing all the goals of libertarian thought, I hope at least to advance the goal of engaged debate.

It is a further honor to be the second speaker in a lecture series inaugurated by one of our nation's most respected jurists, Chief Judge Douglas H. Ginsburg. In the spirit of making this series a continuing dialogue, I will note points of disagreement with Judge Ginsburg's remarks of a year ago. But I know you all will benefit as much as I have from a careful reading of his essay, which is sweeping in its scope and sharp in its critique of much of American judicial review.¹

Here is my thesis, simply put:

The disparagement by some liberal scholars and jurists of the constitutional protection of economic rights weakens the constitutional foundations of personal liberty.

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¹Douglas H. Ginsburg, *On Constitutionalism*, 2002–2003 *Cato Sup. Ct. Rev.* 7 (2003).

And conversely: The disparagement by some conservative jurists and scholars of unenumerated personal liberties weakens the constitutional foundation for rights of property, contract, and occupational freedom.

The Constitution—written and unwritten—protects both economic and non-economic liberty. Both are essential, and each supports the other.

II. Is Constitutional Text Exclusive?

Let me begin, as Judge Ginsburg did, with the question of whether the text of the Constitution contains all the liberties—economic and personal—that are rightfully accorded constitutional protection. Here I both endorse some of what he said a year ago, and join issue with him as well.

First, let me say that I agree with Judge Ginsburg about the centrality of the written Constitution and the binding authority of the text as it was generally understood at the time it was written and ratified. As his colleague, Judge Steven Williams, put it correctly and succinctly a few years ago, “The search for original understanding is for the meaning that a reasonable person in the relevant setting would have assigned the language.”² Divorced from adopters’ understanding of what they were adopting, the text is simply a set of words without legal authority.

The constitutional text, however, cannot contain all of the constitutionally binding fundamental law. There is at least one point of constitutional law, for example, both obvious and profound, that cannot be found within the text of the Constitution. And that is the principle that recognizes the Constitution I hold in my hand—the Federal Constitution of 1787, as amended—as “The” Constitution, the one that is binding law. You may object that the text of the Constitution does indeed address and resolve the question of whether this Constitution is “The” Constitution. And you could point to the Article VI Supremacy Clause which states explicitly that “This Constitution . . . shall be the supreme Law of the Land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding . . .”³ Now, I have no doubt that this is one of the

²Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 *Geo. Wash. L. Rev.* 1366, 1368 (1998).

³U.S. Const. art. VI, § 1 cl. 2.

most powerful phrases in the Constitution. It resolves once and for all the question of federal supremacy over the states, and in a masterstroke it speaks directly to state court judges, saying that “Judges in every State shall be bound thereby.”⁴

But neither the Supremacy Clause nor any other provision *within* the Constitution can make the document the supreme, binding law. That principle of constitutional law must come from *outside* the document. There is no doubt that our larger “constitutional law” establishes the federal Constitution of 1787, as amended, as supreme, binding law. Its immediate acceptance, even by opponents of ratification, and the inescapable fact that virtually every interest in every succeeding generation has invoked the document repeatedly as supreme, binding law, are among the powerful indications of this most fundamental of constitutional propositions. But it remains an “unwritten” constitutional principle.

If a principle external to the written Constitution is necessary to make the Constitution binding, some similar external principle must be invoked to establish either the proposition that “This [written] Constitution” is the exclusive source of enforceable constitutional rights, or the contrary proposition that it is not the exclusive source. Neither of those propositions can be justified merely by looking inside the document itself.

III. The Assumption of Rights Beyond Text

But that is abstract theory. The more convincing proof of the existence of binding norms outside the text is to be found in the debates surrounding the drafting of the Constitution itself, and in the Framers’ understanding that there were rights—binding rights—before there was a written constitution. During all the years that I taught law students about the debates at the Constitutional Convention, nothing surprised them more than the Framers’ clear recognition that there were norms—binding “constitutional” norms, in the larger sense of that word—that preceded the drafting of “the Constitution,” norms that would be binding whether or not included in the document.

One example, discussed at the convention, is the principle of double jeopardy as a limit on the government’s right to appeal,

⁴*Id.*

which found its way into the Constitution only after the Bill of Rights was ratified in 1791.⁵ Another is the assumption of at least some Framers that *ex post facto* principles would preclude retroactive criminal legislation, whether or not such a prohibition was placed in constitutional text. The exchange at the convention between Oliver Ellsworth and Hugh Williamson illustrates this assumption. According to Madison's notes, Ellsworth "contended that there was no lawyer, no civilian who would not say that *ex post facto* laws were void of themselves," and he concluded that "It can not then be necessary to prohibit them."⁶ Hugh Williamson responded not by denying that such a principle existed prior to and outside of any written constitution, but by arguing that placement in text had independent value, observing that "Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it."⁷ Moreover, and particularly important here, the text of the Constitution itself refers to rights not named in the document: The Ninth Amendment does not list rights; but it does presume the existence of rights outside the corners of the document.⁸

Similarly, the Fourteenth Amendment, written by the 39th Congress, employs broad language guaranteeing "life, liberty, and property," "due process," "equal protection," and, most important, "privileges or immunities" against state interference.⁹ Those who

⁵Indeed, are we to suppose that we had no rights against the federal government, except those few that were in the original document, until *after* the Bill of Rights was added? See Roger Pilon, Restoring Constitutional Government, 2001–2002 *Cato Sup. Ct. Rev.* vii, xx (2002).

⁶James Madison, Notes of Debates in the Federal Convention of 1787 510 (1966).

⁷*Id.* at 511.

⁸U.S. Const. amend. IX. The Ninth Amendment was written to address a practical problem discussed at the Convention. Because we have in principle an infinite number of rights, thanks to the creativity language allows in describing them, it would be impossible to list all of our rights in a bill of rights. Therefore, since the standard canon of legal construction—*expressio unius exclusio alterius*—implies that the enumeration of some rights for protection should be read as excluding other, unenumerated rights from protection, the Ninth Amendment had to be written: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, Vol. I and II (Randy Barnett ed., 1989, 1993).

⁹U.S. Const. amend. XIV. See Kimberly C. Shankman and Roger Pilon, Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government (*Cato Policy Analysis No. 326*, 1998).

argue against the existence of rights not specifically enumerated in the text have a formidable problem with the text and with its delegation of significant interpretative authority to future courts. One can criticize the delegation on grounds of institutional policy—that is, it was unwise to confer such authority—but the rights and the authority to secure them cannot be ignored as constitutional text. Moreover, those who wrote and ratified the Fourteenth Amendment were fully aware that judicial review was an established feature of the Constitution and that broad constitutional phrases were to be given “latitudinarian” construction: see, for example, *Marbury v. Madison*,¹⁰ *McCulloch v. Maryland*,¹¹ *Gibbons v. Ogden*,¹² *Fletcher v. Peck*,¹³ and *Swift v. Tyson*.¹⁴ Thus, even the text of the Constitution contemplates the enforcement of rights not specified in the text.

IV. The Excessive Rejection of Economic Rights

Assuming, then, that the “liberty” protected against state interference includes rights not specifically named in the text, should it be read to include judicially enforceable economic and commercial rights? Throughout much of American history, especially recent history, that has been one of the federal judiciary’s most contentious issues. In the last major shift, the New Deal Court abandoned judicial protection of economic rights. But in its zeal to curb what some saw as the Court’s excessive invalidation of state and federal legislation during the so-called *Lochner* era,¹⁵ the New Deal Court swept far too broadly in repudiating the protection of economic liberties. For in so doing, the Court also weakened the basis for protecting personal liberties.

No justice was more influential in weakening the protection of both economic rights and unenumerated personal liberties than William O. Douglas. In 1941, writing for a unanimous Court in *Olsen v. Nebraska*,¹⁶ Douglas sustained a legislative limit on the amount of

¹⁰5 U.S. 137 (1803).

¹¹17 U.S. 316 (1819).

¹²22 U.S. 1 (1824).

¹³10 U.S. 87 (1810).

¹⁴41 U.S. 1 (1842).

¹⁵*Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶313 U.S. 236 (1941).

compensation an employment agency could collect for its services. What is striking about the opinion is not its rejection of the challenge to the law but its virtual rejection of judicial review itself in the field of economic regulation. The agency had argued that the law advanced no legitimate goal, since excessive charges—the presumed evil to be remedied—did not exist due to the vigorous and open competition among employment agencies. Douglas’s response was abrupt and startling: “*There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends bargaining in this field.*”¹⁷ That blunt contention that the state owes no explanation for its restraint on liberty casts aside what ought to be a fundamental principle of constitutional jurisprudence: Before the state deprives a citizen of liberty, it must have a reason—and a good one, too. Unlike the overwrought parent, the state cannot say simply: “Because I say so, that’s why.” Here the challenger claims the state’s asserted reason is without foundation. Instead of determining whether the state’s reason is in fact plausible, however, the Court says simply that “it is not necessary” for the state to give a reason.

The right approach was demonstrated a few years later by a state court judge—Sam Ervin of North Carolina, who was later to win fame as the senator chairing the Watergate hearings. Ervin would not have struck down regulatory legislation that plausibly advanced workplace safety or clean air and water, but he did demand that the state have an actual justification for any restrictions it imposed. Raw preferences were not enough to sustain a statute. A leading example of Ervin’s approach is found in his opinion in 1949 in *State v. Ballance*.¹⁸

Owen Ballance was convicted of the misdemeanor crime of being a photographer for hire without first having been licensed by the Board of Photographic Examiners of North Carolina, a group appointed by the governor, each of whom must have been a professional photographer for not fewer than five years. Needless to say, as is so often the case with occupational licensing schemes, the members of the board were not anxious to license competitors. Ervin understood that and more. In overturning Ballance’s conviction, he wrote that the framers of the North Carolina Constitution “loved

¹⁷*Id.* at 246 (emphasis added).

¹⁸51 S.E.2d 731 (N.C. 1949).

liberty and loathed tyranny, and were convinced that government itself must be compelled to respect the inherent rights of the individual if freedom is to be preserved and oppression is to be prevented."¹⁹

Yet a month before Ervin wrote that, the U.S. Supreme Court had expressly stated in the *Lincoln Federal* case²⁰ that the federal Constitution placed no limits on the power to legislate in the area of business and commercial affairs "so long as [the] laws do not run afoul of some *specific* federal constitutional prohibition"²¹ Applying a provision of the North Carolina Constitution,²² but making clear that he disagreed with the U.S. Supreme Court's constricted view of "liberty," Ervin wrote that the liberty of the individual "does not consist simply of the right to be free of arbitrary physical restraint or servitude, but . . . 'includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation'"²³

Ervin noted that these liberties can be limited by the exercise of the police powers, but went on to make the essential point that "in exercising these powers the legislature must have in view the good of the citizens as a whole rather than the interests of a particular class."²⁴ In a succinct formulation of the proper judicial standard, he concluded that his exercise of the power to curb liberty by legislation must be "reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm."²⁵

Rather than follow the U.S. Supreme Court's wholesale abandonment of judicial scrutiny of economic legislation, Ervin put the state

¹⁹*Id.* at 734.

²⁰*Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

²¹*Id.* at 536 (emphasis added).

²²Article I, section 1 of the North Carolina Constitution, adopted after the Civil War, provides that among the "inalienable rights" of individuals are "life, liberty and the enjoyment of the fruits of their own labor, and the pursuit of happiness," and section 17 provides that no person shall be "in any manner deprived of his life, liberty, or property, but by the law of the land." That last phrase, Ervin wrote, "is synonymous with 'due process of law'" 51 S.E.2d at 734

²³*Id.* (quoting Am. Jur. Constitutional Law § 329).

²⁴51 S.E.2d at 735.

²⁵*Id.*

to its proof, and found that proof lacking in *Ballance*. “It is undoubtedly true that the photographer must possess skill. But so must the actor, the baker, the bookbinder, the bookkeeper, the carpenter, the cook, the editor, the farmer, the goldsmith, the horseshoer . . .” and on and on through the alphabet until he concluded by asking “[w]ho would maintain that the legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve knowledge and skill?”²⁶

In an eloquent passage that refutes the notion that economic liberties are unworthy of protection, Ervin wrote that “In the economy of nature, toil is necessary to support human life, and essential to develop the human spirit.”²⁷ Photography, he observed, “is an honored calling which contributes much satisfaction to living. Like all honest work, it is ennobling.”²⁸

Ervin was not an advocate of returning to the *Lochner* era in which justices freely set aside state and local legislation.²⁹ Indeed, he had recently joined the opinion of the North Carolina Supreme Court³⁰ that was one of the two decisions upheld in *Lincoln Federal*.³¹ But neither would he abandon wholesale the protection of economic liberty.

V. The Weakened Foundation for Personal Liberty

The New Deal Court’s elimination of any effective protection of economic rights seriously weakened the bases for protecting personal liberty as well. This was dramatically illustrated by Justice Douglas’s inept opinion in *Griswold v. Connecticut*.³² Because he and his New Deal colleagues, as part of their project of abandoning protection of economic rights, had rejected any meaningful judicial protection of liberties not specifically mentioned in the constitutional

²⁶*Id.* at 735–36.

²⁷*Id.* at 735.

²⁸*Id.*

²⁹But see David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 82 *Geo. L.J.* 1 (2003).

³⁰*State v. Whitaker*, 45 S.E.2d 860 (N.C. 1947).

³¹335 U.S. 521, 530–37 (1949).

³²381 U.S. 479 (1965).

text, he was forced to write a disingenuous opinion in *Griswold* in order to strike down a state law that prohibited couples in Connecticut from buying contraceptives, a right not specifically mentioned in the text.

Griswold—profoundly right in its result—is one of the modern era’s most important constitutional decisions. But it should never have rested on such an inadequate foundation as Douglas erected. Given the Court’s repudiation of economic liberty, however, he must have felt that he had to distort otherwise important supporting decisions like *Pierce v. Society of Sisters*,³³ *Pierce v. Hill Military Academy*,³⁴ and *Meyer v. Nebraska*³⁵ to avoid acknowledging that those decisions had recognized and protected economic liberties. As Douglas’s *Griswold* opinion shows, a jurisprudence indifferent to whether there is any public purpose served by depriving Owen Ballance of his right to his chosen occupation is hard-pressed to articulate a theory for protecting access to contraceptives against a state’s flimsy arguments restricting access.³⁶

In the inaugural Simon Lecture, Judge Ginsburg is properly dismissive of the Douglas opinion in *Griswold* and its reliance on “penumbras” and “emanations” from tangentially relevant clauses.³⁷ But while right in critiquing Douglas’s opinion in *Griswold*, Ginsburg fails to recognize the proper basis that *does* exist for protecting personal liberties. Thus, his critique could serve also to undercut the case for the judicial protection of economic rights.

Judge Ginsburg believes that “a jurist devoted to the Constitution as written might conclude that the document says nothing about the privacy of ‘intimate relation[s] of husband and wife,’ and thereby remits the citizenry to the political processes of their respective states”³⁸ While true—such a jurist might so conclude—the view expressed there does not resolve the issue. For nowhere does the text confirm that state legislatures have such extraordinary regulatory

³³268 U.S. 510 (1925).

³⁴*Id.*

³⁵262 U.S. 390 (1923).

³⁶See also Randy E. Barnett, Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas, 2002–2003 *Cato Sup. Ct. Rev.* 21, 29–31 (2003).

³⁷Douglas H. Ginsburg, On Constitutionalism, 2002–2003 *Cato Sup. Ct. Rev.* 7, 19 (2003).

³⁸*Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

power in the first instance. For reasons I have set forth at greater length elsewhere,³⁹ there is a sound historical basis for assuming that fundamental personal liberties can be invaded only by a government with a compelling interest in doing so, and the text itself in the Ninth and Fourteenth Amendments recognizes the existence of such rights and privileges.

VI. The Weakened Foundation of Economic Rights

The failure to protect either economic or personal liberty inevitably weakens both. Subjecting the Connecticut birth control ordinance to the kind of judicial scrutiny that Justice Ervin gave the North Carolina occupational licensing law would properly have brought about its demise. But the Supreme Court's economic decisions had taken that argument away from those who challenged the Connecticut ban. Conversely, a version of constitutional law that so defers to legislative fiat that it would leave the birth control law standing surely weakens the case for protecting economic rights. If the state, on such flimsy grounds as were put forward to justify the birth control ban, could intrude to such an extraordinary degree in the intimate lives of individuals and couples, it would be difficult to justify judicial intervention in the state's economic choices, however poorly grounded.

Consider, for example, the Court's decisions last term involving punitive damages and homosexual sodomy. In *State Farm Mutual Automobile Insurance Co. v. Campbell*⁴⁰ the Court sharply limited state awards of punitive damages. In *Lawrence v. Texas*⁴¹ the Court struck down the state's law criminalizing homosexual sodomy. Neither opinion cited a textual provision in the Constitution that addressed, specifically, sexual intimacy or punitive damages. Both decisions imposed constitutional limits on what "sovereign" states could do with their civil and criminal enforcement machinery. In both cases the opinion of the Court was written by Justice Anthony Kennedy.

³⁹Walter Dellinger & Gene Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83 (1989).

⁴⁰538 U.S. 408 (2003). See Robert A. Levy, *The Conservative Split on Punitive Damages: State Farm Mutual Automobile Insurance Co. v. Campbell*, 2002–2003 *Cato Sup. Ct. Rev.* 159 (2003).

⁴¹539 U.S. 558 (2003). See Barnett, *Justice Kennedy's Libertarian Revolution*, *supra* note 36.

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Both seem to me to be correctly decided, and each rests on a judicial determination that property and liberty, respectively, were being compromised by governmental actions that had no sufficient public justification. Read the two opinions by Justice Kennedy back to back. They seem like one case, with two applications. Each is strengthened by the other.

Indeed, it is hard to imagine either *State Farm* or *Lawrence* without the other, or without their precursors beginning with *Griswold*. In an alternative constitutional universe in which the Court had found that Connecticut was free to criminalize the use of birth control by married couples and Texas was free to criminalize homosexual relations, it is difficult to imagine that same Court would override Utah's determination to utilize very high punitive damages.⁴² Yet if one accepts Judge Ginsburg's critique of *Griswold*, and his rejection of any efforts to enforce personal liberties not specifically set out in text, one searches in vain for a convincing ground for intervening in the punitive damage determinations of Utah and other states.

Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding. In *Federalist* No. 10, for example, when Madison spoke of the rights that will be more secure in a national republic, he intermingled protection against "paper money" with protection against repressive "religious sects."⁴³ He echoed and elaborated on those thoughts a few years later in his famous essay, "Property," in the *National Gazette*: "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights,"⁴⁴ after which he gave several examples of both "economic" and "personal" rights. In a passage from a nineteenth century case that eerily echoes today's debates on personal and economic liberty, a nearly unanimous Supreme Court in *Loan Association v. Topeka* wrote:

There are limitations on . . . [the] power of [our governments, state and national] which grow out of the essential nature of all free governments. [These are] implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled

⁴²538 U.S. 408 (2003).

⁴³The *Federalist* No. 10, at 79 (James Madison) (C. Kesler & C. Rossiter eds., 1961).

⁴⁴James Madison, *Property*, 1 *National Gazette* 174, Mar. 29, 1792.

to the name. No court, for instance, would hesitate to declare void a statute which . . . should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. The court also says: Nor would any court “hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D.”⁴⁵

The intertwined nature of economic liberty and personal freedom has never been better explicated than by the author whose name this auditorium bears, F.A. Hayek. In his most famous critique of centralized planning, *The Road to Serfdom*, Hayek speaks of economic freedom as the “prerequisite of all other freedoms.”⁴⁶

As a practical matter, however, the pressing question is not whether economic liberties are protected by the Constitution but how aggressive or restrained unelected judges should be in securing liberty—whether economic or personal. Of particular importance in that regard is the question of how much deference judges should give to elected representatives pursuing public policy. When should libertarian principles give way? A truer libertarian than I would invalidate far more legislation than I would think appropriate. For me, at least, the outcomes of democratic processes have great claim to legitimacy, and a lack of certainty about whether one’s own reading of the Constitution is correct counsels caution and restraint.

Yet reading Hayek is instructive. In *The Road to Serfdom*, at least, he was not as doctrinaire as some have believed. He recognized a significant role for government, for example, especially in establishing the rule of law. Hayek believed that it is possible to deliberately create “a system within which competition will work as beneficially as possible,” but he also criticized “the wooden insistence of some [classical] liberals on some certain rough rules of thumb, above all the principle of laissez faire. Yet, in a sense, this was necessary and unavoidable,”⁴⁷ he notes.

Thus, Hayek believed that some controls on the methods of production—as long as they affect all potential producers equally—may not be anti-competitive:

⁴⁵87 U.S. 655, 663 (1875).

⁴⁶F.A. Hayek, *The Road to Serfdom* 110 (50th anniv. edition, 1994).

⁴⁷*Id.* at 21.

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To prohibit the use of certain poisonous substances or to require special precautions in their use, to limit working hours or to require certain sanitary arrangements, is fully compatible with the preservation of competition. The only question here is whether in the particular instance the advantages gained are greater than the social costs which they impose.⁴⁸

Nor, for Hayek, was the preservation of competition incompatible with an extensive system of social services—“so long as the organization of these services is not designed in such a way as to make competition ineffective over wide fields.”⁴⁹ Consistent with his respect for the rule of law, Hayek also believed, of course, that preventing fraud and deception, including exploitation of ignorance, was a legitimate governmental function.

“There is nothing in the basic principles of [classical] liberalism,” Hayek believed, “that make it a stationary creed; there are no hard and fast rules fixed once and for all.”⁵⁰ But there is a fundamental principle, “a principle capable of an infinite variety of applications.” That principle is that “in the ordering of our affairs we should make as much use as possible of the spontaneous forces of society, and resort as little as possible . . . to coercion.”⁵¹ What a wonderful phrase that is—“the spontaneous forces of society.” How perfectly it captures Hayek’s vision. And how nicely it ties together the economic and personal liberties that in every century seek refuge from coercion and oppression.

⁴⁸*Id.* at 43.

⁴⁹*Id.* Hayek was not making a normative judgment about such services, of course; he was simply making a point about their compatibility with preserving competition. In fact, in the preface to the 1976 edition, he said: “When I wrote [*The Road to Serfdom*], I had by no means sufficiently freed myself from all the prejudices and superstitions dominating general opinion.” F.A. Hayek, *The Road to Serfdom* xxii (1976).

⁵⁰Hayek, *supra* note 46, at 21.

⁵¹*Id.* at 9.