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2010

# Black Tuesday and Graying the Legitimacy Line for Governmental Intervention: When Tomorrow is Just a Future Yesterday

Donald J. Kochan



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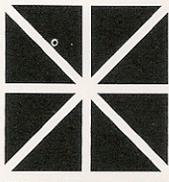
2009 - 2010

Vol. 15

LAW • POLITICS • ECONOMICS • MEDIA

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*“The 80th Anniversary of  
the Great Crash of 1929:  
Law, Markets and the  
Role of the State”*

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# Black Tuesday and Graying the Legitimacy Line for Governmental Intervention: When Tomorrow is Just A Future Yesterday

Donald J. Kochan\*

## Abstract:

Black Tuesday in October 1929 marked a major crisis in American history. As we face current economic woes, it is appropriate to recall not only the event but also reflect on how it altered the legal landscape and the change it precipitated in the acceptance of governmental intervention into the marketplace. Perceived or real crises can cause us to dance between free markets and regulatory power. Much like the events of 1929, current financial concerns have led to new, unprecedented governmental intervention into the private sector. This Article seeks caution, on the basis of history, arguing that fear and crisis mentality

lead to legal reforms that become permanent and may be the result of an irrational reaction. At times of crisis, individuals succumb to increased governmental authority. But, when the real or perceived crisis subsides, many accepted increases in governmental authority empirically tend to be irreversible. Temporary satisfaction can bring long-term consequences. The crux of this cautionary tale is that crises can gray the legitimacy of governmental power and the citizenry's acceptance thereof.

## Introduction

Black Tuesday, October 29, 1929. A day that will live in infamy when the stock market crashed. This symposium's

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choice of topic is hardly a celebration, but instead an opportunity to discuss the dance between markets and regulation and reflect on how our choice of tune can change the outcomes – immediate and future. The 1929 Crash was used to justify a major increase in governmental power,<sup>1</sup> and similar things are happening today.

“What’s past is prologue.”<sup>2</sup> We can learn from it. Just as in the 1930s, the current financial concerns have led to new, unprecedented governmental intervention into the private sector.<sup>3</sup> This Article seeks caution, on the basis of history, arguing that fear and crisis mentality leads to legal reforms that become permanent and may be an irrational reaction to dramatic events. At times of crisis, individuals succumb to expanded governmental authority. But, when the real or perceived crisis subsides, any accepted increase in governmental power tends empirically to be irreversible – the dance ends (and poorly so).<sup>4</sup>

There is little reason to believe that an increase in government is the panacea

for economic woes. There is every reason to believe that fears and crisis lead to dependency – and the politicians know it. Bad times tend to gray the limits of governmental power. Today, we are darkening the shade of gray, much as we did 80 years ago.

This Article will not attempt to specifically confront individual policies, nor will it discuss particular interventions in the banking industry, the automobile industry, the insurance industry, the health care industry, or others. These are indeed market interventions worthy of targeted attention. Instead, this Article will be a broader cautionary tale regarding the human capacity or inclination to *not* look before we leap. We should. History teaches us that every incremental increase in governmental power in a perceived “crisis” state should lead us back to Benjamin Franklin’s cautionary adage that “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”<sup>5</sup> Not every fear re-

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1. David Osborne, *Government that Means Business*, N.Y. TIMES, Mar. 1, 1992, at Sec. 6 (discussing government changes restructuring the marketplace during the 1930s).

2. WILLIAM SHAKESPEARE, *THE TEMPEST: THE SECOND ACT 253-54*, sc. 1.

3. James W. Harris, *Another Great Depression Economy?*, ANDREWS DERIVATIVES LITIGATION REPORTER, Dec. 22, 2008 (“There are several interesting similarities between the origins of the Depression and today’s financial crisis. The Depression is usually said to have begun on Black Tuesday, Oct. 29, 1929.”).

4. Temporary satisfaction can bring long term consequences. To use another analogy, the cookie tastes good today, but step on the scale tomorrow and it may not seem like such a rational choice in retrospect. The indulgence of increased governmental authority is no different. Once you eat the cookie, the government has no incentive to let you work it off. The government gains an interest in you maintaining the weight, because it feeds their power. That is the crux of this cautionary tale – the unending dance and the permanent weight gain. Fear and desperation lead people to accept the dance and eat the cookie, yet not really rationally contemplate the long term consequences.

5. Benjamin Franklin, *Pennsylvania Assembly: Reply to the Governor*, November 11, 1755, in 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963); see also THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 141 (Anthony Jay ed., 1996).

quires the government's hand. Mostly, the invisible hand<sup>6</sup> will do.

## Background on Black Tuesday and Our Current Fiscal Crisis

The New Deal was a manifestation of this level of fear – Black Tuesday was the precipice for a substantial increase in governmental intervention in markets.<sup>7</sup> Massive spending and increased dependency on the government as the savior became acceptable to the public.<sup>8</sup> Much of this faulty reliance, misplaced confidence, rupture in a culture of responsibility, naiveté in the belief of governmental necessity, acceptance of increased governmental power, and overall diminished belief in the market led to many changes in the balance between the private sector and governmental power.<sup>9</sup> So many of these changes became permanent.

Recent commentary and analysis has pointed out that the infusion of govern-

ment spending and control into the markets did not contribute to the end of the Great Depression and indeed impeded the country's recovery.<sup>10</sup> Thus, the lessons of history do not justify government intervention into markets nor should such activities be embraced to address situations facing us today. Later sections of this Article will explain why such history matters.

Much as the governmental response and public acceptance of increased governmental control that was stimulated by the events in 1929, the current financial crisis is being used to justify significant expansion in governmental power vis-à-vis the market. We are treading "treacherous water."<sup>11</sup>

It is undeniable that we are seeing anew a major increase in governmental intervention. Recent government action has been described as "the most sweeping government moves into the nation's financial markets since the Great Depres-

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6. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (Edwin Cannan ed. 1976) (1776).

7. See ROBIN S. DOAK, BLACK TUESDAY, PRELUDE TO THE GREAT DEPRESSION (1996); see also generally John D. Harkrider, *Lessons From the Great Depression*, ABA ANTITRUST, Spr. 2009, at 6 (describing the gradual progression leading to Black Tuesday and the Great Depression); Eugene N. White, *The Stock Market Boom and Crash of 1929 Revisited*, 4 J. ECON. PERSP. 67 (1990); J. KENNETH GALBRAITH, THE GREAT CRASH 1929 (1954); C. KINDLEBERGER, MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES (1978).

8. *Government v. Market in America: The Visible Hand*, THE ECONOMIST, May 30, 2009 [hereinafter *Visible Hand*] ("Price Fishback, an economist at the University of Arizona, writes that the ideological bias against government began seriously to retreat in the face of the Depression and the two world wars, so that 'by 1950 the majority of elites and the general public easily turned to government when they saw a problem they thought should be solved.'").

9. Steven R. Weisman, *What is a Conservative?*, N.Y. TIMES, Aug. 31, 1980 (describing the New Deal's alteration in conservative/liberal terminology).

10. See, e.g., Harold Cole & Lee Edward Ohanian, *New Deal Policies and the Persistence of the Great Depression: An Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004). See also Paul Detrick, *UCLA Economists: Government Intervention Prolonged the Great Depression*, BUSINESS AND MEDIA INSTITUTE, Oct. 10, 2008, available at <http://businessandmedia.org/articles/2008/20081027150030.aspx>.

11. Steven Mufson, *U.S. in Control: Its Goal To Fix, Not Run, Firms*, Wash. Post, Apr. 29, 2009 ("In many ways, we are in uncharted and potentially treacherous water here," said Gregory Mankiw, a professor of economics at Harvard University . . . The most one can hope for is that this period will be temporary . . .").

sion, and perhaps ever, according to economists and finance experts.”<sup>12</sup>

Bailouts, takeovers, czars, new regulations, and other methods of governmental intervention are significantly altering the market<sup>13</sup>—and if history is any indicator, it may very well do so permanently, especially if the citizenry allows their fears to accept the increase in power.<sup>14</sup> President Obama has said that the government *needs* to take over parts of the economy.<sup>15</sup> Many describe the recent interventions as unprecedented in degree<sup>16</sup> and others have called it “shock and awe statism,”<sup>17</sup> which is undoubtedly

true and we should learn from past unprecedented periods of governmental growth. Where is the boundary between the government and the market?<sup>18</sup> Just as with the New Deal, current policies are graying the line.

### History Repeats Itself – or Why We Should be Skeptical of Governmental Intervention into Markets

History often repeats itself. We must be capable of learning from experience. With current governmental intervention in the economy, the purpose of this Arti-

12. Steve Lohr, *Bold Action With Basis in History*, N.Y. TIMES, Oct. 14, 2008, at Sec. A (describing the chaos in financial markets and government intervention as “a momentous step that shifts power in the economy toward Washington and away from Wall Street”).

13. Louise Story & Stephen Labaton, *Overseer Of Big Pay Is Seasoned Arbitrator*, N.Y. TIMES, June 11, 2009, at Sec. B (discussing the creation of a compensation czar as having a “mandate [that] is among the most sweeping given to an individual to oversee the compensation of an entire industry and reflects the federal government’s increasingly visible hand in corporate affairs.”); Vikas Bajaj & Andrew Ross Sorkin & Michael J. de la Merced, *Markets Soar, But New Rules Upset Traders*, N.Y. TIMES, Sept. 20, 2008, at Sec. A (“Many players warned that the government’s sweeping actions might have unintended consequences.”).

14. *Visible Hand*, *supra* note 8 (“[H]istory suggests that many of Mr Obama’s expected moves towards big government, however controversial they may be, will in the end turn out to be permanent.”). *See also id.* (“Laissez-faire has clearly lost some lustre since Ronald Reagan was president. . . .”).

15. Peter Whoriskey & Tomoeh Murakami Tse & Kendra Marr, *U.S. Bets Billions on GM’s Resurgence*, WASH. POST, June 2, 2009 (quoting President Obama as stating that, “The government has needed to take ownership stakes in private enterprises during the economic crisis . . . for the simple and compelling reason that their survival and the success of our overall economy depend on it.”).

16. Peter Whoriskey & Tomoeh Murakami Tse, *Meet the Men Who Are Being Handed the Keys*, WASH. POST, June 3, 2009 (“For the foreseeable future, the U.S. government will play an unprecedented role in the nation’s auto industry by virtue of its multibillion-dollar investments in General Motors and Chrysler.”); Paul Kane & Carol D. Leonnig, *Lawmakers Invested in Bailed-Out Firms*, WASH. POST, June 11, 2009 (Explaining that the current financial crisis has “led to an unprecedented government intervention in the marketplace”); Peter Whoriskey & Tomoeh Murakami Tse & Kendra Marr, *U.S. Bets Billions on GM’s Resurgence*, WASH. POST, June 2, 2009 (describing the GM bailout and “giving the government unprecedented control over one of the nation’s largest manufacturers.”); David Cho & Peter Whoriskey & Kendra Marr, *Talks Tip Chrysler Toward Bankruptcy; As Negotiations With Creditors Falter, Officials Finalize Details of Restructuring*, WASH. POST, Apr. 30, 2009 (“The U.S. government’s attempt to save the automaker amounts to another extraordinary intervention in the U.S. economy. . . . a deal that is ‘unprecedented on this scale,’ according to Harley Shaiken, a University of California at Berkeley professor . . .”).

17. *Visible Hand*, *supra* note 8 (quoting Mitch Daniels, Indiana’s Republican governor).

18. *Id.* (“Mr Obama has been elusive on where he believes the boundary between government and the market should be. . . . Most of the big domestic initiatives taken since he became president involve expanded federal-government activity, either temporary or permanent. . . . Congress is even more unabashedly activist.”).

cle is to remind us of the fact that history matters.

In writing particularly regarding our understanding of the growth of government and the tendencies of human behavior, Hayek in *The Road to Serfdom* observed the following:

Contemporary events differ from history in that we do not know the results they will produce. Looking back, we can assess the significance of past occurrences and trace the consequences they have brought in their train. But while history runs its course, it is not history to us. It leads us into an unknown land, and but rarely can we get a glimpse of what lies ahead. It would be different if it were given to us to live a second time through the same events with all the knowledge of what we have seen before. How different would things appear to us; how important and often alarming would changes seem that we now scarcely notice! It is probably fortunate that man can never have this experience and knows of no laws which history must obey.

Yet, although history never quite repeats itself, and just because no development is inevitable, we can in a measure learn from the past to avoid a repetition of the same process. One need not be a prophet to be aware of impending dangers. An accidental combination of experience and interest will often reveal events to one man under aspects which few yet see.<sup>19</sup>

The significance of the events of the 1930s and their consequences can only foolishly be ignored as we contemplate the acceptable role of government today.

George Santayana famously said, “Those who cannot remember the past are condemned to repeat it.”<sup>20</sup> Crisis mentality after the 1929 Crash led to a major increase in governmental power into the markets. As our economy today confronts an historical struggle and an alley of despair for many, some lose trust in the market and seek government assistance. This government assistance, however, whittles away at individual freedom. That is what occurred then in the 1930s; that is what is occurring now.

Times may be different, but much is the same. Aldous Huxley provides a valuable insight into history and its applicability to changed conditions when he stated: “The charm of history and its enigmatic lesson consist in the fact that, from age to age, nothing changes and yet everything is completely different.”<sup>21</sup> There is every reason to believe that the bloating of government then will have similar consequences now *if* we accept it as a response to a perceived financial crisis.

As philosopher Etienne Gilson once said, “History is the only laboratory we have in which to test the consequences of

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19. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 1 (1964).

20. GEORGE SANTAYANA, *THE LIFE OF REASON, OR THE PHASES OF HUMAN PROGRESS: REASON IN COMMON SENSE* 284 (Scribner's 2d ed. 1922); *see also* GEORGE SANTAYANA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* 82 (Scribner's ed. 1954); Letter from Gustave Flaubert to George Sand (September 8, 1871), *in* *THE GEORGE SAND – GUSTAVE FLAUBERT LETTERS*, at 210 (Aimée G. Leffingwell McKenzie ed., 1921) (“Our ignorance of history makes us slander our own times.”).

21. ALDOUS HUXLEY, *THE DEVILS OF LOUDUN* 259 (Harper ed. 1952); *see also* 4 HERBERT GEORGE WELLS, *THE OUTLINE OF HISTORY: BEING A PLAIN HISTORY OF LIFE AND MANKIND* 1305 (The Review of Reviews Co. ed. 1922) (“Human history becomes more and more a race between education and catastrophe.”).

thought.”<sup>22</sup> As we embark on solutions today, we should view the lab results *first* before acting or allowing the government to act. Look before you leap.

## The Acceptance of Governmental Intervention as the Result of Fear

What is fear? Fear is an internal reaction to external influences, and its power to change the political climate cannot be questioned.<sup>23</sup> But the mere con-

cept raises significant questions about the rationality of behavior and, therefore, the assumptions that underlie much of law and economics literature – including our understanding of the responsive, preemptive, and proactive efforts of the government.<sup>24</sup> Fear often leads to folly when it accepts advanced governmental regulation.<sup>25</sup> It creates a psychological submissiveness to increased governmental power.<sup>26</sup> Individuals submit to emotions over rationality in a time of crisis.<sup>27</sup> People in fear will rally around governmen-

22. See University of Dallas, History Dept., [www.udallas.edu/history](http://www.udallas.edu/history); see also RICHARD SHILLETO, THUCYDIDIS 28 (Deighton, Bell ed. 1872) (“History is Philosophy teaching by examples.”); ARTHUR PORRITT, THE STRATEGY OF LIFE: A BOOK FOR BOYS AND YOUNG MEN 112 (Revell ed. 1920) (“Reading without reflecting is like eating without digesting . . .”).

23. HOWARD PHILLIPS LOVECRAFT, SUPERNATURAL HORROR IN LITERATURE 12 (1973) (“The oldest and strongest emotion of mankind is fear, and the oldest and strongest kind of fear is fear of the unknown”).

24. Owen Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1204 (2001) (“Law deals in human behavior. The power of its models limits the power of law. The rational actor model often works. But it also tends to fail us in the face of real people – with their puzzlingly patterned assortments of emotions, foibles, and fears.”).

25. See SAMUEL TAYLOR COLERIDGE, SPECIMENS OF THE TABLE TALK OF THE LATE SAMUEL TAYLOR COLERIDGE 111 (1836) (“In politics, what begins in fear usually ends in folly”); FRANKLIN D. ROOSEVELT, FIRST INAUGURAL ADDRESS (March 4, 1933), reprinted in THE ERA OF FRANKLIN D. ROOSEVELT, 1933-1945: A BRIEF HISTORY WITH DOCUMENTS at 39, 40 (Richard D. Polenberg ed. 2000) (“So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself – nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance”).

26. On psychological analyses of fear and on its impact on the formation of legal rules, see generally, e.g., ANTHONY R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994); RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); JEFFREY ALAN GRAY, THE PSYCHOLOGY OF FEAR AND STRESS (2d ed. 1987); Arne Ohman, *Fear and Anxiety as Emotional Phenomena: Clinical Phenomenology, Evolutionary Perspectives, and Information-Processing Mechanisms*, in HANDBOOK OF EMOTIONS 520 (Michael Lewis & Jeannette M. Haviland eds. 1993); Kathryn Abrams, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319 (2007); Michael D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977 (2004); Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1 (2002); Ute Gabriel & Werner Greve, *The Psychology of Fear of Crime: Conceptual and Methodological Perspectives*, 43 BRIT. J. CRIMINOLOGY 600 (2003); Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211 (2002); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001); Cass R. Sunstein, *Probability Neglect: Emotion, Worst Cases, and Law*, 112 YALE L.J. 61 (2002).

27. “Emotions provide the animal with a sense of how the world relates to its own set of goals and projects. Without that sense, decisionmaking and action are derailed.” MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 117 (2001); Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL’Y 681, 684 (2001) (“Fear is a complex psychological phenomenon, and it sits uneasily with the rational actor premises of standard accounts of risk regulation. One can, without fear, recognize a danger, appraise the risk, and take steps to minimize the risk; this is a purely cognitive response. But a person confronted by a danger frequently has an involuntary emotional reaction.”).

tal intervention in the face of fear, and collectively disregard the naysayers who believe that a free market alternative is preferable.<sup>28</sup>

Fear can lead to a panic mentality that affects the acceptance of a governmental “parachute.”<sup>29</sup> As Eric Posner, who has written extensively and persuasively on this topic, has explained:

[F]ear is contagious: one person can become fearful upon observing that another person is fearful. We talk of bank panics and food safety scares. . . . Panics can have powerful psychological and physiological consequences . . .<sup>30</sup>

The fearful person tends to jump toward the extended arm of the govern-

ment when it claims it is there to help. That is the danger of crisis.

### Crisis Theory and the Implications for Governmental Power

Everything changes in the face of a crisis – real or perceived.<sup>31</sup> Firmness for principles tends to lapse in a time of crisis. The fear we have faced during the current financial difficulties is no different than historical moments of perceived crisis, where individuals become sufficiently impotent to accept government aid, government programs, and government power – which can only lead to more and more government.<sup>32</sup>

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28. See Lohr, *supra* note 12 (“The United States has a culture that celebrates laissez-faire capitalism as the economic ideal, yet the practice strays at times.”); BERTRAND RUSSELL, *An Outline of Intellectual Rubbish*, in THE BASIC WRITINGS OF BERTRAND RUSSELL 73, 98 (Routledge 1992) (1961) (“Collective fear stimulates herd instinct, and tends to produce ferocity toward those who are not regarded as members of the herd”).

29. *Visible Hand*, *supra* note 8 (“Thus the arrival of the [current] financial crisis found Americans already souring on unconstrained capitalism. . .”).

30. Posner, *supra* note 27, at 685 (citing, among others, Steven P. Schwartz et al, *Environmental Threats, Communities and Hysteria*, 6 J. PUB. HEALTH POL’Y 8, 63-65 (1985)). See also Eric A. Posner & Adrian Vermuele, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 627-29 (2003) (“The rational actor model assumes that people implicitly use accurate probability distributions to estimate the likelihood of uncertain outcomes. . . . The panic thesis argues that . . . [d]uring emergencies, panic interferes with rational assessment of risks . . . Fear is in part a purely physiological response to a threat, a response that is outside of conscious control.”); Jones, *supra* note 24 at 1141 (“People behave rationally. Except, apparently, when they don’t. They get emotional, comply with costly social norms, and offer puzzlingly poor performances on any number of seemingly simple analytic tasks. . .”).

31. Several authors have recently explored increased governmental powers in the face of war or emergencies. For several interesting articles, see Symposium, *Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis*, 69 MO. L. REV. 897, 897-1155 (2004). See also, e.g., THE CONSTITUTION IN WARTIME (Mark Tushnet ed., 2005); CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD (M. Katherine B. Darmer et al. eds., 2004); JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2010); ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 11-12 (2002); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 292-308 (2003); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218-25 (1998); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

32. See generally ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1987); see also John Stossel, *Just Say ‘No’ to Drug Price Controls*, HUMAN EVENTS, Mar. 5, 2007, available at <http://www.humanevents.com/article.php?id=19504&keywords=no+drug+price+control> <<https://exchange.chapman.edu/exchweb/bin/redirect.asp?URL=http://www.humanevents.com/article.php?id=19504%26keywords=no%2Bdrug%2Bprice%2Bcontrol>> (“Government intervention begets more government intervention.”).

Junius Americanus wisely relates the mutation of law as the result of passions that can come forth under the aegis of a “crisis”:

The Constitution is the rock of our political salvation; it is the palladium of our rights; . . . [but] when the [government] pursues a favorite object with passionate enthusiasm; men are too apt, in their eager embrace of it, to overlook the means by which it is attained. These are the melancholy occasions when the barriers of the government are broken down and the boundaries of the Constitution defaced.<sup>33</sup>

When passions run high, so must constitutional restraints on majority action. A vigilant defense against the risk of passion overcoming reason becomes critical.<sup>34</sup> The relaxation of constitutional and legal rules simply because we feel “emergency” is highly dangerous.<sup>35</sup>

When crisis, real or perceived, creates fear, the citizenry tends to accept an expansion of government. Ultimately we must understand this nature of the human condition – the incentives of the powers that be and the behavioral acquiescence of the governed. Crises blind the citizenry from rational deliberation. People accept an expansion of government when looking for hope. Politicians know that the people will clamor for relief.<sup>36</sup> In the end, that combination leads to a permanent expansion of governmental authority – accepted at the time but perhaps regretted later. We must step back, and not embrace band-aids that cannot be removed, but instead handle the pain knowing that we will emerge with a slight scar but not permanent injury.

33. Junius Americanus [pseud.], letter, N.Y. DAILY ADVERTISER, July 23, 1790 (quoted in CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 105 (1930)).

34. In addressing the crisis of Watergate and strong majority pressures to legislate additional checks on the Executive power, Robert Bork stated this proposition well in his objections, based on principles of separation of powers, to the independent counsel law:

It is particularly important in times of crisis and deep-seated unease that we adhere to the constitutional system that has sustained us for so long. It is all too easy to say that this is an emergency and we will only violate the Constitution this one time. But that kind of expediency is habit forming. Bad precedents, once established, are easily used in the future.

*Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 453 (1973) (testimony of Robert H. Bork, Acting Attorney General). A similar statement was made at the same hearing by Roger C. Cramton, Professor of Law at Cornell, when he stated:

[There is a] historic tendency for governmental devices that have once proven handy to be called on again and again and again. . . . The existence of an emergency, the Supreme Court has held, does not create power where none exists. As Mr. Justice Holmes stated, passions of the moment should not be allowed “to exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well-settled principles of law will bend.”

*Id.* at 358 (testimony of Roger C. Cramton).

35. Posner & Vermuele, *supra* note 30, at 608 (“The second major view about emergencies, the strict enforcement view, is that constitutional rules are not, and should not be, relaxed during an emergency.”) (citing David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 28-30 (2003); Norman Dorsen, *Here and There: Foreign Affairs and Civil Liberties*, 83 AM J. INT’L L. 840, 845 (1989)).

36. Lohr, *supra* note 12 (“In past times of war and national emergency, Washington has not hesitated” to intervene in industry).

The greatest risk for increased governmental power on the basis of crisis is that changes in the legitimacy of governmental action become permanent.<sup>37</sup> Milton Friedman famously said, “[N]othing is so permanent as a temporary government program.”<sup>38</sup> His point was that when we allow circumstance to diminish our vigilance for limited government, there is a permanent alteration in the balance of power between market and individual freedom and governmental power.

Clinton Rossiter described that, in times of perceived crises, where there is an acceptance for increased governmental authority, most alterations in the accepted legitimacy of governmental intervention become embedded:

[C]hanges less than revolutionary, but nonetheless changes, will be worked in the permanent structure of government and society. . . . Alterations in the structure of a constitutional government may be wrought and made permanent that do not represent the mature and collected judgment of the representatives of the people, alterations that in their nature are far more difficult to disestablish than

they were to institute. Federalism and free enterprise will serve as examples of institutions easy to break down in crisis and infinitely more difficult to restore thereafter.<sup>39</sup>

Though Rossiter argues that constitutional dictatorship may be necessary in certain crises, he describes several limits to the institution of such a regime. First, such alterations of power should occur only to preserve the state or the constitutional order.<sup>40</sup> Second, specific provision for termination of the “crisis government” should exist, for no crisis government should ever be permanent.<sup>41</sup> Implicit in this argument is that a crisis government should only be instituted if the crisis is actually redressible by such a government. Furthermore, no right or procedure should be restricted more than absolutely necessary for the conquest of the crisis.<sup>42</sup> In each “crisis,” overheated rhetoric creates the fear and support necessary for the public to believe that extreme governmental action is necessary.

And once granted, as Rossiter warned, government power becomes difficult to dissolve. For example, President

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37. See generally Vern Baxter, *Review: The Meaning of Crisis*, 69 *SOC. FORCES* 640-41 (1990); N. Gilbert & Paul Gordon Lauren, *Crisis Management: An Assessment and Critique*, 24 *J. CONFLICT RESOL.* 641-664 (1980); R.J. Holton, *The Idea of Crisis in Modern Society*, 38 *BRIT. J. SOC.* 502-520 (1987); James M. McCormick, *International Crises: A Note on Definition*, 31 *W. POL. Q.* 352-58 (1978).

38. MILTON FRIEDMAN & ROSE D. FRIEDMAN, *THE TYRANNY OF THE STATUS QUO* 115 (1984).

39. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 5 (1948); Posner & Vermuele, *supra* note 30, at 626 (2003) (“With every emergency, constitutional protections are reduced, and after the emergency is over, enhancement of constitutional powers is either maintained or not fully eliminated, so that the executive ends up with more power after the emergency than it had before the emergency. . . . The other argument is psychological: During an emergency, people panic, and when they panic they support policies that are unwise and excessive.”) (citing Editorial, *A Panicky Bill*, *WASH. POST*, Oct. 26, 2001, at A34; JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 129-41, 157-61 (2000)); *Visible Hand*, *supra* note 8 (“Crises usually bring about clamour for more government. It sometimes shrinks afterwards, but never back to its original size.”).

40. ROSSITER, *supra* note 39, at 298.

41. *Id.* at 300, 303.

42. *Id.* at 302.

Franklin Roosevelt's New Deal programs permanently weakened economic liberties, even though the programs were proposed as temporary measures to address the Great Depression crisis. People eventually came to believe that the social welfare state and the subjugation of property created by the programs needed to continue to prevent a future crisis. History repeats itself, so we should be wary of new governmental interventions in the market and increased regulation presumably justified by current "crises".

### **The Role of Political Ambition in the Exploitation of Real or Perceived Crises – Never Seen A Crisis I Didn't Like?**

In times of drought, politicians get thirsty. Fear can have a corruptive influ-

ence on politicians realizing they can capitalize on the psychological impact of that fear on the citizenry.<sup>43</sup> Fear may lead to corruptive opportunism,<sup>44</sup> or potentially benign governmental response out of a feeling of necessity.<sup>45</sup> Either way it affects decision making – politicians can exploit it.<sup>46</sup> The more accepting the citizens are of government mingling with the market, the more ambitious the power grabs by politicians will be.<sup>47</sup>

Law and economics teaches that bureaucracies tend to perpetuate themselves.<sup>48</sup> With fear and "crisis" there is blood in the water and an opportunity for a power grab.

There is no better demonstration of the current political exploitation of fear and crises than that which comes from the words of President Obama's White

43. JOHN STEINBECK, *THE SHORT REIGN OF PIPPIN IV: A FABRICATION* 102 (1957) ("Power does not corrupt. Fear corrupts . . . perhaps the fear of a loss of power").

44. Aung San Suu Kyi, *Freedom From Fear*, in *VIOLENCE AND ITS ALTERNATIVES: AN INTERDISCIPLINARY READER* 313 (Manfred B. Steger & Nancy S. Lind eds., 1999) ("It is not power that corrupts but fear. Fear of losing power corrupts those who wield it and fear of the scourge of power corrupts those who are subject to it"). See also J. CHRISTOPHER HEROLD, *THE AGE OF NAPOLEON* 94 (2002) (quoting Napoleon Bonaparte as stating "Men are moved by two levers only – fear and self interest").

45. Posner & Vermuele, *supra* note 30, at 626-27 (2003) ("First, government officials might feel fear. Second, even if government officials do not feel fear, the public might feel fear, and government officials might feel compelled to act on the public's fears.") (citing PAUL WILKINSON, *TERRORISM AND THE LIBERAL STATE* 81 (1977)).

46. *Visible Hand*, *supra* note 8 ("The financial crisis propelled Mr Obama into the White House and he has aggressively exploited the opportunity").

47. *Id.* ("Americans have grown slightly more receptive to the idea of an activist government. . . . Mr Obama and Congress are exploring ambitious new ways to expand the government's responsibilities.").

48. As Macey explained in relation to the thrift industry:

[L]ong after there was any economic need for a savings and loan industry, thrift regulators took extraordinary steps to ensure the industry's survival. The regulators acted as they did, not to further the public interest, but because they understood that the survival of the industry was crucial to their own professional survival.

Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 92, 94 (1992). Many scholars have demonstrated that bureaucracies tend to exhibit self-perpetuating behavior. See generally WILLIAM NISKANEN, *Bureaucracy and Representative Government* (1971) (arguing that bureaucracies seek to maximize their budgets); GEORGE C. ROCHE, *AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY* (1983); LUDWIG VON MISES, *BUREAUCRACY* (1944).

House Chief of Staff, Rahm Emmanuel. In an amazing amount of candor, Emmanuel explained that now is the opportune time to change the level of government intervention by taking advantage of people's fears and perceived crises:

[Y]ou know this is my operative theory, which is you never allow a serious crisis to go to waste . . . It is an opportunity to do big things. But it is an opportunity to do when you think you couldn't do something, because people know this is a moment of peril, but also a moment of possibility.<sup>49</sup>

One commentator on the Emmanuel statement summarized it well when saying that "The citizen's fear is the politicians elixir . . ." <sup>50</sup> These types of statements and political incentives inspire caution, not trust.

## Conclusion

The mentality of crisis risks citizen accommodation, acceptance, blinders to governmental ambition, or mere ambivalence toward the increase in governmental power.<sup>51</sup> If we do not understand these natural behavioral limitations of the human psyche, history tells us that, as stated before, "[C]hanges less than revolutionary, but nonetheless changes, will be worked in the permanent structure of government and society. . ." <sup>52</sup> So, be careful what you wish for. Compliance in greater government influence in the market may be very difficult to disestablish once the perceived crisis subsides. The balance between the individual and the state can be forever changed. In light of crisis talk and fear, the temptations of accepting governmental intervention in

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49. *Charlie Rose: Rahm Emanuel Is Interviewed On PBS*, 2009 WLNR 1020724 (Jan. 16, 2009, PBS transcript) (quoting Rahm Emmanuel). For video of a previous statement of the same tenor, see <http://allthenewsthatfits.wordpress.com/2008/11/21/rahm-emanuel-dont-waste-a-serious-crisis/>. See also Gershon Gorenberg, *In Praise of Diplomacy*, N.Y. TIMES, Feb. 15, 2009, at BR 8 (describing Emmanuel's statement as "exuberantly defining the economic meltdown as an opportunity for grand new domestic policies."); *Obama shares Bush's instinct to convert a calamity into an opportunity*, ASIAN NEWS INT'L, Mar. 10, 2009 ("They really are trying to push their own policies to the max," said Stephen Hess, a senior fellow at the Brookings Institution . . .); *The Chatter*, N.Y. TIMES, Nov. 9, 2008, at BU ("You don't ever want a crisis to go to waste; it's an opportunity to do important things that you would otherwise avoid." Representative Rahm Emanuel of Illinois, appointed by President-elect Barack Obama as his White House chief of staff, talking about the economic crisis.); David Leonhardt, *The Big Fix*, N.Y. TIMES, Feb. 1, 2009, at MM22 (reporting the Emmanuel "crisis opportunity" comment).

50. Kathleen Parker, *Freud recognized that human beings have a sex drive and even a death drive. Is it possible that we also have an aphorism drive?* KAN. CITY STAR, June 1, 2009, at A11 ("When Rahm Emanuel said, 'You never want a serious crisis to go to waste,' he wasn't the first or the last to express the sentiment. Barack Obama will be remembered for creating budget-busting social programs while Americans were caught in the headlights of unemployment and economic reversal. The citizen's fear is the politician's elixir. . . . Today, we trade liberty for certainty and our once-swashbuckling spirit for contentment."). See also Kevin O'Brien, *Oh, What a Beautiful Crisis*, CLEVELAND PLAIN DEALER, Jan. 29, 2009, at A9 (reporting the Emmanuel statement and commenting, "So, have a crisis and use it to get things you want that you couldn't have gotten from people who weren't frightened. Repeat as necessary.").

51. Posner & Vermuele, *supra* note 30, at 626 ("The first overlooked cost is the long-term, postemergency institutional damage from accommodating aggressive executive action during an emergency. The second is the risk that during an emergency fear leads to bad policy.").

52. ROSSITER, *supra* note 39, at 5.

the marketplace remain high, so there must be vigilance in avoiding it. As Ludwig von Mises said, “Men must choose between the market economy and socialism. They cannot evade deciding between these alternatives by adopting a ‘middle-of-the-road’ position, whatever name they may give to it.”<sup>53</sup> Acquiescence in “middle-of-the road” positions of governmental power always leads the next day to a different, “new” middle – one that is much farther away from freedom. This happened with the Crash in 1929 and we are seeing it happen again now – the use of crisis to justify a gradual creep toward more governmental power and less au-

tonomy and individual liberty. We should learn that lesson of history.

The dangers lie in the graying of the lines of legitimacy and the concomitant risk of permanency of every darkening on that canvas that defines state power. It is very difficult to turn a canvas back to white after we let it be painted gray. As Robert F. Bruner, a finance expert at the Darden School of Business at the University of Virginia stated: “The obvious danger with anything that really starts to look like the government taking ownership or control of a significant piece of an industry is, Where do you stop?”<sup>54</sup>

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53. LUDWIG VON MISES, *HUMAN ACTION* 861 (3d rev'd ed. 1966).

54. Lohr, *supra* note 12.