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What Do We Mean by Legal? *Front Page*
Veto of federal public works bill *Page 5*

Beware a Beneficent Government *Page 3*
Free Markets Reduce Poverty *Page 6*



VOLUME 6, ISSUE 6 BY AND FOR FREEDOM LOVING ALASKANS



What Do We Mean by Legal?

FREEMANSPERSPECTIVE · May 27th, 2014 Paul Rosenberg FreemansPerspective.com

We're surrounded by concerns over what is legal and what isn't. But what, really, do we mean by "legal"?

The first and most practical meaning of the word, of course, is "things you won't be punished for doing."

That definition, however, has never been sufficient for public use. That's because it's too stark. If the situation was as simple as a law enforcer saying to John Doe, "Do it the way I tell you or I'll beat you with my fists," Mr. Doe would eventually find ways to disobey safely or to cripple the enforcer.

Brute-force enforcement can work, but not over a long period of time, and always at a very considerable cost.

In order to secure long-term, effective obedience from humans, some rationale beyond a fear of violence must be used. People must believe that obeying the enforcer's word is the right thing to do. That's why codes of law invoke some type of unseen higher power: a divinity, the "will of the people," "the way of our ancestors," or the like. People need a reason to obey, beyond fear.

And by putting the reason to obey above and away from daily life, it cannot be questioned effectively: *The higher power has spoken, and only an evil person would question it.*

The Exceptions to the Rule

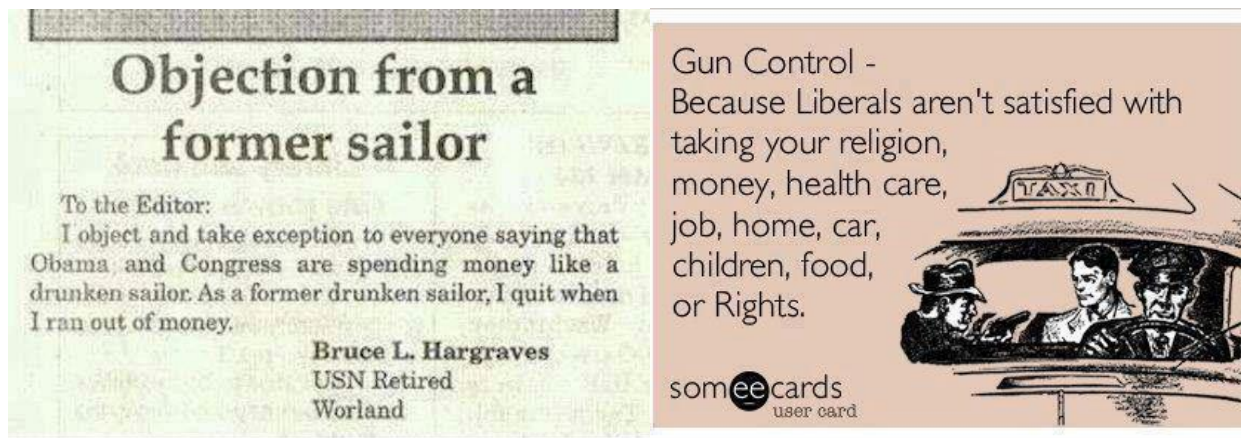
There are times when law is based upon reason, rather than force and edicts from an unquestionable entity. Those times tend to come when political power breaks down. Our best example of it was the common law of England.

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The common law began to form in the vacuum of Rome's influence. The great empire had fallen, leaving people to develop their own ideas. It was a time of reset and reversion toward a natural state.

An early king named Alfred attempted to codify the existing laws around 890 AD. He wrote:

Now I, King Alfred, have collected these laws, and have given orders for copies to be made of many of those which our predecessors observed, and which I myself approved.

Alfred did not write these laws – he collected the previous laws of the people and put them together. This pattern continued:

The *Charter of Liberties* published by Henry I in 1100 AD says that things ought to be done “through force of law and custom,” or “in a lawful manner.” Henry accepted that that law came from the people (that is, *by custom*) and not from the state.

The 1164 *Clarendon Constitution of England* cites a “record and recognition of a certain portion of the customs and liberties and rights of... ancestors.” Thus, laws and customs of the people, rather than laws imposed by rulers, became the law of England.

Even *Magna Carta* followed the model. Article 39 (1215 version) read:

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

Note that the ultimate arbiter was not the king, but “the law of the land.”

The law that came out of this formation was called the *common law*. It was developed through the decisions of judges, rather than through legislative statutes or executive edicts. And it was updated by judges, *not by legislators*. There were no legislators in the modern sense.

The Revolution of 1800

In the decades surrounding 1800 AD, we in the West were given a new type of rulership, featuring three main parts: representatives, legislation, and police. This arrangement, which is incorrectly called Democracy, is how men are ruled today. Under this system, law is no longer based upon reason and doesn't have to be justified by custom or even by effectiveness – **laws are freshly created** by an elite class of “representatives.”

This new class of representatives can change the law any time it wishes. In fact, it adds thousands of new laws every year – far more than anyone can memorize. They may play lip service to the common law, but common law and legislation are two very different things, and legislation rules the day.



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These days, what is “legal” is controlled by a corrupt political elite. Their law contradicts its own foundational statements, is impossible to know in its entirety, and is enforced arbitrarily.

Reason is no longer a tool of safety. The actions that may trigger punishment cannot be fully understood. The enforcer class will hurt you upon command, asking no questions as to right. Our forefathers would have called this *tyranny*.

What Shall We Do?

In this situation, three particular actions make sense:

- 1 Stop taking laws created by a representative class seriously from any moral standpoint. These are the edicts of people who employ enforcers, and nothing more. Their invocations of constitutions and higher powers are sucker-bait.
- 2 We do, unfortunately, need to be aware of how the enforcers are hurting people. There is value in staying safe.
- 3 We should start building our own ways of obtaining safety and justice.

Our schooling championed the interests of those who paid our teachers. Now it’s time for us to look after our own interests.



Beware a Beneficent Government

By Andrew P. Napolitano <http://tenthamentcenter.com/2014/06/12/beware-a-beneficent-government/>

The president is an ardent progressive. This dastardly philosophy of government was brought into the American mainstream 100 years ago by a Republican, Theodore Roosevelt, and a Democrat, Woodrow Wilson. Its guiding principle is the belief that government — not individuals — is the chief engine of human progress. If that means government tearing down rich persons to help poor persons, if that means the massive redistribution of wealth, if it means federal regulation of every conceivable occupation or productive endeavor, if it means fighting an unjust war, progressives are for it.

Before the progressives, the dominant political thinkers in America were Madisonians. James Madison, who kept the notes at the Constitutional Convention in Philadelphia in 1787 — notes that eventually formed much of the language of the Constitution — made clear what the purposes of the Constitution were: to prescribe discrete areas of human endeavor in which the new federal government could legislate; to set forth open-ended areas of human behavior in which no government could legislate; and to leave the remaining areas of governmental endeavor in the hands of the states. The areas delegated to the federal government are only 17 in number and generally are referred to as federal powers. The areas in which no government may regulate are infinite and generally are referred to as natural rights.

The progressives have turned this philosophy on its head. TR and Wilson believed that the federal government could regulate any behavior, right any wrong, tax any event and curtail any freedom, subject only to the express prohibitions in



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the Constitution itself. This view of American government not only contradicts Madison, but it also contradicts the language of the Constitution itself, particularly the Ninth and Tenth Amendments, which state in writing what Madison said many times throughout his life.

President Obama, most congressional Democrats and many congressional Republicans are ardent progressives. They view Congress as a general legislature with no limits to its powers — and they mean no limits. For example, in an area clearly beyond congressional reach, such as in-state highway speed limits, the progressives found a way to extend their reach. They offered money to the states to repave their highways, with the condition that the states adhere to federally prescribed speed limits (only South Dakota declined). Once the courts gave their imprimatur to this assault on the Constitution, the feds realized that by spending taxpayer dollars — by bribing the states — they could extend their regulatory tentacles to any extra-constitutional area they chose.

Progressivism's adherents finance the government by borrowing or by heavily taxing only the rich, both of which are sold as being painless to most voters. Yet, the former merely delays the due date of bills until tomorrow for goodies consumed today; the latter takes cash out of the free market today, where it could contribute to growth and jobs tomorrow, and puts it into the hands of the mindset that runs the Post Office and the Department of Veterans Affairs.

Progressives hate the states because they can be laboratories of less government.

They love central government and all of its creations, such as the cash-printing Federal Reserve, the wealth-stealing progressive income tax, and the concept of a federal safety net for all persons. None of this, except the income tax (which Wilson promised would not exceed 3 percent of adjusted gross income), is authorized by the Constitution.

Yet today, we are witnessing a government that is beyond ideologically progressive. Does Obama understand that progressive ideas have consequences and that governmental behavior often has unintended consequences? It would appear not, as his long train of incompetence and indifference, grounded in progressive thought, keeps picking up speed. It is crushing human freedom, destroying human wealth and even taking human lives.

Under his presidency, the government saddled us all with a three-sizes-fits-all version of compulsory health care (which caused more than five million persons to lose their coverage and their doctors); it has been spying on all Americans all the time (and we sleepily permit it to do so); it allowed our ambassador in Libya to be murdered (after it destroyed the lawful government there); it told illegal aliens they need not worry about deportation (and thus encouraged the immigration of hundreds of thousands more — even unaccompanied children — to our shores); it neglected veterans to the point of death in government hospitals (demonstrating conclusively that the feds cannot deliver health care); it released assets material to terrorist organizations into the theater of war in the Middle East (ostensibly in a prisoner swap to save a weird military bird who once embraced his captors); it has claimed the power to kill Americans it views as a threat to others and yet too troublesome to arrest and bring to trial (all the while claiming it has a secret reading of the Constitution and American law that somehow justifies this); and it has added \$6 trillion to government debt (with no plans to repay it).

What's going on? The modern presidency is blinded by a conceit that says it can do no wrong. This is partially the result of the passage of power from the states to the feds and from Congress to the president and partially the fault of a president who relishes telling us all how to live. In Obama's hands, all this power produces the vast unhappiness and government recklessness we now see every day.



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The same Madison whom Obama rejects warned 200 years ago against the Obama mindset: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

[June 12, 2014](#) By [Judge Andrew Napolitano](#) [Federal Power](#) [Founding Fathers](#) [James Madison](#) [1 Comment](#)

Andrew P. Napolitano, a former judge of the Superior Court of New Jersey, is the senior judicial analyst at Fox News Channel. Judge Napolitano has written seven books on the U.S. Constitution. The most recent is [Theodore and Woodrow: How Two American Presidents Destroyed Constitutional Freedom](#). To find out more about Judge Napolitano and to read features by other Creators Syndicate writers and cartoonists, visit [creators.com](#).



Veto of federal public works bill

By James Madison, President of the United States March 3, 1817

To the House of Representatives of the United States:

Having considered the bill this day presented to me entitled "An act to set apart and pledge certain funds for internal improvements," and which sets apart and pledges funds "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to return it with that objection to the House of Representatives, in which it originated.

The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation with the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.

"The power to regulate commerce among the several States" can not include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such commerce without a latitude of construction departing from the ordinary import of the terms strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress.

To refer the power in question to the clause "to provide for common defense and general welfare" would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms "common defense and general welfare" embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared "that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between

"As democracy is perfected, the office of the President represents, more and more closely, the inner soul of the people. On some great and glorious day, the plain folks of the land will reach their heart's desire at last and the White House will be occupied by a downright fool and complete narcissistic moron."

-- H.L. Mencken, the Baltimore Evening Sun, July 26, 1920 So it was written, and so it has come to pass ...

the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.

A restriction of the power "to provide for the common defense and general welfare" to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.

If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the States in the mode provided in the bill can not confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution.

I am not unaware of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity. But seeing that such a power is not expressly given by the Constitution, and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and reliance on insufficient precedents; believing also that the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it, and to cherishing the hope that its beneficial objects may be attained by a resort for the necessary powers to the same wisdom and virtue in the nation which established the Constitution in its actual form and providently marked out in the instrument itself a safe and practicable mode of improving it as experience might suggest.



The Data Is Clear: Free Markets Reduce Poverty

Mises Daily: Monday, June 16, 2014 by [D.W. MacKenzie](#)

Some Catholic clergy have, once again, [denounced supporters of laissez-faire capitalism](#). Cardinal Oscar Rodriguez Maradiaga claims that the free market economy is "a new idol" which creates inequality, excludes the poor, and that "this economy kills." Cardinal Maradiaga does not speak alone. He quoted Pope Francis in his recent remarks and claimed that since the Pope "grew up in Argentina," he "has a profound knowledge of the life of the poor."

I have no doubt that Pope Francis has seen many poor people with his own eyes. But, our comprehension of the root causes of poverty requires both data on economic conditions and theoretical knowledge of economic systems. What does rational analysis of evidence tell us about global poverty?

It is an obvious fact that severe poverty has disappeared in the most industrialized countries. Nations like the US, UK, Switzerland, and Japan industrialized within what were predominantly *laissez-faire* free-market conditions. Even the so-called social democracies, like Sweden and Germany, developed in free-market conditions, and adopted extensive state welfare and regulatory programs only after achieving high levels of economic development and industrialization. [World Bank data](#) shows that there is inequality, but this inequality is *between* the free-market nations and the crony-capitalist and socialistic nations.^[1]

The idea that domestic *laissez-faire* causes poverty is unfounded. It is a historical fact that India, China, and Kenya *never tried* capitalism, so this system was never given a chance to work. Furthermore, China and India have realized some

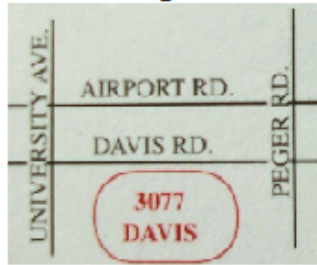
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progress in abating poverty since they moved in the direction of capitalism. Of course, China and India adopted regulated crony capitalism, but this is still better than their old socialist systems.

	Building Laborer		Skilled Industrial worker		Engineer	
	Nominal Wage	Real Food Wage	Nominal Wage	Real Food Wage	Nominal Wage	Real Food Wage
New York	\$16.6	\$16.6	\$29	\$29	\$26.5	\$26.5
London	\$9.7	\$15.4	\$19	\$30.4	\$22.1	\$35.2
Beijing	\$.8	\$1.3	\$2.3	\$3.8	\$5.8	\$9.5
Delhi	\$.5	\$1.7	\$2.1	\$6.9	\$2.9	\$9.1
Nairobi	\$.6	\$1.5	\$2	\$4.7	\$4.0	\$9.2
Rich-Poor income Ratio	20.4	10.9	11	5.8	5.8	3.3

One could argue that global capitalism allows a few people in some nations to exploit the masses of other nations. Marxists have attempted to make this case since Lenin. Lenin revised Marx because even in his day it had become obvious that Marx's prediction that capitalists would exploit domestic workers was refuted by evidence. We now know that Lenin's attempt to blame poverty on global markets is wrong. As previously mentioned, economic conditions in China and India *improved* after switching from socialism to crony capitalism. China and India have also expanded trade in global markets.

There have been significant improvements in living conditions around the world over the past thirty years. The largest improvements in the poorest nations took place during the wave of globalization that took place twenty years ago, after the fall of the USSR. The collapse of the Soviet Union opened the door to unprecedented globalization of industry. What does real data tell us about poverty during this period? [Per Capita GDP](#) rose dramatically:

<u>Per Capita GDP-PPPS</u>	<u>1982</u>	<u>1987</u>	<u>1992</u>	<u>1997</u>	<u>2002</u>	<u>2007</u>	<u>2012</u>
Low income	428.33	506.07	563.6	638.58	759.28	1059	1369.4
Middle income	1259.8	1617.2	2065.3	2728.6	3403.5	5328.5	7275.3
High income	10006	13408	17491	21296	26134	34230	38372
High income: OECD	10872	14707	19407	23914	29185	36978	40571
World	3233.4	4135.5	5185.1	6280.8	7556.2	10313	12260

Thirty years ago half (50 percent) the people in the poorer nations of the world lived [in extreme poverty](#). In 2012, 21 percent of people in the poorer nations of the world live in extreme poverty. Development of global markets has greatly lessened poverty around the world. This is a very important fact. Movement from being in the lowest global income bracket, to lower middle income to middle income means moving from average life expectancy in the low forties to life

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expectancy of fifty or sixty, respectively. Cardinal Maradiaga is wrong: this economy does not kill; it has extended the lives of the poorest people in the world.

A superficial examination of the world today reveals that there is poverty, that this poverty has real consequences for living-standards and life-expectancies, and that we do have global markets and capitalism in most of the world. Careful analysis shows that capitalism has truly lessened the severity of poverty over time, and that the main problem with capitalism in most nations is that it has too many elements of government regulation and cronyism. Pope Francis and Cardinal Maradiaga have good intentions, but their anti-capitalistic beliefs are unfounded. Their campaign against global capitalism endangers the poorest people of the world.

Note: The views expressed in Daily Articles on Mises.org are not necessarily those of the Mises Institute.

D.W. MacKenzie is an assistant professor at Carroll College.

Notes [1] Food prices are estimated from a basket of 39 food products with weights reflecting West European consumption patterns. New York food prices are set equal to 1. Real food wage (in New York food prices) is estimated by dividing the nominal after-tax dollar wage by the food price index (not shown here). See <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5820>, page 15.

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