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IDEAS ON LIBERTY

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Perspective

The State Is Morally Hazardous to Your Health

It's never been more important for advocates of individual liberty to emphasize that what is failing today is not the free market but the state. To claim otherwise is to ignore generations of pervasive and deep-seated privilege through government interference with the marketplace.

Intentions are irrelevant. The laws of economics proceed whether those who interfere have good motives or bad. But we should not be oblivious to the fact that most interference is not purely "public-spirited." Rather, it's self-serving, as power-wielding politicians hunt for votes and reward corporate and other allies.

Many of the privileges have been in the form of guarantees to institutions that lend money to homebuyers. The subprime-mortgage mess, overblown by the news media as it is, has been portrayed as the result of recklessness and predation by lenders in an unregulated marketplace. But would they have lent money to people with bad credit and no assets if they knew that they and their stockholders would have to bear the losses in full?

Such lending can only be explained by the presence of an explicit or implicit guarantee against loss. And only the government—the Federal Reserve (the government's legal counterfeiter) in particular—is in a position to offer such a guarantee by overtly or covertly promising to come to the rescue with low interest rates or injections of liquidity. (Incidentally, about half of foreclosures involve prime, fixed-rated mortgages.)

The result this intervention is called moral hazard, a well-known phenomenon in which a guarantee against risk increases the likelihood of risky activity. Put another way, people respond to incentives. When someone else bears the losses, people act differently from how they would act if they expected to bear the losses themselves. When the market is disciplined by free competition, all incentives point in the direction of prudent risk-taking. Government intervention changes that. See the history of the S&L collapse for details.

This is key to the mortgage difficulty that has spread through the credit markets and helped bring the economy to a crawl.

Another part of the story is the government's efforts to drastically lower the cost of buying a home. A combination of government agencies and government-sponsored enterprises (FHA, VA, Fannie Mae, Freddie Mac) made it possible for people to buy houses with little or no down payment and insured mortgages. On top of that, the federal government threatened sanctions against lenders that were reluctant to take on low-income borrowers with poor credit ("redlining").

The result was a volume of mortgages that would be viable only as long as home values continued to increase. But despite government-fueled expectations and ill-advised policies, there was no guarantee of *that*. When values went south, a slew of homeowners were left with loans that were larger than the market price of their homes. The absence of equity made default an attractive option.

The government-boosted secondary market for mortgages and the emergence of mortgage-backed securities, pioneered by government-sponsored enterprises like Freddie Mac, put the volume of shaky mortgages in a position to rattle hedge funds and "too large to fail" investment banks. Now lenders are reluctant to part with their money, and the economy is in the doldrums. The Fed stands ready to help the troubled investment bankers, reinforcing moral hazard.

The consequences of government's interference are finally clear for all to see.

This mess is largely the product of a tangled web of government policies, including land-use controls that made housing artificially expensive. The free market cannot justly be blamed because for ages there has been no free, undistorted market in housing or money. The privileges granted under political capitalism, or the corporate state, have seen to that. Yet the only "solutions" most people can imagine consist of more of the same and worse, including ex-post changes in mortgage contracts, interest-rate freezes, expanded authority for Freddie and Fannie, and wider scope for Fed bailouts of investors through loans based on bad collateral.

The table is set for the next "crisis"—which will of course be attributed to laissez faire. The fix is in.

★ ★ ★

California homeschoolers got a scare recently when an appeals court said their form of education is illegal. But almost before they could react, the court agreed to rehear the case. What's next? Steven Greenhut reports.

If a politician wants to sound reasonable, he calls for compromise. As Gary Galles points out, some things can't be compromised.

Land-use controls not only interfere with property rights; they also set off a never-ending competition to influence policymakers. The economic consequences, says Bruce Benson, are serious.

Freedom in particular areas of life can wax and wane. So how are we doing today? David Boaz takes an inventory.

Concern about the growth of government in America didn't begin in the Progressive Era or during the New Deal. It was present from the start, when the Constitution's ink was still wet on its parchment. One of the most eloquent of voices warning of imminent danger belonged to John Taylor of Caroline. Joseph Stromberg explores his constitutional philosophy.

This issue's columnists examine some intriguing topics. Richard Ebeling looks at secession in connection with Tibet. Lawrence Reed wonders what's wrong with private ownership of historical artifacts. Thomas Szasz debunks anti-psychiatry. Burton Folsom discusses John D. Rockefeller and his enemies. John Stossel says lobbying abuses could be stopped by shrinking the government. Walter Williams insists on distinguishing rights from wishes. And Steven Horwitz, reading a conservative argument for government intervention in the mortgage mess, replies, "It Just Ain't So!"

Books subjected to review deal with the Constitution, Pearl Harbor, the Duke lacrosse case, and Prohibition.

—Sheldon Richman
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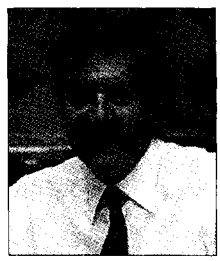
From the President

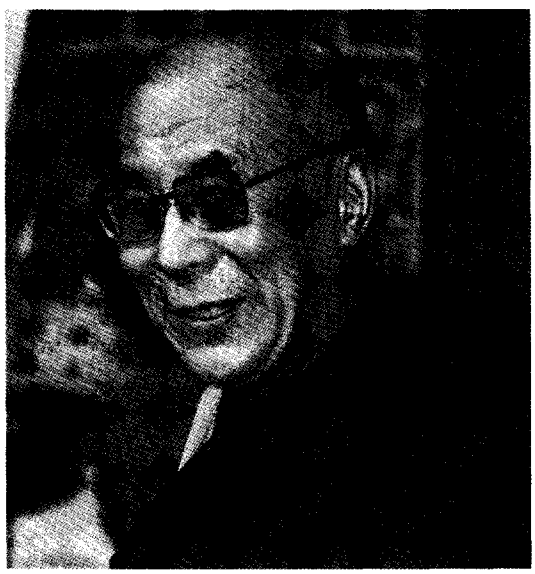
Freedom and the Right of Self-Determination



BY RICHARD M. EBELING

The most guarded prerogative of every government is its legitimized monopoly over the use of force within its territorial jurisdiction. The second most important prerogative is its exclusive control over all its territory. By implication, governments therefore claim an exclusive right over the political, economic, and cultural destinies of the people under their control. If people may not voluntarily and peacefully separate from the state in which they live, then it is tacitly claiming ownership over them.

Of course, the most fundamental right of self-determination is the individual's right to live his life as he chooses, as long as he does not violate any other person's right to life, liberty, and honestly acquired property. In other words, the core principle underlying any free society is the right of self-ownership. The individual is not the property of the state, any collective group, or any other individual. Without this principle, freedom is unsustainable in the long run.



Tenzin Gyatso, 14th Dalai Lama
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The recent events in Tibet should remind us once again that there is no liberty without the right of self-determination. In 1950, shortly after Mao Zedong's communist armies drove Chiang Kai-shek's Nationalist government off the Chinese mainland to Taiwan, they invaded Tibet and imposed communist rule there as well. For the next nine years Mao's government suppressed religious freedom, persecuted and brutalized Buddhist monks, forced Buddhist nuns into marriages with Chinese soldiers, and imposed economic collectivization on a pastoral and peaceful people.

In 1959 a revolt broke out against Chinese rule. The Tibetan spiritual leader, the Dalai Lama, was forced to flee and take refuge in India, and tens of thousands of Tibetans were killed during the Chinese repression of the rebellion. In the years since then, communist control has maintained a stranglehold on Tibetan society. In addition, the Beijing government has heavily subsidized the settlement of thousands of ethnic Chinese, which the Tibetans view as potential cultural and ethnic genocide, considering that the entire Tibetan population within the borders of Tibet comes to less than three million. In the neighboring provinces of Qinghai, Gansu, and Sichuan, many among the large Tibetan minorities have only been taught Chinese in the compulsory government schools and have often lost all working knowledge of the Tibetan language and its various dialects.

While the Dalai Lama and his government in exile have publicly embraced the more conciliatory objective of greater autonomy within China, a vast number of Tibetans want the right to determine whether they will once again be an independent country, which Tibet virtually was from 1913 to 1950.

The Chinese government insists that Tibet has been, is, and will permanently remain an integral part of the People's Republic of China, regardless of the wishes of the Tibetans. The Chinese government bases its claim on the principle that if any piece of land was ever part of China, it should remain as such or be reunited with

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China even if it is currently under the jurisdiction of a neighboring state. This was the justification for reclaiming political control over Hong Kong and Macao, and for China's insistence that Taiwan must submit to Beijing's authority. It is also the basis for China's occasional claim to large stretches of Russian territory bordering on China in Siberia.

The classical liberals of the nineteenth century believed that individuals should be free to determine their own lives. It is why they advocated private property, voluntary exchange, and constitutionally limited government. They also believed that people should be free to reside in any country they wish. In general, therefore, they advocated freedom of movement. Governments should not compel people to stay within their political boundaries, nor should any government prohibit them from entering its territory for peaceful purposes.

An extension of this principle was that individuals should be free to determine through plebiscite what state they would belong to. This is distinctly different from the collectivists' notion of "national self-determination," the alleged necessity for all members of an ethnic, racial, linguistic, or cultural group to be incorporated within a single political entity, regardless of their wishes. Thus, for instance, the Nazis demanded that all members of the "Aryan race" be forcefully united within a Greater Germany under National Socialist leadership.

Classical liberalism is closer to "individual self-determination." Austrian economist Ludwig von Mises argued in *Liberalism* (1927) that the liberal ideal allows individuals within towns, districts, and regions to vote on which state they would belong to; they could remain part of the existing state, join another state, or form a new one.

Mises stated that in principle this choice should be left to each individual, not majorities, since a minority (including a minority of one) might find itself within the jurisdiction of a government not of its own choosing. But because it was difficult to imagine how competing police and judicial systems could function on the same street corner, Mises viewed the majoritarian solution to be a workable second best.

The liberal ideal allows individuals within towns, districts, and regions to vote on which state they would belong to.

Minimal Intrusion

What would at least assure the minimal political intrusion into the individual's affairs, even if he found himself under a government not of his own choosing, was the reduction of state power to protection of life, liberty, and property in a social order of voluntary association and free-market exchange. In such a world the use of political power to benefit some at the coerced expense of others would be eliminated or at least reduced to the smallest amount humanly possible. Government, then, would be only a "night watchman" responsible for guarding each individual from force and fraud under the equal protection of law within its monopoly jurisdiction.

Many, if not most, of the ethnic, linguistic, racial, and cultural conflicts that we see would be ended or significantly diminished if this right of individual self-determination were practiced by nation-states. The problem of Tibet would soon be a footnote in history if only the government of China would let Tibetans vote on whether their villages remain part of China or become part of an independent Tibet. Areas of Tibet in which a Chinese majority voted to remain a part of China would have to be allowed to. The slate of past injustices might have to be cleaned and set aside, with the outcomes of the plebiscites the bases of a new beginning. Bygones, no matter how hurtful, might have to be bygones.

Needless to say, the same principle of self-determination should be applied to the people of Xinjiang province, Inner Mongolia, Taiwan, and Hong Kong.

Alas, neither the government of China nor other governments seem ready or willing to respect the sovereignty of their citizens, which individual freedom and self-determination require. We continue to live in a time when governments presume to claim ownership over all they administer, including the people.

Government Intervention Is Needed to Solve the Housing Crisis? It Just Ain't So!

BY STEVEN HORWITZ

In his March 18, 2008, column in the *New York Times*, David Brooks addresses the ongoing problems in the housing industry and concludes that "In normal times, the free market works well. But in a crisis like this one, few are willing to sit back and let the market find its own equilibrium."

Instead, Brooks calls for a variety of government interventions to address the problems he sees, even as he recognizes that government contributed to those problems. Consistently throughout the column he fails to be as skeptical about regulators as he is about market participants, although the regulators are the cause of the problem and the key to his proposed solution. It simply "just ain't so" that additional regulations are necessary to deal with these problems; in fact, they are likely to exacerbate them.

Brooks begins with a typical litany of potential problems arising from the fall in housing prices. Millions of people are expected to default on mortgages in the next few years, with millions of others owing more than their houses are worth. Furthermore, he worries that uncertainties about mortgage-backed securities will create ongoing problems for the banking system for the foreseeable future. And as for who's to blame for the situation, Brooks points to "out of control" mortgage brokers, regulators who were "asleep," and homebuyers who thought themselves entitled to huge houses as well as ever-rising property values.

Brooks then asks, rhetorically, "Shouldn't people be held responsible for their stupidity and greed?" His answer, unfortunately, is "not really."

One point worth noting in the hand-wringing over the housing crisis is that it is not a universal phenomenon. Yes, it's very much true that housing prices have taken a big tumble in a number of major metropolitan areas, but more so in hot markets like Las Vegas and south Florida, as well as the affluent suburbs of other cities. The fact that many of these places are in "blue" states, where opinion-makers tend to live, might explain why it has received so much media attention. However, in the rest of the United States the effects are not so great. And where I live, near the Canadian border in New York state, the local newspaper indicated that housing prices in the tri-county area are up over one year ago. Moreover, reports from areas with high foreclosure rates suggest that some number of the houses falling in value in hot areas were bought to be "flipped," that is, sold quickly for a profit, rather than lived in as primary residences. The number of people losing their primary residences is much lower than the total in mortgage default.

One point worth noting in the hand-wringing over the housing crisis is that it is not a universal phenomenon.

However, let's grant Brooks the fact that there is a crisis at hand. Why then not have individuals take responsibility for their own bad choices? He argues that such responsibility, while important, has its limits. Specifically, he cites research in behavioral economics that shows how we "are powerfully and unconsciously influenced by the ideas and assumptions that float

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around in the social ether." In his view "financial elites" offered "delicious loans to consumers" that they apparently were powerless to resist because they were unable to see the real risks involved. Therefore, they are to be rescued from their own short-sightedness.

This argument is dangerous in two ways. First, am I then to be saved from myself every time I walk into a restaurant that dangles a delicious serving of Buffalo wings before me at a price I am apparently powerless to resist, only to discover later that I've gained weight and caused my cholesterol to rise? What about that ultra-soft toilet paper I buy that turns out to be not as soft as I expected? As F. A. Hayek argued decades ago when similar arguments were made by people like John Kenneth Galbraith, the fact that our opinions and beliefs are very much shaped by the cultural environment and not consciously or rationally chosen does not mean that specific sellers can somehow "deliberately determine the wants of particular consumers." The results of behavioral economics do not suggest we are victims of malevolent sellers, whether of food or mortgages.

But suppose Brooks is right that we are being overwhelmingly influenced by the ideas in the social ether. *Why is this not equally true of those whom he would empower to save us from ourselves, if not Brooks himself?* Do we suddenly become all-knowledgeable and able to resist that social ether when we move from consumer to regulator? Perhaps Brooks himself interprets the housing crisis the way he does because of similar unconscious, and erroneous, influences. Whatever the truth of the results of behavioral economics, they do not by themselves provide a case for government regulation of human behavior because, like the fact that people are generally self-regarding, the claim that people are unconsciously influenced applies to regulators as well. How can we be sure they will do any better than the same people will in the marketplace?

Perhaps most disturbingly, Brooks dismisses the most trenchant criticism of some sort of bailout by invoking the language of crisis. The danger of a bailout of homeowners or mortgage holders is that it creates "moral hazard" for the future. Moral hazard refers to the propensity to engage in more of a risky behavior when you know you are insured against a bad outcome. A bailout today suggests that all parties can count on such bailouts in the future, reducing the costs of engaging in the same sort of risky behavior down the road. In fact, it was former Federal Reserve chairman Alan Greenspan's promise several years ago that the Fed would cushion against bursting asset bubbles that some commentators blame for encouraging the risky loans in the housing market. Brooks recognizes that this is a concern, but then says that's a worry for "normal times" In a crisis, concerns like this go "on the back burner."

Dangerous Precedents

What is so disturbing about this argument is that it is *precisely* during crises that precedents get set and powers are given to government that never are given back. As the work of Robert Higgs has documented, very rarely do the temporary powers given to the state to address a specific crisis ever get completely removed when the crisis passes. It is all too easy for the politics of a crisis to slowly transform into the politics of "normal times." In the current situation, regulators are not even bothering to pretend that their "need" for new powers is a "temporary necessity." The current proposal to give the Fed broad new regulatory oversight will be a permanent increase in the power of the state. To the extent the causes and consequences of the problems in the housing market have been misinterpreted and power-hungry politicians and regulators see an opportunity to swoop in, more "solutions" such as this one are sure to follow.

Those who propose intervention to bail out homeowners and mortgage providers not only fail to see that it was prior intervention (among other things, the promised bailout) that helped to create the current crisis, but they also fail to recognize that the precedent created by a bailout makes it more likely that one will occur in the future.

Court Holds California's Homeschoolers in Suspense

BY STEVEN GREENHUT

Anyone interested in the nearly criminal mismanagement of the nation's government-run schools need only do research on the acronym LAUSD. In March 2006 Los Angeles Mayor Antonio Villaraiogosa gave a speech blasting the LAUSD—Los Angeles Unified School District—for its "culture of complacency" and described the dropout problem in the district as "the new civil rights issue of our time." These aren't the words of a conservative education reformer, but of a liberal Democratic mayor with close ties to the teachers' union. He is the latest in a string of LA mayors who have tried to deal with a school system that's immune from serious reform, not to mention unable to keep students safe.

I offer this as a background to an article on homeschooling for this simple reason: California officials operate some of the worst education bureaucracies in the nation. Yet some officials here are concerned not so much with the government-run schools, but with the possibility that a fraction of the state's students are being educated by their non-credentialed parents at home. This is the "let no flower bloom" approach to public policy, as government officials and public-sector unions react against small private successes in their midst, mainly, I suppose, because of the embarrassment it entails. If for a few bucks a year parents can teach kids who go on to excel in state tests, get accepted to Berkeley, and win spelling bees, then why can't the professional "educators" do as well with $11,000 or more per student each year taken from taxpayers?

If for a few bucks a year parents can teach kids who go on to excel in state tests, get accepted to Berkeley, and win spelling bees, then why can't the professional "educators" do as well with $11,000?

In California this issue of homeschooling had been dormant for about five years, after the current superintendent of public instruction overruled his predecessor's policy of harassing homeschools. But a February ruling by the state district court of appeal brought back reminders of the bad old days after it ruled that "parents do not have a constitutional right to homeschool their children. . . . Because parents have a legal duty to see to their children's schooling within the provisions of these laws, parents who fail to do so may be subject . . . to imposition of fines or an order to complete a parent education and counseling program." The court even issued a threat to parents that they could lose custody of their children if they persist in teaching them at home: "the juvenile court has authority to limit a parent's control over a dependent child."

This ruling—which stemmed from a Child Protective Services action against a Los Angeles County homeschooling parent accused of physically and emotionally harming his kids—was remarkably broad and viewed by most observers as outlawing homeschooling. My newspaper columns argued that parents had much to fear from the ruling, which could give local school

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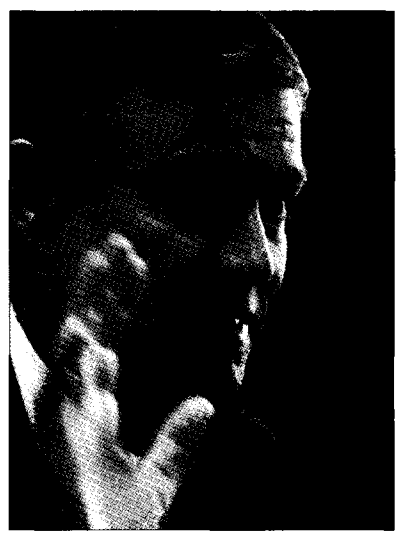
districts the rationale to declare homeschooled kids truants. The case needs to be overturned, but two significant things happened in the ensuing weeks.

First, although the California Teachers Association celebrated the ruling, prominent Republican and Democratic politicians rebuked it. Gov. Arnold Schwarzenegger vowed to push for a legislative fix, but he seems unclear on what course his administration is going to take. More important, the superintendent of public instruction, Jack O'Connell, declared that homeschooling is legal and that his department would respect the choices made by homeschooling parents.

Second, in the wake of such political and public outrage, the court of appeal vacated the ruling and said it would rehear the case. It will take months to get a new ruling, but homeschool families are safe for now, and it's likely that any new ruling will be tailored in a narrower manner. Homeschoolers still have reason for worry, though, so it's worth looking closely at how such a basic freedom could come under a sustained government assault.



Jack O'Connell, California Superintendent of Public Instruction
Photo by Cyndy Sullivan, *North County* (Calif.) *Times*

The good news is that the homeschooling landscape has changed significantly in California in the past five years. In a February 2003 *Freeman* article, I described "California's War on Homeschoolers" under then-Superintendent Delaine Eastin. A teachers' union ideologue (who lacked a teaching credential herself!), Eastin believed homeschooling to be illegal and was dedicated to stamping it out. She argued that parents who homeschooled needed a state teaching credential, even though at the time about 13 percent of public-school teachers in California lacked one.

The problem: California law then, as now, is unclear on the issue of homeschooling. The state has compulsory-education laws that require government schooling for minor children unless they attend private schools or are tutored by someone with a teaching certificate or meet some other narrow exceptions. Foes of homeschooling argue that homeschooled kids don't meet any of those exceptions. But homeschool defenders point to another section of the education code: "Children who are being instructed in a private full-time day school by persons capable of teaching shall be exempted" from the compulsory-education law.

Legislation and Unions

In an ideal world (or some place more rational than the California legislature), some sort of legislative clarification would be welcome, but homeschooling families and their defenders have been correctly frightened by such a direct approach. They understand that the teachers' unions, which have much power in both houses of the Democratic-dominated legislature, could easily steer such a "fix" into a direct banishment of homeschooling, which could leave families far worse off than they are now.

So homeschoolers and most school districts—which ultimately decide whether to pursue cases against truants—embraced a sort of "don't ask, don't tell" work-around. Parents registered their homeschools as private schools or enrolled in a private or charter school, then taught their kids in a home-study program. Those who chose to call themselves private schools filled out a private-school affidavit at their local county department of education. The occasional department challenged this, but most did not.

But in 2002 the state Department of Education adopted a change in how parents were required to file those affidavits. Instead of filing with their county education departments, parents were told to file the affidavits directly with the state's department online. It sounded simpler, but homeschoolers got nervous, given the department's position on homeschooling. To make matters worse, Eastin sent a letter to the local departments explaining the state's policy regarding the new private-school filing procedures:

"As generally understood, the term homeschooling describes a situation in which non-credentialed parents . . . teach their own children, exclusively, at home, often using a correspondence course or other types of

courses. Defined in this way, homeschooling is not authorized in California, and children receiving homeschooling of this kind are in violation of the state's truancy laws."

Eastin was clear. The "not authorized in California" line is a giveaway. Yet she denied that she was using her post to outlaw homeschooling.

Fortunately, Eastin's term ended soon after this, and she left the state. Although he was noncommittal during his campaign for superintendent, former legislator Jack O'Connell quickly put the kibosh on Eastin's anti-homeschool efforts after he was elected. He said he believed in homeschooling as a choice in education, and homeschoolers have operated in peace until the court decision in February.

The *Rachel L.* case should send shivers down any freedom-lover's spine. Three judges—two Republican appointees and one Democratic appointee—not only denied that there is any right to homeschool in California, but described education and the role of parents in starkly big-government terms. The case also gives disturbing insight into the state of parental rights in America today.

In giving the case background, the judges explained that the family's eldest child reported physical and emotional mistreatment by the father: "The Los Angeles County Department of Children and Family Services investigated the situation and discovered, among other things, that all eight of the children in the family had been homeschooled by the mother rather than educated in a public or private school."

In a footnote the court explained that one of the explanations the parents offered for not sending their kids to school was that "educating children outside the

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home exposes them to 'snitches.'" The court seems to be mocking the parents here, but Leslie Heimov, executive director of the organization that represented the family's two children in the case, told the *San Francisco Chronicle* that "her organization's chief concern was not the quality of the children's education, but their 'being in a place daily where *they would be observed* by people who had a duty to ensure their ongoing safety'" (emphasis added). So the winning party in the case argued directly that education per se wasn't at issue, only the ability of outsiders to monitor what was going on inside this particular family's home.

The State's View of Education

The court then quoted the California Constitution, which states: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Based on that sentence, the court echoed this point from an earlier case: "In obedience to the constitutional mandate to bring about a general diffusion of knowledge and intelligence, the Legislature, over the years, enacted a series of laws. A primary purpose of the educational system is to train school children in good citizenship, patriotism and loyalty to the state and the nation as a means of protecting the public welfare."

By striking down homeschooling through a private-school program, the court attacked one of the main ways parents homeschool in this state.

Read that again for full effect: A primary purpose of education is train children to be loyal to the state! This is ironic, because when libertarian critics of public education argue that the main goal of public education is not to teach, but to promote the government or to propagandize, we are mocked as extremists. Yet the court's own opinion supports this view.

Here's the court explaining why private schools are acceptable, but homeschools are not, based on what is known as the *Turner* case (1953): "The court observed that whereas it is unreasonably difficult and expensive for a state to supervise parents who instruct children in their homes, supervising teachers in organized private schools is less difficult and expensive."

The sole focus of the court was the prerogative of government. The above statement is most telling, in that it mentions nothing about the rights of the people and is committed to approving a scenario that is most convenient for the government. Have things really gotten this bad?

But as bad as this case has been, some homeschooling advocates told the public not to worry. They argued that the appeals court's decision here was narrow and only dealt with one family that happened to homeschool through a home-study arrangement with a religious school. One blogger, called Ace of Spades, argued, "If only the parents had attempted to homeschool their kids in one of the statutorily prescribed methods, they would have prevailed." It's just one opinion, of course, but the blog post was e-mailed widely—even by homeschool supporters who wanted to reassure fellow homeschoolers that they had nothing to worry about. But falsely reassuring people is no better than unnecessarily scaring them. Most legal authorities on both sides of the issue, however, agreed that the ruling could spell trouble for the state's homeschoolers.

Those who echoed Ace of Spades' reasoning clearly misunderstand California's law regarding homeschooling. Parents could not simply follow "statutorily prescribed methods" for homeschooling because there are no clear statutorily prescribed methods. The law is unclear, which leaves parents dependent on the latest interpretations of state officials. The court ruling gives ammunition to districts that might want to take a negative view of homeschooling.

By striking down homeschooling through a private-school program, the court attacked one of the main ways parents homeschool in this state. Parents can enroll their kids in private or charter schools, the court argued, but their kids must actually go to those schools and not be schooled instead at home, unless the tutor or parent has a government teaching certificate (some-

thing few parents have or even would want). No wonder most homeschool families have been alarmed by the decision; it seems to undermine the way most of them operate within the current system.

The Scope of the Decision

"The scope of this decision by the appellate court is breathtaking," said Brad Dacus, president of the Pacific Justice Institute (PJI) in Sacramento, which defends homeschool families. "It not only attacks traditional homeschooling, but also calls into question homeschooling through charter schools and teaching children at home via independent study through public and private schools."

Fortunately, homeschoolers got agitated at the decision and the state's political establishment reacted appropriately. Right after the decision was publicized, I called O'Connell's office and his spokeswoman emphasized that the superintendent supports homeschooling as an educational choice.

The superintendent issued a statement: "I have reviewed this case, and I want to assure parents that chose to homeschool that California Department of Education policy will not change in any way as a result of this ruling. Parents still have the right to homeschool in our state. . . . As the head of California's public school system, I hope that every parent would want to send their children to public school. However, traditional public schools may not be the best fit for every student. . . . [S]ome parents choose to send their children to private schools or to homeschool, and I respect that right. I admire the dedication of parents who commit to oversee their children's education through homeschooling."

That statement was exactly what was needed. It reinforced that the state still considers homeschooling legal, and it was respectful toward the "right" parents have to homeschool. This was great news, especially coming from a prominent Democrat who is running for governor.

Furthermore, the current Republican governor said, "Every California child deserves a quality education and parents should have the right to decide what's best for their children. Parents should not be penalized for acting in the best interests of their children's education. This outrageous ruling must be overturned by the courts and if the courts don't protect parents' rights then, as elected officials, we will."

What is more fundamental to the idea of a free society than the ability to teach one's children at home without the prying eyes and approval of the state?

Then came word that the court would rehear the case.

The outcry against the case has been broad, and news of the court's reconsideration was well-received. My sense is homeschooling has come into its own in the last few years—so much so that it's harder to attack now than it was in 2002, when Eastin was trying to treat homeschoolers as truants. Eternal vigilance remains the key to preserving fundamental liberties. And what is more fundamental to the idea of a free society than the ability to teach one's children at home without the prying eyes and approval of the state?

Homeschoolers will be watching the rehearing closely.

Compromise, Principles, and Politics

BY GARY M. GALLES

"Public servants" laud compromise as a principled and sensible political course. They call it statesmanship or bipartisanship, and portray it as the path to unity, while roundly criticizing those unwilling to compromise in the desired way. This appeal often strikes a chord with the public. (Leave aside that compromise is usually sought by legislative near-majorities that intend for others to move toward them, rather than the other way around.)

Political reality reveals that the unity argument is a sham. The diametrically opposed things people want government to do guarantees disunity. America cannot be unified about government powers that some consider essential but others reject as unjustifiable. Unity in defense of freedom cannot be achieved when some intend to violate others' rights to get what they want. How can those who wish to pick pockets and those who are to have their pockets picked unite? As long as government is involved in income distribution, real unity is beyond reach. There is only the question of whose preferences will dominate.

Unity in defense of freedom cannot be achieved when some intend to violate others' rights to get what they want. How can those who wish to pick pockets and those who are to have their pockets picked unite?

Further, politicians' self-congratulatory compromise rhetoric glosses over important distinctions. In particular, there are huge differences between market compromises—flexible, voluntary compromises by all whose rights are affected—and political compromises—typically arrangements in which just over half the participants compromise on an agreement to coerce others.

There are few better illustrations of the distinction between market compromises and political compromises than the legislation governments impose on economic arrangements.

The free market (as opposed to the current mixed economy) is nothing but a name for voluntary, peaceful compromise. For example, in a market negotiation, I may offer you $5 for an item and you may ask for $10. The resulting price we agree on will typically be something in between—a compromise, but unlike political compromises, one without coercion. It is practical. It disturbs no one's harmony or peace. And as any of innumerable circumstances change, that price can change in response, again without coercion. No less important, everyone whose rights are involved, but no one else, must come to mutual agreement.

Market Compromise

Unfortunately, the nature of market compromise can be easily misunderstood, especially when misunderstanding is continually promoted by demagogues. During negotiations, when a higher price benefits the seller more and a buyer less, and a lower price benefits the buyer more and the seller less, it is easy to lose sight of the mutual benefit that drove buyer and seller together in the first place. The apparent win-lose imagery of the

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negotiation process can obscure the win-win reality of agreed exchanges.

As a result, whenever the market price rises against buyers' wishes (especially when they have become used to a price, so that they feel they have a right to it and anything higher is "unfair"), they may believe they are being ripped off rather than part of a compromise. Sellers can feel the same way when the market price falls. That can lead them to ignore the fact that they still gain, because their focus is instead drawn to their portion of the joint gains. They can overlook the unique ability of markets to maintain voluntary arrangements even as myriad conditions change. It's a short step to demanding that government do something, such as impose maximum or minimum prices.

Because market prices are compromises between those who would like to pay less and those who would like to sell for more, price controls and other economic restrictions are bans on such compromises that people would otherwise willingly make with each other. In restricting such compromises, governments reduce people's options and gains from trade. That harm is not mitigated at all by calling a price control a political compromise.

Market interventions such as price controls remind us that the essence of government is coercion, because it alone can force supposed compromises on those who didn't agree to them. But coercion—"Do it my way, or else"—is the opposite of compromise; it is tyranny, regardless of how many parties compromised before proceeding to plunder others.

Coercion—"Do it my way, or else"—is the opposite of compromise; it is tyranny, regardless of how many parties compromised before proceeding to plunder others.

The Necessity of Property

Property rights, which form the basis for market exchange, are no better understood by those who shill for political compromise. Property rights reflect an absolutely crucial compromise, yet allow us to avoid what can be an extremely costly process of reaching compromise when it is unnecessary.

Respect for property rights arises because I could gain by taking your property, forcing you to invest money and effort to defend it, and vice versa. If we could honor one another's property rights, the risk from predation would be lowered, benefiting both of us and setting the stage for further mutually beneficial voluntary market arrangements.

This view was clearly expressed by John Locke, who wrote that "the preservation of property [is] the reason for which men enter into society." That central purpose of government was widely echoed by America's founders. For example, John Adams wrote that "The moment the idea is admitted into society, that property is not just as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." In the same vein, James Madison, the "father of the Constitution," wrote that "Government is instituted to protect property. . . . This being the end of government, that alone is a *just* government which *impartially* secures to every man whatever is his own."

Importantly, the establishment and defense of property rights is not a compromise over what people will do, but over what they will *not* do. They are negative rights to be free from others' interference, not positive rights to be guaranteed things without the willing cooperation of others. Unlike positive rights, which must treat individuals differently, negative rights that no one is allowed to violate reflect the rule of law. They are the only type of rights that can advance the general welfare in the commonplace sense—making all of us better off than before. The compromise leading to respect of negative property rights stands in sharp contrast with "compromise" legislation that gives some individuals new positive rights by violating others' negative rights against intrusion.

Well-established property rights also allow us to avoid an extremely costly process of reaching compromises when they are unnecessary. Clear property rights establish that the owner has the power to dispose of an

asset. All the other people who would like to control or influence that disposition (so-called stakeholders) can do so only by persuasion. Owners, of course, have a right to remain unpersuaded. Vast social benefits result from their being free to avoid having to compromise with everyone who would free-ride on their rights.

There is also a huge gap between the marginal compromises on markets and compromises that involve moral principles. As FEE founder Leonard Read put it, "The compromising attitude is exalted by many . . . [but] it has no application whatever in a moral sense. . . . Principle does not lend itself to bending or to compromising. . . . I must either abide by it, or in all fairness, I must on this point regard myself as an inconsistent, unprincipled person."

Offering a little more money or accepting a little less to consummate a transaction is compromise, but it does not violate any moral principles. But unlike prices, which are designed for marginal adjustments to maintain mutually beneficial arrangements, essential moral principles tend to be all or nothing; compromising means abandonment. "Thou shalt not steal" is violated by small thefts as well as large. In both cases, you take other people's property not only without their consent, but over their objections. So a compromise between someone who doesn't want to steal and someone who wants to steal a lot—stealing a smaller amount—abandons the principle in the process of compromising.

The political process has so compromised the participants that only the explicit "Thou shalt nots" in the Bill of Rights have even a fighting chance of protecting citizens.

Ideas Born of Surrendered Principles

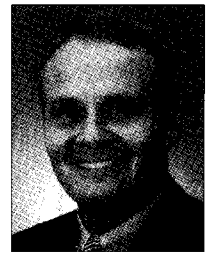
Unfortunately, as Read concluded, "[S]urrender of principle appears to be the distinguishing mark of our time . . . [and] ideas born of surrendered principles are the most dangerous vandals know to man." This is illustrated by the eroded status of Americans' inalienable rights that were laid out in the Declaration of Independence. Inalienable rights cannot be compromised without being lost, but they have been dramatically compromised. You see it in the massive overstepping of the limited role the Constitution assigned to the federal government. The political process has so compromised the participants that only the explicit "Thou shalt nots" in the Bill of Rights have even a fighting chance of protecting citizens from the predatory tendencies of government.

Unlike market compromises, political compromises do not include all parties whose rights are affected. If Rep. Curly wants to take X dollars from Moe to benefit his constituents and Rep. Larry wants to take Y dollars from Moe to benefit his constituents, doing both can be enacted on a 2-to-1 vote. Yet that is a compromise only between Curly and Larry to help them at Moe's expense. If not done through government, that would be considered a criminal conspiracy. Calling it a compromise cannot change the fact that Curly and Larry only compromised over the extent to which they would support each other's violation of Moe's right not to be robbed. George Washington rejected such compromises long ago when he asserted that Parliament "hath no more Right to put their hands into my Pocket, without my consent, than I have to put my hand into yours, for money."

The day-to-day "work" of legislators and other politicians—finding ways to make theft work better by mutual agreement among the thieves—further undermines moral and ethical principles. If Curly wants to take X dollars from Moe, but Larry believes it is wrong to harm Moe, Larry would oppose doing so. But instead, in search of a majority, Curly looks for a way to compromise with Larry by paying him off with some of the booty (as with earmarks and other logrolling agreements), raising the price of Larry's adherence to principle in hopes that he will become willing to compromise himself. And if Curly holds a powerful position (say, as a committee chairman or a member of an appropriations committee), he can keep raising the bribe offers until he attracts enough of the most cheaply corruptible legislators to pass the legislation. Moe, having been abused, then translates that into an excuse to participate in similar rip-offs of others, when the opportunity arises. All end up corrupted.

Charles Sumner once observed that "It is by compromise that human rights have been abandoned" and that "repose can only be found in everlasting principles." Unfortunately, despite a great deal of lip service to the principles on which America was founded, we have compromised them to a large degree. Not only are the consequences for society adverse, but they erode ethical behavior in a way that is a creeping catastrophe. Leonard Read said that those "who believe that they should gratify their personal charitable instincts not with their own goods, but with goods extorted from others by the police force, who fail to see how thieving damages integrity, and who accept the practice of political plunder as right and honorable—to them 'Thou shalt not steal' must appear wrong in principle. . . . [W]hen vast numbers of people surrender living by what they believe to be right, it follows that they must then live by what they believe to be wrong. No more destructive tendency can be imagined."

Politicians who laud compromise are right in one sense. It is part of living successfully in society. However, they are also very wrong. The kinds of compromise that advance our well-being by improving social coordination are those that respect our property rights and the markets built on them. Unfortunately, those are not the compromises politicians have in mind. Instead, they wish to compromise exactly the rights from which we all benefit while posing as social benefactors. There is nothing noble about compromising people's well-being and integrity.

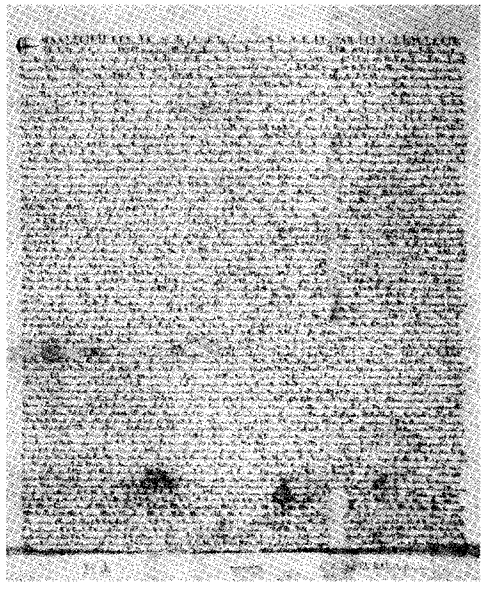


History for Sale: Why Not?

BY LAWRENCE W. REED

"Sold!" cried the Sotheby's auctioneer on the night of December 18, 2007, as one of history's oldest political documents changed hands. It was Magna Carta, or rather a copy of it that dated to 1297. The buyer was not a government but an individual, a Washington lawyer named David Rubenstein. He paid $21.3 million for it and promptly announced he wanted his newly acquired private property to stay on public view at the National Archives in the nation's capital.

A privately owned Magna Carta? Aren't such important things supposed to be public property? A couple of "educated" American students visiting Britain in mid-December certainly thought so. For a story that aired on CNN about the auction at Sotheby's, they were interviewed at the British Library in London while gazing on another of the great charter's copies on display there.



Magna Carta
commons.wikimedia.org

"I couldn't imagine that there is still a privately owned copy of the Magna Carta floating around the world. It seems really incredible that any one person should actually have that in their possession," one of the young scholars pronounced. "Personally, I hope the government or some charitable foundation gets a hold of it so that everybody can enjoy seeing it," chimed the other. Both assumed that private property and public benefit, at least with regard to historical preservation, were incompatible.

The Magna Carta copy that Rubenstein bought will not be spirited into his closet because it is the new owner's wish that it be preserved for public display. While some might say humanity lucked out in this particular instance, it really is just the latest in a rich heritage of private care of documents, manuscripts, and objects of historical significance. Indeed, the very copy Rubenstein bought was previously owned by businessman Ross Perot's foundation, which in turn had acquired it in 1984 from yet another private owner, the Brudenell family of Britain. Given that record, those students should have sung hosannas to private efforts like that of Rubenstein's.

The content of books from the ancient world appears to have been brought into the digital age largely through private efforts. Through various eras, libraries, scribes, and printers were supported to a great extent through private patronage.

Ecclesiastical institutions were critical in preserving texts that are important to the Western tradition, points out Dr. Ryan Olson, director of education policy at the Mackinac Center for Public Policy and holder of a doctorate in the classics from Oxford University. For example, Olson says, in the sixth century Cassiodorus finished his career as a government official in Ravenna and organized monastic efforts to copy Christian and classical texts. Some work of his monks seems to have ended up in Rome, where it could be more influential. Though the history of transmission can be difficult to trace, scholars have argued that at least one classical work, by Cato, seems to have survived to this day because of Cassiodorus's efforts. "It is our

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intention," Cassiodorus wrote shortly before his death, "to weave into one fabric and assign to proper usage whatever the ancients have handed down to modern custom."

Borrowing From Cicero

I also learned from Olson that the Roman politician, lawyer, and author Cicero revealed in his letters a network of extensive personal libraries that preserved important books that could be read by members of the public and even borrowed and sent with messengers. Books could be consulted or copied for one's own library and returned to the owner. If one wanted to look at several books, a personal visit to a private library could be arranged.

The Bodleian Library at Oxford, where Olson once studied, was founded by Sir Thomas Bodley and dedicated in 1602. King James I, on entering the library in August 1605, said its founder should be dubbed "Sir Thomas Godly." Bodley had spent his considerable personal wealth acquiring books and early manuscripts that have formed the core of one of the most extensive collections in the world. That collection includes among its innumerable treasures a first edition of *Don Quixote*, a manuscript of Confucius acquired at a time when few could read its Chinese characters, a fourteenth-century copy of Dante's *Divine Comedy*, as well as first editions of the works of John Milton, who called the library a "most sacred centre," a "glorious treasure-house" of "the best Memorials of Man."

Additional examples of historical preservation through private means are, it turns out, legion. Pittsburgh banker Andrew Mellon acquired a massive assortment of prized artwork. He donated his entire collection (plus $10 million for construction) to start the National Gallery of Art in Washington, D.C. Tens of thousands of historic homes and buildings all across America are owned and maintained privately, many of them refurbished and open for public viewing. Even historic lighthouses, once largely public property, are being preserved today by private owners after decades of neglect by government authorities. On and on it goes.

The more one looks into this, the more apparent it is that private efforts have not just been a sideshow in historical preservation. They have been the centerpiece. And why should it be otherwise? Private owners invest their own resources, acquiring an instant and personal interest in the "capital" value of the historical asset. Being a government employee does not make one more interested in, or better equipped to care for, the things we regard as historically valuable than those many private citizens who put their own resources on the line.

> Examples of historical preservation through private means are legion.

By the way, have you ever noticed that the greatest book-burners in history have been governments, not private individuals?

So what's the problem with a copy of Magna Carta being purchased by a private citizen? Nothing at all. To suggest otherwise is simply to repeat an uninformed and antiquated prejudice. In a civil society of free people, that prejudice should be rare enough to be a museum piece.

How Land-Use Planning Benefits Big Business Over Small

BY BRUCE L. BENSON

It is widely recognized that central-government attempts to completely plan economies (that is, totally eliminate private property rights) are destined to fail. But even lower levels of government can have debilitating impacts on an economy by undermining private property rights through planning and regulation.

Indeed, as urban-policy analyst Sam Staley explains, the implications of the "socialist calculation debate" between Austrian economists Ludwig von Mises and F. A. Hayek and socialists Oskar Lange and Abba Lerner also apply to state and local development planning and land-use regulation. The planners' knowledge deficiencies, however, are not the only reason that planning is destined to fail. Planning and regulation are inevitably destabilizing because the government's rules continuously change in the face of a spiraling process of competition to influence the allocation of property "rights." Consider an example.

Oregon established itself as the leader in statewide land-use planning.
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The Oregon legislature created a new state agency in 1973, the Department of Land Conservation and Development, headed by the Land Conservation and Development Commission (LCDC). This department was vested with the power to establish statewide land-use policy and established 19 goals over a three-year period. However, H. Jeffrey Leonard points out that three goals intended to limit the geographic scope of growth have dominated: establishment of urban-growth boundaries, preservation of farm lands, and preservation of forest lands. All local governments were ordered to develop comprehensive land-use plans, to be approved by the LCDC, that implemented the statewide policy goals.

With this legislation, Oregon established itself as the leader in statewide land-use planning, serving as a model for other states that have followed. Arthur Nelson and James Duncan contend that "Oregon's planning program is widely considered one of the most comprehensive and effective in the nation." Presumably, planners in other states aspire to be just as effective. So an examination of Oregon's record should provide a reasonably good prediction of what other states that have started down the planning path can expect. Just what has the effect been?

Edward Sullivan contends that land-use planning and regulations in Oregon resulted in "uniformity and relative predictability in land-use decision making." But in reality, as David Hunnicutt points out, "[D]efenders

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of Oregon's land-use planning system seem to forget that Senate Bill 100 (1973) [which set up a system of mandatory statewide planning], amended countless times over the years due to vagaries in the original language, has spawned endless litigation, and has resulted in the creation of two separate state agencies, costing taxpayers millions of dollars annually to staff and operate." Consequently, as Steven Giesler, Leslie Marshall Lewallen, and Timothy Sandefur explain, "Oregon's land-use regulation system had become a labyrinth of unreasonably restrictive regulations that made no allowances for the costs and burdens imposed on property owners."

Regulation Is Destabilizing

The primary reason for the destabilizing impact of planning is that regulation to implement the plans involves the assignment of property "rights" and enforcement of those assignments. Property rights dictate the distribution of both material and nonmaterial wealth. Therefore, whenever regulation alters the assignment of property rights, some individuals lose; wealth is in fact taken.

One of thousands of examples from Oregon involves a 40-acre parcel of land zoned for forest use in Hood River County. When the owners purchased the land in 1983 for $33,000, the applicable land-use regulations allowed construction of a single-family dwelling. Following the purchase, Hood River County adopted new regulations to bring its comprehensive plan into compliance with statewide goals. Construction of a dwelling on the property was now prohibited. The owners submitted applications for a number of permits and changes (land-use permit, condition-use permit, zoning and comprehensive-plan changes) to allow them to build the home they had planned. In support of their application the owners provided a report from a forestry expert estimating that the value of the 40 acres without the ability to build a home was $691. The county's forester countered that there was $10,000 worth of timber on the property. The owners filed suit against the county, challenging the regulation as a takings. The Oregon Supreme Court ruled for the county because the regulation did not result in loss of all economic benefits from using the property. In particular, the court noted that the ability to generate $10,000 in revenues from the timber on the land "certainly constitutes some substantial beneficial use." The implication is that if the regulation allows some beneficial use of the land, the owner has not been deprived of his property.

Facing that kind of loss, landowners have incentives to protect their assets through litigation, lobbying, regulatory avoidance efforts, and so on. As a result, the planning and regulatory process is tremendously costly, but not just in terms of government expenditures. Some of the most significant costs are the resources diverted into a never-ending competition to avoid and/or alter the plans and regulations, competition that plays out in markets, legislatures, elections, bureaucracies, and courts. Many of the most significant costs are not even measurable. For instance, as regulators, courts, legislators, and voters react to the pressure arising from the competitive process, rules change. The uncertainty that characterizes a constantly changing regulatory environment shortens time horizons, altering investment and resource-use decisions in ways that reduce the long-run productive potential of resources.

Landowners have incentives to protect their assets through litigation, lobbying, regulatory avoidance efforts, and so on.

Consider a few examples from Oregon's tumultuous regulatory history. The state's urban-growth boundaries were supposed to encompass enough land so that residential, industrial, commercial, and recreational needs could be met for 20 years, and the boundaries were to be flexible to accommodate changing conditions. Randal O'Toole explains, however, that once the urban service area boundaries were put in place, this "created a constituency for not moving them. People who lived near the boundary enjoyed scenic vistas and open space just a short distance away. Urbanites who lived on rural residential lands just outside the boundary enjoyed knowing that their neighbors would not be allowed to subdivide their land."

By the late 1980s urban boundaries were becoming binding, particularly in the western part of the Portland area (Beaverton, Tualatin, Hillsboro), and land prices within the boundary "started rising at double digit rates," according to O'Toole. One of Oregon's strongest interest groups, 1000 Friends of Oregon, represented the constituency demanding fixed boundaries. O'Toole writes, "[I]nspired by the need to protect the boundary, 1000 Friends conceived and developed an entirely new view of growth management. Instead of moving the boundary to accommodate growth, vacant lands and existing neighborhoods inside the boundary should be built and rebuilt to much higher densities."

In 1992 the regional government, Metro, was given substantial new powers to coordinate planning for the 24 cities and three counties in the Portland area, and within a few months, this government published a draft plan to implement the 1000 Friends urban-growth policies. Metro applied new minimum-density zoning ordinances to existing neighborhoods to prevent construction of single-family homes on lots zoned for higher density. (For instance, an owner of a lot zoned for up to, say, 24-units-per-acre apartments, is not allowed to build a single-family home, or even a duplex; instead, perhaps a minimum six-units-per-acre complex might be allowed.) While some single-family units continued to be allowed, they were restricted to very small lots. O'Toole gives an example of a development in Orenco, where single-family homes do not have backyards and each homeowner has only a ten-foot-wide side yard on one side of the house. (The ten-foot side yard on the other side belongs to the neighboring homeowner.)

As a result of the binding growth-management boundaries and regulatory limits on construction of new single-family units, Portland has turned from one of the nation's most affordable markets for single-family housing in 1989 to one of the least affordable since 1996. The cost of an acre of land for housing rose from $20,000 in 1990 to $200,000 in 2006. Clearly, those who own any land that is still available for development are reaping huge benefits. Similarly, anyone who owns a previously constructed single-family home, particularly on a reasonably large lot (and especially if it is near the urban-growth boundary) has seen a dramatic increase in wealth. On the other hand, O'Toole notes, the National Association of Homebuilders reported that while more than two-thirds of Portland households could afford to buy a median priced house in 1989, only about 30 percent could afford such a home in 2006. Metro planners' "response to the lack of affordable housing has been the implementation of more regulation" by mandating that developers provide some "affordable housing" units in each new development.

Individuals who want to start or expand businesses generally will "need to request variances, conditional use permits, and comprehensive plan amendments."

Effects of Planning on Small Business

Changes in land values due to restrictions are the most obvious examples of transfers arising from Oregon's land-use planning process, but there are many others. For instance, James Huffman and Elizabeth Howard explain that land-use regulation has significant negative effects on small and emerging businesses, thereby creating competitive advantages for, and even entry barriers to protect, large established businesses. After all, given the extensive zoning that exists in Oregon, individuals who want to start or expand businesses generally will "need to request variances, conditional use permits, and comprehensive plan amendments to develop such land. Any one of these application processes will cost the applicant significant preparation and legal fees with no guarantee of ultimate success." In an effort to reduce the probability of denial of their applications, individuals generally must hire lawyers and various kinds of experts. Huffman and Howard write:

> While the costs can vary significantly from one case to another, most applicants will spend $5,000 to $20,000 to gain approval for a basic conditional use

permit [permission to engage in a special use in a particular zone]. This estimate does not include fees which might be incurred for transportation engineers who add $5,000 to $10,000 or for wetland consultants or fish biologists who add around $5,000 each to the small business owner's application costs. The cost estimate also does not include the expense of educating neighbors or the local government's staff who oppose the small business owner's application. Small business owners can expect to pay at least another $10,000 per objection. As these figures demonstrate, costs incurred to obtain permit approvals generally far exceed the statutorily-imposed processing fee. However, the most difficult issue concerning application fees is that the considerable discretion of land use officials and the difficulty of anticipating challenges from third parties make the ultimate cost of the application hard to anticipate with any degree of accuracy. The uncertain costs [sic] of permit applications causes them to be a significant budgetary challenge in the development of a business plan.

Furthermore, even if the applications are successful, anyone who feels aggrieved by a local government's land-use decision can appeal it to the Land Use Board of Appeals (LUBA), and then to the Oregon Court of Appeals. Opposition "almost always occurs," Huffman and Howard write, either due to objections from local planning officials or the "inevitable not-in-my-backyard objections of neighborhoods."

The legislature reduced the LCDC's duties and powers in 1979 by creating LUBA, a three-member board appointed by the governor with power to hear virtually all individual and county government appeals of local land-use decisions. Michael Blumm and Erik Grafe contend that the legislature hoped to "encourage consistent adjudication." If precedents are being created so that local governments and individuals are increasingly able to predict how disputes are going to be resolved, however, it seems reasonable to expect that LUBA's caseload would decline over time. Yet, Huffman and Howard observe that LUBA reviews between 150 and 200 cases each year.

In addition to the costs of simply getting permission to locate a new business or expand an existing business, state and local governments impose exactions on property owners, such as requirements that businesses dedicate property to some public use in exchange for permission to develop their business activities. Indeed, as Gieseler and coauthors observe, such exactions in exchange for permits actually allows local governments to avoid state law by using land-use regulation to obtain public use of private property without paying for it, rather than by "purchase, agreement, or legislative authorization of eminent domain," as the law requires. Exactions also can involve monetary payments in lieu of property dedications.

State and local governments impose exactions on property owners, such as requirements that businesses dedicate property to some public use in exchange for permission to develop their business activities.

All businesses in Oregon, large or small, face similar costs of entry or expansion, of course (and therefore, economic growth is clearly reduced), but these costs still have distributional impacts. Huffman and Howard write, a "large developer or other business has the benefit of experience as well as the economies inherent in recurrent regulatory compliance. This is not to say that the costs of regulation are not significant for large businesses, only that they are likely to be even more significant for small businesses." Furthermore, most of the compliance costs occur up front, before a new location or expansion is created. For large businesses, these costs are smaller portions of the total cost of the enterprise. Thus "large companies are often advocates for regulation, presumably because of both their competitive advantage [under regulation] relative to small business and because of public relations benefits associated with a perception of corporate responsibility."

The costs limit entry by or expansion of small businesses, and therefore reduce the level of competition that existing businesses, large or small, expect to face.

Not surprisingly, if individuals subject to the negative consequences of planning and regulation, such as small businesses or individuals who want to build or live in single-family homes, can find a way to avoid those consequences, they have strong incentives to do so. Therefore, a political backlash against the comprehensive planning process materialized very early, and virtually every legislative session has amended the land-use planning statute. The legislature was not willing to make the major changes that opposition groups demanded, so they also focused on litigation and ballot referenda. Three different ballot initiatives designed to roll back land-use planning failed, however.

Even as these statewide efforts were failing, ad hoc organizations were springing up in many counties to oppose local planning efforts. Local officials in a number of counties who supported land-use planning faced recall campaigns, and a substantial number lost their jobs. These ad hoc groups were successful in bringing the planning process to a standstill in some counties for several months. The situation was ripe for a well-organized statewide interest group to take up the cause, and Oregonians in Action filled this niche.

The situation was ripe for a well-organized statewide interest group to take up the cause, and Oregonians in Action filled this niche.

Oregonians in Action was a primary actor in getting two reform measures on the 1998 ballot. One, which passed with 80 percent of the vote, required both state and local governments to mail notices to landowners describing any proposed changes in land-use regulations and laws. The second, a proposed amendment to the state constitution to allow citizens to petition to the state legislature for review of administrative rules, failed with 48 percent. These ballot measures were quickly followed in 2000 with an initiative to amend the takings clause in the Oregon Constitution to require state and local governments to compensate landowners for reduced property values arising from any law or regulation that restricts the owners' use of their land. Opponents of the amendment, such as 1000 Friends of Oregon, estimated that passage would cost the state $5.4 billion a year. If this were true, of course, it would suggest that annual land-use planning was imposing huge losses on Oregon property owners. Over 54 percent of Oregon's voters cast ballots in favor of this amendment, with majorities for approval in 30 of the state's 36 counties.

Compensation is specified as the entire difference between the market value of the land before and after the regulation is applied, including the "net cost to the landowner of an affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archeological or cultural resources, or low income housing." However, before the amendment could be implemented, opposition groups challenged its constitutionality. The Marion County Circuit Court declared the amendment unconstitutional in February 2001 in a summary judgment, concluding that it violated two clauses of the Oregon Constitution. The decision was appealed, but the court of appeals upheld the decision, and the State Supreme Court agreed.

Oregonians in Action did not give up after the court loss. The amendment was modified and reintroduced as an amendment to state statutes rather than the state Constitution. The result, Ballot Measure 37, went before Oregon voters in 2004. Supporters raised about $1.2 million, primarily through a political action committee, Family Farm Preservation PAC, as well as through Oregonians in Action. Opponents raised much more money, roughly $2.7 million, primarily through the No on 37 Take a Closer Look Committee. But even so, 61 percent of the voters approved the measure, with majorities in 35 of the 36 counties. Not surprisingly, supporters of land-use planning moved quickly against the measure, but their initial success was reversed by the state Supreme Court in 2006.

Lobbying and Litigation

While litigation was in progress, both sides were lobbying the state legislature. A large number of bills introduced in the 2005 legislature would have altered various aspects and implications of Measure 37. Most never left their committees, however, and none was enacted, perhaps because legislators hoped that the court would overturn the measure. The legislature did create a task force to evaluate the state's land-use planning system as a whole. The ten-member force was ordered to provide an initial report to the 2007 legislature and a final report in 2009.

Before the 2007 legislature could take any action, roughly 7,560 Measure 37 claims were filed in Oregon (as of April 2007). Estimates of the monetary value of these claims range from $10.4 billion to over $19 billion, Blumm and Grafe report, and more than 750,000 acres of land were estimated to have been involved. The 2007 legislature faced considerable pressure to act on land-use regulation and/or amend Measure 37. The first action taken was to give government entities more time to adjudicate claims. Measure 37 had allowed 180 days, but the legislature extended this to 540 days for any claims filed after November 1, 2006. More important, the legislature also drafted a 21-page revision to Measure 37 to be referred to the voters in November 2007 as a ballot measure—Measure 49. The proposal to put the measure on the ballot passed both houses.

Both sides once again accumulated large amounts of money for the campaign to follow. Three PACs were established to oppose the measure: Fix Measure 49, Oregonians in Action PAC, and Stop Taking Our Property. Sarah Wetherson reports that almost $2.26 million was raised to campaign against the measure. Supporters raised about twice as much money, however, accumulating over $4.69 million. This time the pro-planning side won. Measure 49 was affirmed by 61 percent of the voters.

This massive ballot measure substantially altered several aspects of Measure 37. It retained the ability of landowners to make Measure 37 claims against land-use regulations that "restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property." But it withdrew the ability to make such claims for regulations limiting commercial or industrial uses of land. It also imposed a variety of limits on residential use claims, essentially preventing waivers that would allow large residential developments.

Measure 49 brought a number of other important changes to Oregon land-use regulation, but as with previous legislation and ballot measures, it is likely that the new arrangements will not last. Given the tumultuous and ever-changing history of Oregon planning and land-use regulation, there surely is no reason to expect that interest groups like 1000 Friends of Oregon or Oregonians In Action will be satisfied with every aspect of the system produced by Measure 49. Court challenges are bound to arise. Lobbyists will be hard at work in future legislative sessions, attempting to revise the law in their favor, and ballot initiatives will provide a focus for more expensive political campaigns. Uncertainty about what property rights really are will persist as long as the planning process' entrenched bureaucracies and easily manipulated politicians (and voters) facing interest-group pressures have the power to make and impose decisions on how property can be used.

Lobbyists will be hard at work in future legislative sessions, attempting to revise the law in their favor, and ballot initiatives will provide a focus for more expensive political campaigns.

Oregon is years ahead of many states in the development of statewide planning and in the evolution of organized opposition to the system. Are other states destined for similar instability and uncertainty? Judging from what has happened in other states that have pursued statewide planning, it seems likely. Arizona, California, Washington, and Idaho voters considered 2006 ballot measures similar to Measure 37. Arizona's passed with almost 65 percent of the vote, while the other

three failed, although California's was close. (Gieseler and his coauthors note that legislation similar to Measure 37 also was under consideration in Montana, Texas, Wisconsin, and Washington.) Note that the fact that some of the ballot measures failed clearly does not mean that the issue is settled, as illustrated by the repeated efforts to restrict state regulatory takings in Oregon, many of which failed before Measures 7 and 37 passed.

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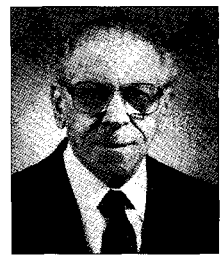

Anti-Coercion Is Not Anti-Psychiatry

BY THOMAS SZASZ

The term "anti-psychiatry" was created in 1967 by the South African psychiatrist David Cooper (1931–1986) and the Scottish psychiatrist Ronald David Laing (1927–1989). Instead of defining the term, they identified it as follows: "We have had many pipe-dreams about the ideal psychiatric, or rather anti-psychiatric, community." The "we" were Cooper, Laing, Joseph Berke, and Leon Redler, the latter two American psychiatrists and pupils of Laing.

"A key understanding of 'anti-psychiatry,' " explains British existential therapist Digby Tantam, "is that mental illness is a myth (Szasz 1972)." Alas, this is not true. While many anti-psychiatrists pay lip service to rejecting the "medical model" of psychiatry, they continue to conceptualize certain human problems and efforts to resolve them in medical terms and, even more importantly, do not categorically reject "therapeutic" coercion and excuse-making.

Psychiatrists engage in many phony practices but none phonier than the insanity defense. The anti-psychiatrists have not addressed this subject in their writings, but Laing gave "expert psychiatric testimony" in the famous case of John Thomson Stonehouse (1925–1988). Stonehouse, a British politician and Labour minister, went into business, lost money, and tried to bail himself out by engaging in fraud. When the authorities were about to arrest him, he staged his own suicide. On November 20, 1974, Stonehouse left a pile of clothes on a Miami beach and disappeared. Presumed dead, he was en route to Australia, hoping to set up a new life with his mistress. Discovered by chance in Melbourne, he was deported to the United Kingdom and charged with 21 counts of fraud, theft, forgery, conspiracy to defraud, and causing a false police investigation.

Psychiatrists engage in many phony practices but none phonier than the insanity defense.

Stonehouse pleaded not guilty by reason of insanity; he was convicted and sentenced to seven years in prison. To support his insanity defense, he secured the services of five psychiatrists, R. D. Laing among them, to testify in court under oath that he was insane when he committed his criminal acts. In his book, *My Trial*, Stonehouse writes: "Dr. Ronald Laing . . . gave evidence on my mental condition. He confirmed . . . that in his report he had called it psychotic and the splitting of the personality into multiple pieces. He went on: 'The conflict is dealt with by this splitting instead of dealing with it openly. . . . It was partial reactive psychosis.' "

Laing did not know Stonehouse prior to his trial, hence could have had no knowledge of his "mental condition" during the commission of his crimes. Laing's "diagnosis" was classic psychiatric gobbledygook, precisely the kind of charlatanry he pretended to oppose. Laing and Stonehouse were both liars, plain and simple.

Laing's fame was closely connected with his role as Emperor of Kingsley Hall, a "household" founded by him and by a group of his acolytes. It was promoted as a place to which a person—whom psychiatrists would diagnose as schizophrenic—could retreat, secure in the knowledge that he would be neither coerced nor drugged. Day-to-day life in Kingsley Hall was based on the fiction that all the "residents" are equal, no one is a patient and no one is staff. The American psychiatrist Morton Schatzman, who had chosen to live there for a

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year, emphasized that "No one who lives at Kingsley Hall sees those who perform work upon the external material world as 'staff,' and those who do not as 'patients.' " This claim—that psychiatrists and residents share power equally—is the paradigmatic lie of the anti-psychiatrists. It is a revised version of the paradigmatic lie of the psychiatrists—the claim that depriving patients of liberty is care, not coercion.

The American writer Clancy Sigal (born 1926) went to London to be Laing's patient. Soon the "therapy" ended and they became friends and LSD-using buddies. Sigal, one of the co-founders of Kingsley Hall, eventually became disenchanted with the Laingian commune, especially after he discovered that Laing and his cohorts preached nonviolence but practiced violence.

After returning to the United States, Sigal wrote a devastating exposé of Laing and his cult. *Zone of the Interior*, a roman à clef, was published in the United States in 1976. Using the threat of British libel laws, Laing prevented its publication in the United Kingdom. Only in 2005 did *Zone of the Interior* appear in a British edition. Sigal writes: "In September 1965, during the Jewish High Holidays, I had a 'schizophrenic breakdown' . . . or transformative moment of rebirth. It's all in your point of view. My 'breakdown' did not happen privately but acted out in front of twenty or thirty people on a Friday shabbat night at Kingsley Hall. . . . The notion behind Kingsley Hall was that psychosis is not an illness but a state of trance to be valued as a healing agent."

That psychiatrists and residents share power equally is the paradigmatic lie of the anti-psychiatrists.

In an interview after the publication of *Zone of the Interior* in Britain, Sigal described his *folie à deux* with Laing:

"We began exchanging roles, he the patient and I the therapist, and took LSD together. . . . Laing and I had sealed a devil's bargain. Although we set out to 'cure' schizophrenia, we became schizophrenic in our attitudes to ourselves and to the outside world. . . . [One] night, after I left Kingsley Hall, several of the doctors, who persuaded themselves that I was suicidal, piled into two cars, sped to my apartment, broke in, and jammed me with needles full of Largactil [Thorazine], a fast-acting sedative used by conventional doctors in mental wards. Led by Laing, they dragged me back to Kingsley Hall."

The Sigal saga ought to be the last nail in the coffin of the legend of Laing as a psychiatrist opposed to the practice of psychiatric coercion. Had Sigal's book been published in Britain in 1976, Laing would have been exposed and perhaps punished as a criminal (for assault and battery), Kingsley Hall might have been shut down (as an unlicensed mental hospital), and the legend of Laing the "savior of the schizophrenic" would have been cut short. Shakespeare was right: "The evil that men do lives after them."

The End of the Kingsley Hall Chaos

The chaos at Kingsley Hall endured for less than five years. The inhabitants left the place "derelict and uninhabitable." Unfortunately, the imbecilic term "anti-psychiatry" survived, even though, ironically, Cooper and Laing knew full well that it was mischievous and misleading.

As a result of the anti-psychiatrists' self-seeking sloganeering, psychiatrists can now do what no other members of a medical specialty can do: they can dismiss critics of any aspect of accepted psychiatric practice by labeling them "anti-psychiatrists." The obstetrician who eschews abortion on demand is not stigmatized as an "anti-obstetrician." The surgeon who eschews transsexual operations is not dismissed as an "anti-surgeon." But the psychiatrist who eschews coercion and excuse-making is called an "anti-psychiatrist." The upshot is that every physician—except the psychiatrist—is free to elect not to perform particular procedures that offend his moral principles or procedures he simply prefers not to perform.

Why is the psychiatrist de facto deprived of this freedom? Because in psychiatry the paradigmatic practice—coercing patients deemed to be dangerous to themselves or others, called "civil commitment"—is the medico-legal "standard of care," deviation from which invites malpractice litigation and exposes the "deviant" psychiatrist to forfeiture of his medical license.

The Politics of Freedom

BY DAVID BOAZ

Thomas Paine said that freedom had been hunted and harassed around the world and that only America offered it a home. Today, it seems to many Americans that freedom is on the run here, too. War and taxes, the nanny state and the Patriot Act, unsustainable entitlements—all threaten the liberty we enjoy as Americans.

But our situation is not as bleak as that might sound. I write most often about threats to freedom. But just as I chide the mainstream media for ignoring the good news about prosperity, technology, health, and life expectancy, I sometimes need to remind myself of the good news about freedom—which of course is what makes possible all that other good news.

War and taxes, the nanny state and the Patriot Act, unsustainable entitlements—all threaten the liberty we enjoy as Americans.

Our recent political history provides ample cause for depression. Forty years of Democratic control of Congress gave us what the Republicans in 1994 called "government that is too big, too intrusive, and too easy with the public's money." Dissatisfaction with that record and with the Clinton administration's efforts to make government yet bigger and more intrusive led to a historic Republican victory.

It didn't take long for the Republicans to get just as comfortable in power as the Democrats had become, especially after the election of George W. Bush gave the GOP control of the presidency and both houses of Congress. For decades the Republicans had promised voters that they would reduce the size and power of government if only they controlled the White House . . . if only they controlled the Senate . . . if only they controlled the entire government. Beginning in 2001, they did.

And what did complete Republican control of the federal government deliver? Federal spending up $1 trillion in six years. Exploding earmarks. The centralization of education. The biggest expansion of entitlements since Lyndon Johnson. A proposed constitutional amendment to take marriage law out of the hands of the states. Federal intrusion into private family matters. Spying, wiretapping, "sneak and peek" searches. A surge in executive power. And a seemingly endless war.

No wonder the voters quickly tired of that and returned Congress to the Democrats. As Dr. Phil would say, How's that working out for ya?

Within two months of the Democratic takeover, the *Washington Post* reported that Democrats were charging lobbyists—including some of Jack Abramoff's favorite clients—big bucks to meet Speaker Nancy Pelosi and the chairmen of the congressional committees that write tax laws, regulations, and spending bills. After six months, they'd held hearings and press conferences and all-night slumber parties.

But the war goes on. The spending goes on. Citing Citizens Against Government Waste's "Pig Book," the *Washington Times* reported, "Congress stuffed 11,610 projects into fiscal 2008 spending bills, the second-

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highest total ever and more than triple the number of projects in fiscal 2007." American citizens are still being held in jail without access to a lawyer. Democrats are proposing huge increases in federal spending—on top of Bush's trillion-dollar increase—and tax hikes to pay for them.

Which is presumably why a CBS News-New York Times poll in April showed that 81 percent of Americans said the country was on the wrong track. Only 22 percent approved of Congress's performance, according to a February Associated Press-Ipsos poll.

The politics of big government continues to flounder. Maybe it's time for the politics of freedom.

Assaults on freedom come from all sides these days. The right and the left, the military-industrial complex and the teachers unions, the environmentalists and the family-values crowd, they all have an agenda to impose on us through government. Political scientists offer a number of labels for the vast and powerful state that threatens our constitutional freedoms:

The Nanny State. On both left and right we're bombarded by people who just want the government to take care of us, as if we were children. This takes many forms—Bill Clinton was famous for "I feel your pain and I have a program for it." George W. Bush responded with "compassionate conservatism" and "We have a responsibility that when somebody hurts, government has got to move." Both conceptions offer a sweeping mandate for the federal government, one never envisioned by the Founders nor even by FDR. They combine Progressivism with Prozac.

On both left and right we're bombarded by people who just want the government to take care of us, as if we were children.

And once in a while politicians reveal the patronizing attitude toward the voters that underlies these promises. Vice President Al Gore told an audience, "The federal government should never be the baby sitter, the parents," but should be "more like grandparents in the sense that grandparents perform a nurturing role and are aware of what parenting was like but no longer exercise that kind of authority."

Bush's one-time chief of staff Andy Card disagreed: The government should be the parents, he said; "this president sees America as we think about a 10-year-old child," in need of firm parental protection.

And so we get sexual-harassment laws from the Democrats and niggling regulations on workplaces, and smoking bans, and fat taxes, and gun bans, and programs to tuck us in at night.

Political Goodies

And from the Republicans we get federal money for churches; and congressional investigations into textbook pricing, the college football bowl system, the firing of Terrell Owens, video games, the television rating system, you name it; and huge new fines for indecency on television; and crackdowns on medical marijuana and steroids and ephedra; and federal subsidies to encourage heterosexuals to marry; and bans to prevent homosexuals from doing so.

And on both sides the politicians and the intellectuals tell us they're just trying to encourage "socially desirable behavior"—not a role that Thomas Jefferson and James Madison envisioned the government playing.

The Entitlements Crisis. Everyone in Washington knows that the burden of "entitlement" programs like Social Security, Medicare, and Medicaid is growing to an unsustainable level. But not only does no politician want to talk about the problem, they continue to pile on more benefits that make the situation worse.

Entitlements already cost taxpayers more than $1 trillion a year, about 40 percent of the federal budget. That's a heavy enough burden. But the first members of the huge baby-boom generation are retiring this year. In barely 20 years, economists predict, entitlements will almost double as a share of national income. Today's young workers will find themselves staggering under the burden of supporting tens of millions of retired boomers.

After years of discussion of this looming fiscal crisis, what have the politicians done? They all declare themselves "fiscal conservatives" and then keep on spending. They reject reform proposals and promise more benefits. "Nobody shoots at Santa Claus," Al Smith used to

say of Franklin Roosevelt's New Deal handouts, and politicians have found that a useful reminder ever since. Instead of fiscal responsibility, in 2003 Democrats and Republicans combined to pass a prescription-drug entitlement for Medicare recipients. Critics said it might cost a trillion dollars over the next decade.

But even that figure drastically underestimates the problem. Jagadeesh Gokhale, an economist at the Cato Institute, calculated the real costs of our current entitlement programs. The numbers are simply incomprehensible: the total cost of the drug benefit alone will eventually be more than $16 trillion, on top of the $45 trillion that Medicare was already going to cost taxpayers. That's how much *more* money we'll eventually have to raise in taxes if we're going to pay off these debts.

Terror, War, and Surveillance. Theocratic Islam is a real threat to freedom in the Muslim world, where people often face a desperate choice between secular dictators and religious totalitarians. Americans need not worry about living under an Islamic theocracy, but terror is certainly a threat to our life, liberty, and pursuit of happiness. Thus we need a strong national defense, better intelligence, and international cooperation to track and prevent terrorism.

But ever since the September 11 attacks, we have let fear and panic drive us to put up with infringements on freedom that change the nature of our society without any real increase in safety. Laws like the Patriot Act were passed without careful scrutiny, and without providing for the normal checks and balances of constitutional government. The more power government has in such areas, the more important it is to constrain that power within the law, with congressional oversight and judicial review.

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Secrecy and Presidential Absolutism

In this new world the Bush administration is pushing secret subpoenas, secret searches, secret arrests, and secret trials. American citizens are being held without access to a lawyer, and without access to an impartial civilian judge. The Great Writ of habeas corpus is denied. The administration's "torture memos" have been most notorious for their carefully oblique definitions of what constitutes torture and for the fact that they were kept secret for years. What has been too often overlooked in discussions of the memos is their assertion that the president cannot be restrained by laws passed by Congress. They claim executive powers that far exceed what our constitutional tradition allows. As Gene Healy and Timothy Lynch write in their study "Power Surge," "The Constitution's text will not support anything like the doctrine of presidential absolutism the administration flirts with in the torture memos."

One problem with the new powers is that they aren't used just to investigate and prosecute terrorists. There's a bait-and-switch game going on. Citing the threat of another 9/11, administration officials demand and get greatly expanded powers to deal with terrorism. But then it turns out that the new powers aren't restricted to terrorism cases. And indeed the Bush administration has been using the powers granted in the Patriot Act with increasing frequency in criminal investigations that have little or no connection to terrorism. Those cases range from drugs and pornography to money laundering, theft of trade secrets, and simple fraud. No doubt we could prevent or punish more crimes if we allowed the federal government to put a surveillance camera in every conference room and every living room. But we don't want to live in that kind of society. We're moving in that direction, though, by granting government new powers to deal with terrorism and not restricting the scope of those powers.

And of course the fight against terrorism isn't the only source of expanded powers for police and prosecutors. Long before 9/11 legal scholars were bemoaning the "drug exception to the Fourth Amendment." The Supreme Court ruled that government investigators do

not need warrants to conduct aerial surveillance of areas that any pilot could legally fly over, including both the fenced yards of private homes—where they might be looking for marijuana—and highly secure chemical factories, where the Environmental Protection Agency was looking for evidence of air pollution violations.

Every new war, real or metaphorical—war on terror, war on drugs, war on obesity—is an excuse for expanding the size, scope, and power of government. A good reason to organize antiwar movements.

The Politics of Statism. For any friend of freedom, one of the most frustrating aspects of our current political system is the near absence of politicians challenging any of these expansions of state power. It's hard to find officeholders, Republican or Democratic, who don't support one or another aspect of the nanny state. Practically every member of Congress turns away when the problem of our unsustainable welfare state is mentioned. "It won't go bankrupt before the next election, so it's not my problem," seems to be their attitude. As for the wars on both terrorism and drugs, most politicians just want not to be labeled as "weak." The Patriot Act passed the Senate with only one dissenting vote, even though few if any members of Congress had actually read the bill. Most Democrats, including all presidential candidates then in the senate, joined nearly all Republicans in voting for the authorization for war with Iraq. And virtually no elected officials will protest the insanity of the war on drugs, or even vote against its continued escalation.

It's not that politicians couldn't show a little courage once in a while. After all, gerrymandering and campaign-finance regulations have given House members a reelection rate of over 98 percent. With so little to fear from the voters, they ought to be able to vote their consciences. But there aren't many citizen-politicians these days; they all want to be part of a permanent ruling class, in office forever until they collect their congressional pensions, so they try to play it safe. All the talk about increased polarization between Democrats and Republicans just obscures the increasing agreement on most aspects of the welfare-warfare state, a sprawling federal government that promises to meet our every need, as long as we give it ever-increasing amounts of money, and keeps us embroiled in conflicts around the globe.

A Stacked Deck

It's no wonder that ever-larger numbers of Americans express disgust with the current political establishment, even though the election laws make it difficult to organize and fund a new party, an independent campaign, or even an insurgency within the major parties.

After a litany of problems like that, it's easy to get discouraged, to believe that we're losing our freedom, year after year. Libertarians often quote Thomas Jefferson: "The natural progress of things is for liberty to yield and government to gain ground."

We should take pride in the freedom that we have wrested from government and remain optimistic about the future of freedom.

But let's take a moment to think about some of the laws we *don't* have any more: Slavery and established churches. Segregation and sodomy laws. Sunday-closing laws, 90 percent income-tax rates, wage and price controls. In many ways Americans are freer today than ever before.

Politicians don't get much of the credit for that. They often tended to react, not to lead. Social change and a mass movement challenged segregation before Congress responded. Popular resentment over rising taxes led to Proposition 13 in California and then the election of Ronald Reagan. A court challenge struck down the last few sodomy laws, which had fallen into disuse anyway. Economists produced enough evidence on the costs of transportation, communications, and financial regulation that Congress finally had to recognize it.

It's certainly not time to rest on our laurels. But we should take pride in the freedom that we have wrested from government and remain optimistic about the future of freedom.

When I argue for a society that fully recognizes each person's right to life, liberty, and the pursuit of happiness, I'm often asked, Where's an example of a successful libertarian society? The answer to that question is easy: the United States of America.

As I noted above, the United States has never been a perfectly libertarian society. But our Constitution and our national sense of life have guaranteed more freedom to more people than in any other society in history, and we have continued to extend the promises of the Declaration of Independence to more people.

More than any other country in the world, ours was formed by people who had left the despots of the Old World to find freedom in the new, and who then made a libertarian revolution. Americans tend to think of themselves as individuals, with equal rights and equal freedom. Our fundamental ideology is, in the words of the political scientist Seymour Martin Lipset, "antistatism, laissez-faire, individualism, populism, and egalitarianism." Some people don't like that fact. Professors Cass Sunstein and Stephen Holmes complain that libertarian ideas are "astonishingly widespread in American culture."

And indeed they are. My recent work with David Kirby found that in several different public-opinion surveys, 15 to 20 percent of Americans give libertarian answers to a range of questions—answers that in combination distinguish them from both "liberals" and conservatives. But that figure seriously underestimates the prevalence of libertarian ideas. Many American conservatives are fundamentally committed to small government and free enterprise. Many American liberals believe firmly in free speech, freedom of religion, and the dignity of every individual. Both liberals and conservatives may be coming to better appreciate the value of the Constitution in restraining the powers of the federal government. The sharpening of the red-blue divide in the past decade causes liberals and conservatives to deepen their opposition to "the other team." But it may obscure the number of Americans on both sides of the divide who are fundamentally libertarian in their attitudes.

As one measure of that, after the 2006 election the Cato Institute commissioned Zogby International to ask poll respondents if they would describe themselves as "fiscally conservative and socially liberal." Fully 59 percent of the respondents said yes. When we asked the same question but noted that such a combination of views is "known as libertarian," a robust 44 percent of respondents still answered yes.

Freedom Versus Power

Part of the challenge for libertarians is to help those Americans understand that their fundamental political value is freedom. Instead of being frightened and distracted by politicians, they should recognize that the main issue in politics—in 2008 and beyond—is the freedom of the individual and the power of government.

In some ways the idea of freedom is very simple. Recall the bestseller, *All I Really Need to Know I Learned in Kindergarten*. You could say that you learn the essence of libertarianism—which is also the essence of civilization—in kindergarten:

Don't hit other people,
Don't take their stuff, and
Keep your promises.

Don't hit other people.
Don't take their stuff.
Keep your promises.

Most people understand that idea in their personal lives. Now if only we could get people to apply it to "public policy" as well: Don't use force to make other people live the way you think they should. Don't use the power of taxation to take their stuff. Don't interfere with contracts, and don't make promises the taxpayers can't keep. A politician who ran on such a platform would find a large and receptive audience.

There's never been a golden age of liberty, and there never will be. There will always be people who want to live their lives in peace, and there will always be people who want to exploit them or impose their own ideas on others. There will always be a conflict between Liberty and Power.

In the long run, freedom works, and people figure that out. I have no doubt that at the dawn of the fourth millennium more of the human beings in the universe will live in freer societies than do today. In the shorter run the outcome is less predictable, and it will depend on our own efforts to capitalize on our strengths and learn to counter the trends that work against a free and civil society.

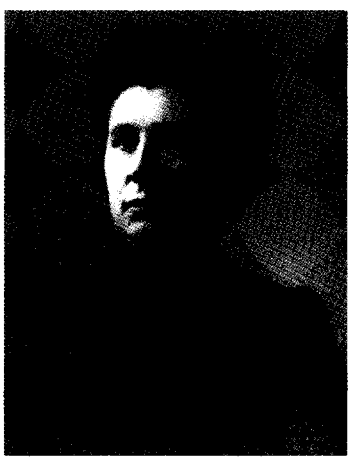
John D. Rockefeller and His Enemies

BY BURTON FOLSOM, JR.

One hundred years ago John D. Rockefeller, America's first billionaire and the head of Standard Oil, faced a critical issue: what should he do about the criticisms of investigative journalist Ida Tarbell?

To Rockefeller, the solution was simple—ignore her. He was marketing 60 percent of all oil sold in the whole world. His company was popular with consumers everywhere. Therefore, let his actions speak for themselves.

Rockefeller had entered the raucous oil business during the Civil War, when oil often sold for a dollar a gallon. While most refiners dumped oil byproducts into nearby rivers, Rockefeller wisely hired research-and-development men to produce waxes, paving materials, and detergents from the seemingly unmarketable sludge that was discarded. He also developed the technology to get more kerosene out of a barrel of oil than anyone else. Rockefeller had become a billionaire by making a fraction of a cent per gallon selling millions of gallons of kerosene to illuminate every civilized part of the earth.



Ida Tarbell, critic of John D. Rockefeller and author of *The History of Standard Oil Company*
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The result was often win-win for everyone. The U.S. became a major industrial country, and inefficient refiners in the United States sold out for Standard Oil stock, which often made them comfortable for life. As one editor in oil-rich Titusville, Pennsylvania, exclaimed, "Men until now barely able to get a poor living off poor land are made rich beyond their wildest dreaming."

However, even with cheap oil and the prospering of the United States, Ida Tarbell was unhappy. In 1904 she wrote *The History of the Standard Oil Company*, which complained loudly about Rockefeller and his company. He was a cutthroat competitor, she insisted, who relied on rebates to outsell his rivals. "The ruthlessness and persistency with which he cut and continued to cut their prices drove them to despair," she wrote. Furthermore, he low-balled those whom he sought to buy out. Innuendo became a powerful Tarbell weapon: "There came to be a popular conviction that the 'Standard would do anything.' " She concluded that Rockefeller "has done more than any other person to fasten on this country the most serious interference with free individual development."

How might we explain Tarbell's astonishing animus? The motivating force seems to be that her father, whom she adored, chose to compete with Rockefeller rather than sell to him. When Franklin Tarbell proved unable to market oil for eight cents a gallon, he brooded at home and Ida's blissful childhood was diminished. Her brother became an officer for a competing oil company, so when Ida was growing up she heard much grumbling about Standard Oil.

Tarbell serialized her book in *McClure's* magazine, which was a prominent publication of the early 1900s. The timing of her attacks meshed well with certain fears that were growing in America about large companies and their potential for monopoly and price-fixing. In 1901, for example, U.S. Steel had become the first billion-dollar corporation and it controlled more than 60 percent of the steel market. Would monopolies prevail and competition be diminished? Tarbell suggested that Standard Oil's sinister rise to power was dangerous and undesir-

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able. President Theodore Roosevelt agreed, and with his blessing the Justice Department began a lengthy assault on Standard Oil that resulted in its break up into more than 30 companies.

Beware Muckraking

The Wal-Marts of the world need to take note: political agitation plus muckraking can defeat a competitive product enjoyed by millions of consumers. Rockefeller's decision to "let the facts speak for themselves" was naïve. His "facts" were dwarfed by the negative publicity from *McClure's,* from editorial pages, and finally from the White House. In 1911 the Sherman Anti-Trust Act was used against Standard Oil.

If Rockefeller had chosen to challenge Tarbell, he could have made two useful points. First, Standard Oil rose to economic power not on rebates but on providing cheap oil to the general public. "We must ever remember," Rockefeller told one of his partners, "we are refining oil for the poor man and he must have it cheap and good." Or as he put it to another partner, "Hope we can continue to hold out with the best illuminator in the world at the *lowest* price."

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Rockefeller did receive large rebates, but he earned them by supplying the largest shipments of oil. Without the large shipments, which came through low costs of production, he would not have had any leverage to win low shipping rates from the railroads. In any case, those low costs were mainly passed along to consumers by further reducing the price of his oil.

Second, Rockefeller avoided predatory price-cutting because it tended to hurt him more than his competitors. That point is often hard to understand, but economist John S. McGee did extensive research on Standard Oil's pricing policies and discovered that predatory price-cutting was an anathema to Rockefeller.

As McGee and others have pointed out, since Rockefeller did most of the oil business in the United States, if he cut prices he would be losing the small profits he was earning on the lion's share of the business he was already doing. Also, even if he gained a 100 percent market share, that gain would be temporary. The moment he tried to raise prices, other competitors would re-emerge, the price would fall again, and Rockefeller would (at best) be back where he started.

The charges that Rockefeller thrived on "unfair rebates" and that he was eagerly waiting to employ predatory price-cutting did him a great deal of damage and offset the favorable opinion many Americans had of him and of his oil.

Tarbell also attacked Rockefeller's character. She wrote that his "big hand reached out from nobody knew where, to steal their conquest and throttle their future. The suddenness and the blackness of the assault on their business stirred to the bottom their manhood and their sense of fair play."

Even Rockefeller's relatively modest house, Tarbell claimed, was "a monument of cheap ugliness." Yes, she conceded, his frugality was "a welcome contrast to the wanton lavishness which on every side of us corrupts taste and destroys a sense of values." However, she noted, "One would be inclined to like Mr. Rockefeller the better for his plain living if somehow one did not feel that here was something more than frugality, that here was parsimony . . . made a virtue."

If Rockefeller instead had built a magnificent mansion and had spent money lavishly, she could then have attacked him for wasting the money he greedily extracted from others. Rockefeller could not win, and that was, in part, the problem of allowing Tarbell to go unchallenged.

Sometimes Tarbell must have been perplexed. Rockefeller, she admitted, was a stable family man who was loved by his wife and children. By contrast, her boss, S. S. McClure, was a chronic adulterer. But she chided McClure in private and Rockefeller on the pages of her bestseller.

The Constitutional Republicanism of John Taylor of Caroline

BY JOSEPH R. STROMBERG

"Great power often corrupts virtue; it invariably renders vice more malignant. . . . In proportion as the powers of government increase, both its own character and that of the people becomes worse."

—John Taylor of Caroline, 1814

John Taylor of Caroline has a secure place in the history of American political thought. Charles Beard's historical writing did much to revive Taylor's reputation in the early twentieth century. Eugene T. Mudge saw Taylor as a "prophet" of sectional struggle, while English historian M. J. C. Vile saw him as "in some ways the most impressive political theorist that America has produced." New Left historian William Appleman Williams thought Taylor "made the best case against empire as a way of life."

Other historians are dismissive. Louis Hartz chided Taylor for failing to become the American Disraeli, and Richard Hofstadter called him "a provincial windbag." For Hofstadter, Taylor's Jeffersonian ideas were "negative" and "laissez faire," ending as mere conservatism in the hands of "men like William Graham Sumner." Manning Dauer saw Taylor as—paradoxically—the father of both Southern Agrarians and "states' rights industrialists."

Despite the attention given Taylor over the years, he remains (in my view) somewhat neglected, relative to his actual merits.

Raised in the home of his uncle Edmund Pendleton, John Taylor (1753–1824) attended The College of William and Mary, studied law, served as a major in the Continental Army, and became a successful lawyer and planter, owning several plantations and 150 slaves. He preferred his rural life, but entered politics to defend republican values, serving in the Virginia legislature (1779–81, 1783–85, 1796–1800) and filling out unexpired terms in the U.S. Senate (1793–1794, 1803, 1822–24). Taylor was clearly no archaic-radical republican like Jean-Jacques Rousseau. He did not find freedom in political participation as such, but he would step forward in a crisis, as his sponsorship of the Virginia Resolutions, damning the Alien and Sedition Acts, shows.

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Taylor began as an "Anti-federalist." Once the Constitution won ratification, he meant to hold the victors to the assurances they gave while promoting it. Generally, Taylor's books (1814, 1818, 1822, 1823) arose from immediate political questions; they included attacks on federal economic policies and reasoned polemics against the centralizing decisions of John Marshall's Supreme Court. A book by Taylor levels much learning and colorful language against pressing issues, in the manner of Jeremiah.

There are some awkward moments in Taylor's literary style, as Adams, Jefferson, and John Randolph all

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noted, but there are also interesting compression and apt expression. Taylor was a secular preacher. Like William Faulkner, he is sometimes better understood when read aloud. He is also a stepfather of semantics and semiotics, as his running critique of "artificial phraseology," or counterfeit language, shows. He was not an especially successful politician. Taylor served the public better as a critic.

Here I must at least mention the Forty-Years War between historians of the Republican School and the Liberal-Lockean School over early American ideology. For J. G. A. Pocock, classical republican themes—court versus country, the mixed constitution, balanced social orders, "virtuous" agrarian landowners—dominated revolutionary thinking. The Lockeans have Americans abandoning those in favor of abstract individualism and natural rights. But the two political "languages" co-existed throughout the Revolutionary era. What matters is their exact "mix." Taylor, for one, employs republican language within a liberal framework.

Beginnings of Centralization

Not long after independence, centralizing Federalists replaced the Articles of Confederation with a constitution (1788) aimed at creating a mercantilist political economy. Their opponents coalesced as "Republicans," broadly continuing the Anti-federalist cause. Federalist-Republican debates over the National Bank, excises, public debt, standing army, and tariffs echoed English debates after 1688.

Perhaps the worst tragedy that can befall an ideology is to have a political party professing allegiance to it come to power. (Think of "conservatism" today.) So it partly was after 1800, with Jeffersonian republicanism in power. Taylor defended Jefferson's measures into 1804, but gradually drifted into the "Quid" opposition movement within Republican ranks. He railed against the administration's half-Federalist policies. Along with John Randolph of Roanoke and a few other Republicans, he opposed the War of 1812—his own party's war—as a "metaphysical war." He rightly feared its potential for state-building.

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For Taylor, the laws of nature suggested political equality instead of the fixed social orders found in John Adams' archaic republicanism. Popular sovereignty "flows out of each man's right to govern himself." Similarly, Taylor traces the right of free speech directly to the right of self-government, which presupposes open discussion.

On solidly liberal ground, Taylor sees human nature as "compounded of good and evil qualities." Men should frame governments "with a view to the preservation of the good and the control of the evil." Self-interest was the only real constant in human affairs, and bad structural incentives might make governments "vicious." Suitable structures would "secure the fidelity of nations to themselves," even if the people were individually "vicious." Here Taylor broke decisively with archaic-republican "virtue," mixed constitutions, and social balance. Americans had chosen to *divide* rather than "balance" power, and in so many ways—vertically (federally) and horizontally (departmentally)—as to prevent serious abuse.

Protecting men's lives, liberty, and rightful property was the purpose of government.

The goal of "political law" (the Constitution) was *control* over all representatives and agents. Taylor hails election, divisions of power, and an armed people (militia) as among the means to republican liberty. "Oaths of agents," he observes, "are prescribed to enforce, not to destroy, the duties of agency." Taylor's overall conception thus far surpasses any tame notions of "checks and balances" or "separation of powers."

Taylor frowned on notions of absolute sovereignty. Where he does use the word, he is normally referring to self-government, which results from men's living together in a community. He does not explain community as arising by conventional social contract; indeed, he tends to reject his contemporaries' half-digested Lockeanism, thereby postponing any final surrender of natural rights. (Here he comes close to Thomas Paine.)

There was, however, an *actual contract*—the Constitution—creating a limited union with a common agent

subjected to structural, procedural, and substantive restraints on its power. This contract was between the peoples of the several states, *not* between the members of a single, aggregate American people *as individuals*. The constitutional agreement "derives its force, not from the consent of a *majority* of the states, but from the separate consent of each" (italics supplied).

Taylor denied the common assertion that the people, "having thought and spoken once, had lost the right of thinking and speaking forever." If so, "its first will, must be its last will"—something Taylor found absurd. If, for example, the states should call a convention and approve a constitutional amendment previously blocked in the Senate, "any one state may refuse to concur in [it], because each state will resume *its original right* to refuse or consent, as being independent of each other in negociating the terms of *a new union*" (italics supplied). Implicit here is renegotiation of the agreement—and even secession in an extreme case. Any other conclusion conflicted with outstanding historical facts, as Taylor saw them.

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Taylor observes that no *governments* —federal or state—could, in their status as subordinate agents, dissolve the union on their own. (The constituent peoples could.) And Taylor was so far from being a positive "disunionist" that, in describing the geographical advantages of the United States, he attributed Americans' safety to their maintaining a union *of some kind*. But he was not an unconditional unionist.

Taylor always tried to bracket sovereignty. He supposed the states to possess full concurrent jurisdiction with the federal government, except where one or the other clearly had an exclusive delegation of power. He denied that the Supreme Court's reasoning necessarily bound the state courts; decisions applied at most between the parties to a case. Taylor thought an occasional inconsistency of outcome preferable to letting the Supreme Court remodel all of American law. To concede final interpretive power to the Court would transfer sovereignty to the general government, as the Court imported consolidation into the Constitution. Finally, the Court would assert "an immoveable power of construction" *over* the Constitution, over the other branches, and over the people.

Republicanism and Nationalism

Taylor's states-rights republicanism necessarily collided with the intermittently nationalist views of James Madison. Taylor was trying to unravel the knots Madison tied while confusing different audiences and, finally, himself. Taylor questioned Madison's claim in Federalist 10 that a republic *must* be geographically extensive—and even expand farther—to prevent "factious" instability. Taylor viewed expansion as unwise, where it might undermine liberty through war, armies, debt, and taxes. And he had little awe of the Federalist Papers: "The English writers . . . contain whatever is to be found in the Federalist; but all their theories sunk, as soon as they were promulgated; in a vortex of corruption. . . ."

Republican adoptions of Federalist policies were many and galling. Even worse, Federalists remained entrenched as federal judges and appointments by Republican presidents had not changed this. Taylor's *Construction Construed and Constitutions Vindicated* (1820) targeted John Marshall's decision in *McCulloch v. Maryland* (1819) with its mighty assertions of federal power. "The unknown powers of sovereignty and supremacy may be relished," Taylor writes, "because they tickle the mind with hopes and fears." Further, "the term 'sovereignty,' was sacrilegiously stolen from the attributes of God, and impiously assumed by Kings." Later, "aristocracies and republicks . . . claimed the spoil."

Sovereignty being "neither fiduciary nor capable of limitation," Taylor wished to neutralize the concept. Americans had tried "to eradicate it by establishing governments invested with specified and limited powers," so that "ungranted rights remain also with the grantors . . . the people." (Alas, the principle that rights

or powers "not granted" are *not granted* failed to impress either Marshall or Harvard Law School.)

Marshall's decision turned allegedly "necessary and proper" *means* into actual unenumerated powers. Taylor recalled the 1760s, when Parliament asserted "it would be absurd to allow powers, and with-hold any means necessary or proper." The colonies found it "more absurd to limit powers, and yet concede unlimited means for their execution." The principle made the Constitution's list of powers superfluous. Following Marshall, "[E]nds may be made to beget means" and "means . . . made to beget ends, until the co-habitation shall rear a progeny of unconstitutional bastards, which were not begotten by the people." Roads being "necessary in war," Congress could "legislate locally concerning roads." Congressional power over horses—and everything else—would soon follow.

Taylor believed that Americans had never knowingly adopted that European conception of absolute, unitary sovereignty, which licensed Marshall's centralizing deductions. Americans supposed their governments to be their *agents*, not their rulers. Lately, however, American legislatures—state and federal—were aspiring to be "British parliaments," and if the trend held, one must conclude that in American government, "no experiment at all has been made."

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Marshall made much of the supremacy, superiority, and so on of Congress in its proper *sphere* of action. Taylor answers, "If the sovereignty of the spheres means any sovereignty at all, it supersedes the sovereignty of the people." The problem was not spheres, but *sovereignty* in them. *Powers* might exist, certainly, but granted by principals to agents. *No one* had "inherent" powers.

Sphere-Sovereignty Dogma

Taylor preferred the "occasional collisions" arising from concurrent jurisdictions. Instead of creating various institutions, each *supreme* in a sphere, our system featured "co-ordinate political departments . . . as checks upon each other, only invested with defined and limited powers, and subjected to the . . . controul of the people." The Court's sphere-sovereignty dogma overthrew this distribution of powers, because a "power able to abolish collisions, is also able to abolish checks, and there can be no checks without collisions." In America we "have preferred checks and collisions, to a dictatorship of one department." Congress and the states might pass laws, each one constitutional, which "impede each other. . . . For this clashing the constitution makes no provision." (Taylor's view thus differs greatly from the highly artificial "separation of powers" espoused by "conservative" unitary-executive theorists working for the Bush administration.)

Having asserted Congress's right to "remove all obstacles to its action," the Court pretended to "hook every implied [power], to some delegated power" as a means. (Even today, a massive regulatory state subsists under the Commerce Clause, while global military enterprises masquerade as simple "defense.") Taylor did not buy the argument.

Deductions from the international lawyers' sovereignty-construct intruded into war and peace. Our system, Taylor writes, provided the necessary "powers of making war and peace . . . not as emanations from . . . sovereignty . . . but as delegated powers conferred by the social sovereignty, or natural right of self-government." Otherwise, "the federal government, as having no sovereignty," could not have declared war. That international law and lawyers "contemplate the powers of declaring war and making peace, as residing"—inherently—"in an executive department" meant nothing to us; the American system divided the powers and "does not intrust the president with either."

So the question was "whether these laws of nations or our constitutions have delegated powers to our political departments." If the former, the game was up, Marshall could go on deducing, and power would not—and could not—be limited. Interestingly, Taylor's line of attack on these questions supplied materials for

refuting *United States v. Curtiss-Wright* (1936) 114 years before the Supreme Court issued those latter-day deductions about "inherent" executive powers over foreign affairs and war.

Even with all these new, constructively discovered means and powers about, Americans remained complacent, safe in the knowledge that their officials were elective and responsible. For Taylor, representation and elections did not, by themselves, provide security against abuses of power. If elected officials managed to escape their bounds, then we would once again see that "no experiment . . . has been made." As a mere slogan, "popular sovereignty" meant nothing to Taylor, and he foresaw the *probable failure* of republicanism if Americans adopted European sovereignty as its legal basis. Indeed, "a sovereign power over labour or property is less oppressive in the hands of an absolute monarch, than in those of a representative legislature" and "the error of trusting republican governments with this tyrannical power, has probably caused their premature deaths, because they are most likely to push it to excess."

A government outfitted with "the complete panoply of fleets, armies, banks, funding systems, pensions, bounties, corporations, exclusive privileges; and in short, possessing the absolute power to distribute property," was effectively "unrestrained" and tyrannical—and therefore not a republic in Taylor's meaning. (Taylor has much to say about power distributing property, but I intend to treat that topic in another place.)

As party leader, aggregator, aider and abettor of factions, would-be war hero, and more, the president of the United States, whoever he might be, spearheaded the political evolution deplored by Taylor. As Taylor writes, the American executive was so constructed as "to excite evil moral qualities . . . propelling us toward force and fraud." His exclusive control of military patronage, and its extension during war, inclined the president to initiate war. And now we understand Taylor's commitment to a genuine, revitalized militia system; he wanted it for practical, political—even liberal—reasons, and *not* out of an attachment to Greek, Roman, or Renaissance Italian republicanism.

Taylor can find no "reason why war, peace, appointments to office, or the dispensation of publick money, should have been counted in the catalogue of the [executive], except for the efficacy of these powers in one man for begetting tyranny." (He has elsewhere denied real textual, constitutional authority for exclusive presidential power over war and peace.)

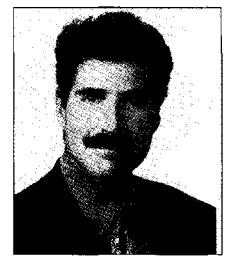
More Power to the President

The treaty and appointment powers add to the president's political weaponry; and to his already excessive military power "is subjoined a mass of civil power," as well as patronage. Election "procures a confidence which has no foundation."

The treaty power has long been prized and feared as a source of new, unknowable federal powers. As late as the mid-1950s, the Old Right movement sought to define and curtail that power through the Bricker Amendment. It took all the Eisenhower administration's leverage to defeat the proposal in Congress. Under the Constitution, properly understood, Taylor finds no magic in the words making treaties part of the supreme law of the land. "On the contrary," he notes, "the laws were to be made in pursuance of the constitution, and the treaties, under the authority of the United States." And now he springs his trap: "The United States have *no authority*, except that which is given by *the constitution*" (italics supplied).

It followed that treaties could not alter or overthrow the Constitution. He gives an example: "Suppose the treaty-making power should stipulate with England to declare war against France; would that deprive congress of the right of preserving peace, with which it is invested by the constitution?" Presumably not, unless we must once more endure theories of inherency and sovereignty under international juridical deductivism.

James Madison, "father of the Constitution," thought an extensive and expanding union would "dilute faction" and preserve liberty under an American mercantilism. Tying liberty to territorial expansion, Madison imposed an imperial logic on the Constitution he helped create. Taylor, spying the state-building possibilities of that program, came to oppose it. "A protector is unexceptionally a master," he noted. Almost two centuries later, under another "Republican" regime betraying principles it never had, we may wonder who was the better prophet over all—Madison or Taylor?



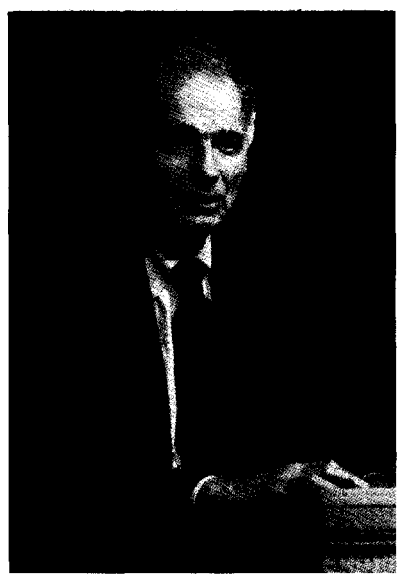
Influence-Peddling

BY JOHN STOSSEL

Since the *New York Times* published its page-one story alleging an inappropriate link between Senator John McCain and telecommunications lobbyist Vicki Iseman, we've heard much more about the evil of "influence-peddling."

The day the *Times* story ran, Senator Barack Obama debated Hillary Clinton, saying, "Washington has become a place where good ideas go to die. They go to die because lobbyists and special interests have a strangle-hold on the agenda in Washington."

Then Ralph Nader announced he would again run for president because Washington is "corporate-occupied territory, every department agency controlled by overwhelming presence of corporate lobbyists."



Ralph Nader
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"Good government" types like Nader love to decry the cozy environment in which members of Congress and corporate lobbyists work closely together and even socialize. They warn that this gives an unfair advantage to special interests.

They have a point.

Major economic interests can afford to pay for lobbying operations that provide congressional staffers reams of information about their industries and their "need" for legislative favors.

Under these circumstances, what chance do masses of unorganized taxpayers have?

The Public Choice school of economics calls this the problem of concentrated benefits and dispersed costs. Individual members of relatively small interest groups stand to gain huge rewards when they lobby for government favors, but each taxpayer will pay only a tiny portion of the cost of any particular program, making opposition pointless.

Sugar consumers, for example, far outnumber sugar producers, but the benefits of a sugar program that keeps out foreign sugar and forces up the price helps each producer far more than it harms individual consumers. Sugar growers have an incentive to hire fulltime lobbyists, while consumers do not. So the minority rules. The disgustingly unfair and expensive sugar support program is renewed year after year.

"Good government" types rightly abhor this influence-peddling, but they propose pointless reforms like bans on lobbyist-sponsored gifts, junkets, and rides on corporate jets. They also back a vicious assault on free speech: campaign-finance restrictions designed to reduce the influence of lobbyists in political campaigns. Despite all these "reforms," influence-peddling goes on.

For good reason. None of the reforms gets near the root of the problem.

The root is government power. When government is free to meddle in every corner of our lives and manipulate the economy through taxes, regulation, and subsidies, then "special interests" have every incentive to work on the politicians to preserve their turf or gain an advantage.

A tax, regulation, or subsidy can make the difference between an industry's success and failure. If the government were not giving preferential tax treatment to ethanol, the corn farmers and ethanol processors would have to find something else to do because their product can't compete against regular gasoline on a level playing field.

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In a real free market, a company succeeds only by making things consumers want to buy and keeping costs low enough that the market price yields a profit. Sadly, in our mixed economy, success can be achieved another way: by lobbying the government for advantages over one's competitors. The prospect of favorable government intervention creates incentives for producers and their lobbyists to strive to satisfy legislators and bureaucrats instead of consumers. The resulting competition for privileges sets the stage for the improper relationships that reformers fret about.

The irony is that the "good government" types favor big government, so they undermine their own efforts to eliminate corruption.

It is naïve to think that government can hold the power to grant privileges without also setting off a mad scramble by special interests to get a piece of it. All the good-government legislation in the world cannot prevent unsavory dealings between the wielders of power and those who seek to profit by it. To think otherwise is to ignore human nature.

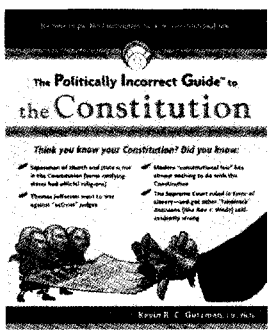
There is one way to rid the political system of this sort of corruption: severely restrict government power as the founders intended. Only when we eliminate the state's ability to meddle in business will business stop meddling in government.

A genuine free market, unburdened by government interference, is the route to cleaner politics.

Book Reviews

The Politically Incorrect Guide to the Constitution
by Kevin R. C. Gutzman
Regnery • 2007 • 258 pages • $19.95 paperback

Reviewed by J. H. Huebert



Conservative commentators often tell us that if only we would get back to the Constitution as it was understood, say, 100 years ago, all would be well with our Republic again.

The reality, however, is not so simple. It's true that government was smaller before the New Deal, when presidents, Congress, and judges sometimes considered themselves more constrained by the Constitution than they do now.

The problem is that, apart from a few amendments, we had the same Constitution then as now. Our supposedly sacrosanct Constitution created a government that became *our* government. Whatever nominal restraints the Constitution contains weren't enough to stop this from happening, as Lysander Spooner noted in "The Constitution of No Authority."

Kevin Gutzman tries to show where things really went wrong in his new book, *The Politically Incorrect Guide to the Constitution*—and to his credit, he at least goes back further than the New Deal.

Gutzman shows how the Constitutional Convention had three factions, rather than the usual two that are taught in civics classes: the monarchists (who were extreme nationalists), the nationalists (a.k.a. the Federalists), and the true federalists (a.k.a. the Anti-federalists). In Gutzman's unorthodox account, the Anti-federalists actually won at the time of ratification. Despite remaining skepticism among many Anti-federalists, the states signed on to the Constitution only because they had been assured that it would respect federalism. Since that interpretation was an implicit condition of their ratification, Gutzman says that is the correct interpretation; the Constitution cannot be read to give the federal government any more power than the states agreed to.

Whatever the states may have understood, and however "correct" their interpretation may have been, the key people in all three branches of the national government soon showed that they did not consider themselves so constrained.

An early offender against federalism was not an FDR appointee, but Chief Justice John Marshall, who among other things defined the Constitution's "Necessary and Proper" clause as allowing Congress to use any means "convenient" to exercising its power; he began the abuse of the Commerce Clause that today allows Congress to do almost anything it likes.

Whatever the states may have declared or understood in ratifying the Constitution, its language was highly susceptible to a nationalist interpretation like Marshall's, as the Anti-federalists pointed out. Over the years, federal courts have gone much further in that direction, putting ever more power in the hands of the federal government and the courts in particular, as Gutzman documents well. Of course that's what the Constitution's authors—monarchists like Hamilton and nationalists like Madison—wanted in the first place.

How could things have ended otherwise?

Gutzman doesn't say so, but these problems will be inherent in *any* constitution. A legal document will always be open to multiple interpretations (some more strained than others), and when the government gets to interpret its own rules, it will of course choose an interpretation that gives itself more power in the long run. Without the people's eternal vigilance, the nationalists will prevail.

Gutzman thinks strong legislatures, especially at the state level, are preferable to our powerful federal judiciary because voters can at least hold legislators accountable to some extent. But the Congress's actions, with and without judges' help, and its high reelection rate show that this option is hardly more appealing than the status quo.

Gutzman admits in his final chapter that federal courts will not soon adopt his judicial philosophy, so the whole issue is rather academic. Nonetheless, he offers much more than the usual conservative clichés and provides a history of the Constitution's creation

and ratification that is worth knowing, if only to see how the Constitution's creators pulled the wool over so many people's eyes—and continue to do so today.

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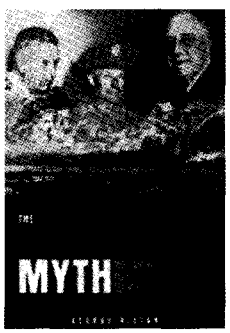
The Pearl Harbor Myth: Rethinking the Unthinkable

by George Victor
Potomac Books • 2007 • 365 pages • $27.50 hardcover; $18.95 paperback

Reviewed by Robert Higgs



Almost from the moment the Japanese bombs began falling on the U.S. fleet at Pearl Harbor, the prime question has been, "What did President Franklin D. Roosevelt and his subordinates know about the impending attack, and when did they know it?" A series of official investigations during and immediately after the war failed to silence the president's critics or to satisfy those who were skeptical about the official explanations. Even now, the debate continues. George Victor's *Pearl Harbor Myth* is the latest substantial contribution to this controversy.

Although Victor, a retired psychologist, might seem an unlikely candidate to make an important contribution, and presents no new evidence, he adeptly exploits the relevant official reports and historical literature. He expresses his account in clear, fact-filled prose, highlighting the inconsistencies in various testimonies.

He finds that the Roosevelt administration deliberately provoked the attack, knew it was coming, and did not attempt to stop it. Yet Victor describes himself as an admirer of Roosevelt and declares that "moral and legal judgments are outside the purpose here." If the president and his lieutenants conspired to bring the United States into the war in Europe through the Pacific "back door," he concludes, they did only what all governments sometimes do—conspire, blame scapegoats, and then cover up their conspiracies by destroying evidence, coercing witnesses, and lying—and they did it for an excellent reason, to save the world from conquest by Hitler.

The government conducted this Machiavellian maneuvering because the great majority of the populace opposed entry into the war unless the United States were attacked. Hence Roosevelt, who ardently desired (and worked relentlessly) to take the country into the war, needed to incite such an attack to unify the people in support of U.S. entry. "Establishing a record in which the enemy fired the first shot was a theme that ran through Roosevelt's tactics." Despite hostile but clandestine U.S. naval actions against German ships and submarines in the North Atlantic in 1941, the Germans refused to take the bait.

On the other side of the world, more than two years of U.S. economic warfare against Japan had placed the Japanese economy in a tightening stranglehold. War was almost inevitable, yet for Roosevelt's political purposes it remained imperative "that Japan commit the first overt [military] act," as a dispatch from Washington cautioned General Walter Short, the Army commander in Hawaii. Short and the Navy commander, Admiral Husband Kimmel, were set up as the fall guys to be blamed for lack of preparation when the U.S. forces at Pearl Harbor were caught "by surprise" in a "sneak attack"—such surprise and sneakiness being key elements of the enduring myth that Victor aims to explode.

As Secretary of War Henry L. Stimson wrote two weeks before the Japanese attack, "the question was how we should maneuver them into the position of firing the first shot without allowing too much danger to ourselves." The attack "was expected to get Congress to declare war on Japan. The crucial needs were to save the Soviet Union [from a Japanese invasion] and have Japan attack in circumstances that would move Congress to declare war on Germany."

Why didn't the President instead make a frank, straightforward request that Congress declare war, explaining why he considered U.S. entry into the war to be desirable? Because he thought that approach would fail.

On December 2, 1941, Roosevelt "told a subordinate that he expected to be at war with Japan within a

few days. On December 4 [Secretary of the Navy Frank] Knox told a subordinate the same [thing]." Yet Short and Kimmel were not alerted to the attack that high officials in Washington expected to occur shortly. Mid-level army and navy officers had urgently recommended that the commanders in Hawaii be warned, but their superiors had rejected those pleas.

After news of the attack reached Washington, Roosevelt convened his War Council. According to Harry Hopkins, "[T]he conference met in not too tense an atmosphere because . . . all of us believed that . . . the enemy was Hitler and that he could never be defeated without force of arms; that sooner or later we were bound to be in the war and that Japan had given us an opportunity."

Although Victor's apology for the Roosevelt administration's aggressive, devious actions during the years preceding the attack on Pearl Harbor strikes me as highly problematical, I recommend *The Pearl Harbor Myth* as a thorough, clearly written, and generally even-handed account of the events that led to U.S. engagement in World War II. For the typical American, still clinging to the myth, the book will be a revelation.

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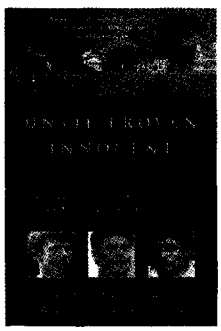
Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case

by Stuart Taylor Jr. and KC Johnson
Thomas Dunne Books • 2007 • 405 pages • $26.95

Reviewed by George C. Leef



In an infamous 1931 case, several black youths were arrested in Alabama and charged with raping two white women. Those young men—eventually called the Scottsboro Boys—could have been executed for the crime. Newspapers throughout the south wrote about the case as if the defendants' innocence was inconceivable. It perfectly fit the reigning stereotypes—white women were virtuous and black men were vicious sexual predators.

As it turned out, the accusers had lied. The women were sure they could play on the prejudices of law-enforcement officials to cover up their own indiscretions, so they made up a story. Good work by dedicated defense attorneys ripped apart the prosecution's case and the defendants were freed.

The Duke lacrosse case of 2006–07 mirrored the Scottsboro incident. A black woman, Crystal Mangum, hired as a stripper (almost always referred to in the media as an "exotic dancer") at a party thrown by the captains of the Duke University lacrosse team, showed up so drunk that she passed out after just a few minutes. Later, to avoid possible legal consequences from her drunkenness—she had two young children—she told a nurse that she had been raped at the party. The nurse, eager to credit the story, said that some of Crystal's injuries were consistent with rape.

After that, the case grew like a wildly malignant cancer. A police official with an animosity toward Duke students got his hooks into the case and drove it relentlessly, but never with any interest in finding out what actually occurred. Then the district attorney, Mike Nifong, a white man who desperately wanted to win favor with the predominantly black electorate in Durham, seized on the case as his salvation. He never bothered to investigate the accuser's veracity—she told several different and inconsistent versions of the alleged crime—but instead took to calling her "my victim." Flagrantly violating prosecutorial rules, he rushed to indict three Duke lacrosse players.

The media had a field day with the case. Story after story in papers ranging from the *New York Times* to the *Durham Herald-Sun* excoriated the accused players with ideologically tendentious pieces that presumed not just guilt but racism. Yet that was nothing compared to the academic left on campus—Duke's and many others. To leftist professors, the case seemed to be the perfect validation of their worldview that America's evils stem from oppression on the basis of race, gender, and class. Their speeches and articles seethed with righteous indignation over the alleged crime.

Until Proven Innocent is a thorough recounting of the case by veteran political columnist Stuart Taylor and

Brooklyn College history professor KC (Robert) Johnson. In exasperating detail we learn about the shoddy police work and abuses of prosecutorial power by DA Nifong. By the time Taylor and Johnson reach the climax of the story—Nifong's disbarment and removal from office—readers will yearn for condign justice to be meted out to the many villains of the piece.

Alas, there was no justice for the Duke officials who went along with the lynch mob, nor for the professors who eagerly pronounced guilt and demanded punishment of students who had committed no crime at all. The authors make it clear that in the minds of many of those academics, the concept of guilt has little to do with individual conduct. White male students from well-to-do families are necessarily complicit in the whole oppressive, exploitative class structure of America, so punishing some of them is good, whether or not they actually committed any crime.

One big lesson from the book is how poorly our justice system works. Police and prosecutors often have their own agendas and will obliterate the truth if it suits them. Perhaps the fact that the vicious Nifong has been disbarred and branded as a criminal himself for lying in court will cause prosecutors to think twice before trying to railroad defendants into prison just to make themselves look good. But maybe they'll think it was just a fluke that he got caught.

The other big lesson is that many university professors who incessantly proclaim their dedication to "social justice" don't care a whit about true justice. Even after the case unraveled as a hoax, many of them continued to defend their previous statements, claiming that "the narrative" about how dominant classes oppress the subservient classes must remain vital.

What the case demonstrates, however, is that injustice doesn't fall along the lines of race, class, and gender. It falls along different lines—those who wield coercive power and those who don't. Thus the book not only tells a crucial story, but also supports the libertarian critique of modern society.

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Dry Manhattan: Prohibition in New York City

by Michael A. Lerner
Harvard University Press • 2007 • 351 pages • $28.95

Reviewed by Robert Batemarco

Give the Prohibitionists this much credit: they didn't just preach to the choir. They brought their battle to its most formidable opponent—New York City. Unfortunately, their cause was misguided, providing a textbook's worth of examples of the law of unintended consequences. In his book *Dry Manhattan*, Michael Lerner (associate dean at Bard High School Early College in New York City) not only portrays the impact of Prohibition on the Big Apple in fascinating detail, but also offers key insights into the political process that both made Prohibition possible and led to its demise.

While people with some knowledge of history are aware that Prohibition created opportunities for corruption, filled the coffers of organized crime, undermined respect for the law, and made drinking more dangerous but no less common, Lerner offers specifics that lend greater immediacy to those things than mere statistics can. He writes, for instance, "[M]ore new pharmacies opened in New York between 1920 and 1923 than in the ten previous years combined, undoubtedly because pharmacies, which could legally dispense prescription whiskey, offered a perfect front for bootleggers."

The part of the book I found most enlightening was the confluence of political factors that enabled Prohibition to pass. Lerner highlights the role of the Anti-Saloon League in assembling the coalition that obtained ratification of the Eighteenth Amendment. In doing so, he makes clear that much more was at stake than simply eradicating the social consequences of alcohol abuse. The Prohibitionist movement was driven by a nativist desire to remake urban and ethnic America in the image of the Anglo-Saxon heartland, combined with a Progressive penchant for social engineering. Saloons made an obvious target. The connection between saloons and corrupt politics had given them a

bad name. For instance, in New York City, saloons played a central role in Tammany Hall's graft and vote-buying and helped launch many political careers. However, in urban immigrant communities the saloon was much more, serving a multiplicity of social functions, including providing a bridge "between the old world and the new, places where newly arrived immigrants could learn from their predecessors and begin the often painful process of adapting to a new homeland." (Many of those functions were soon to be usurped by the welfare state.)

But the factor that served as a tipping point ensuring ratification was America's entry into World War I. In the shadow of wartime hysteria, Prohibitionists demonized brewers and distillers for their predominantly German ancestry, then played the patriotism card to muzzle dissent. As passage of alcohol prohibition started to assume an air of inevitability, owners of motion-picture theaters and producers of such putative liquor substitutes as tea, soft drinks, and ice cream opportunistically jumped on the bandwagon, hoping to get their share of dollars that had been spent on alcohol. A bit of deceit also helped put Prohibition over the top. It was never made clear that beer and wine were to be prohibited as well as hard liquor. Once Prohibition took effect, its selective enforcement against Jews, Catholics, and ethnic minorities furnished strong evidence that "the main objective of the dry lobby was to police the habits of the poor, the foreign-born, and the working class."

Prohibition had its economic impact, too, and the author displays a better grasp of economics than most historians. He does not take at face value the allegations of either "wets" or "drys" that every increase or decrease in employment and inflation was the result of the Volstead Act, which implemented the Eighteenth Amendment. Rather, he sees through their fallacious reasoning and understands that other events, such as the Federal Reserve's credit creation, had a much stronger impact on macroeconomic variables.

The book concludes with the repeal of Prohibition. The heroine of Lerner's account in bringing about repeal is Pauline Sabin, a one-time Prohibition supporter who reached beyond her own upper-crust background to assemble a winning coalition for repeal. Lerner paints Franklin Roosevelt less heroically, showing how he waffled on this issue until the eve of his nomination.

In all, this is a well-written narrative of a disturbing episode in our history, filled with local color that makes it especially interesting to New Yorkers. Despite being clearly in the anti-Prohibition camp, Lerner covers both sides in a fair-minded way. Yet there is something bittersweet in his conclusion that "New Yorkers who opposed Prohibition rejected the idea that the state had a right to dictate the private conduct of its citizens." These same New Yorkers would embrace the state's "right" to control rents for apartments and prevent citizens from owning guns.

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Rights Versus Wishes

BY WALTER E. WILLIAMS

Critics of the U.S. health-care system often suggest that we should adopt the single-payer universal systems of other countries. The serious problems encountered by those systems are increasingly documented and well known, such as the long waiting lists, restrictions on physician choice, and rationing in countries such as Canada, Italy, Greece, and the United Kingdom.

People often suggest that our health-care system's problems stem from the fact that we have a free market; hence, their solution is to move to socialized medicine, where everyone has a right to a certain level of health care. The problem with that assessment is that our health-care system is not a free-market system. Over 50 percent of health-care expenditures are made by government at various levels, and there is extensive government regulation and control. Most of the problems of health care can be directly connected to that fact.

But there is a much more important question, not given much discussion, that will be the focus of this article.

Do people possess a right to health care whether they can afford it or not? If you believe the 2008 presidential aspirants, the answer is yes. In a Wisconsin campaign speech Senator Hillary Clinton said, "I believe health care is a right, not a privilege. And I will not rest until every American is covered." In a campaign speech in Iowa, Senator Barack Obama said, "I believe that every American has the right to affordable health care." While Senator John McCain has not said health care is a right, he nonetheless proposes greater government involvement. Many Americans share the vision that health care is a right. Let us try to decide what is or is not a right.

People often suggest that our health-care system's problems stem from the fact that we have a free market; hence, their solution is to move to socialized medicine, where everyone has a right to a certain level of health care.

Imagine that I meet an attractive young lady and ask her to date me. Suppose she refuses. Have my rights been violated? Or suppose I ask to live in your house, and you say no. Have you violated my rights to decent housing? Finally, suppose I knock on your door and tell you I am hungry and wish to share dinner with you and your family. If you refuse, have you violated my rights? I am sure that most Americans, including Senators Clinton, Obama, and McCain, would agree that I have no constitutional, human, or natural right to date someone, or to live in someone's house, or dine with him. But why?

Rights and Obligations

True rights, such as those in our Constitution, or those considered to be natural or human rights, exist simultaneously among people. The exercise of a right by one person does not diminish those held by another. It imposes no obligations on another except those of non-interference. I have a right to ask a lady for a date, but I have no right to impose an obligation on her to actually date me. Similarly, I have a right to ask you to permit me to live in your house and dine with your family, but I have no right to impose such an obligation on you. Moreover, since I do not have these rights, I do not have a right to delegate authority to government to impose such obligations on another. In other words, from

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a moral point of view, one can delegate only those rights that one possesses.

To argue that people have a right that imposes obligations on another is absurd. This can be readily seen if we apply such an idea to my rights to speech or travel. Under that vision, my right to free speech would require government-imposed obligations on others to provide me with an auditorium, television studio, or radio station. My right to travel freely would require government-imposed obligations on others to provide me with airfare and hotel accommodations.

For government to guarantee a "right" to health care, or any other good or service, whether a person can afford it or not, it must diminish someone else's rights, namely his rights to his earnings. The reason is that government has no resources of its own. Moreover, there is no Santa Claus or Tooth Fairy giving the government those resources. The fact that government has no resources of its own forces one to recognize that for government to give one American citizen a dollar, it must first, through intimidation, threats, and coercion, confiscate that dollar from some other American. In other words, if one person has a right to something he did not earn, it of necessity requires another person not to have a right to something that he did earn.

For government to give one American citizen a dollar, it must first, through intimidation, threats, and coercion, confiscate that dollar from some other American.

A better term for these new-fangled rights to health care, decent housing, and food is "wishes." If we called them wishes, I would be in agreement with Clinton, Obama, McCain, and others. I also wish everyone had adequate health care, decent housing, and nutritious meals. However, if we called them wishes, there would be confusion and cognitive dissonance among people calling for socialized medicine. The average American would cringe at the thought of government punishing one person because he refused to make someone else's wish come true.

For example, if I simply had a wish for a palatial house and a Rolls Royce in my driveway, and Congress told its agents at the IRS to take other people's money to make my wish come true, I am sure the average American would be offended. Americans would find it easier to live with their consciences, and find congressional initiation of force against others more palatable, if it were alleged that I have a constitutional "right" to a palatial house and a Rolls Royce. After all the primary job of government is to protect rights.

We can evaluate the morality of rights versus wishes another way. Suppose someone initiated force to prevent another from exercising his speech rights and another stepped in to protect that person's right to speak. Would the intervener be seen as a hero or villain? Most people would answer hero. Then suppose someone saw a homeless person in need of health care and did privately exactly what government does—initiate force to take someone else's money to provide that homeless person with medical services. Would that person be seen as a hero or villain? Most people, at least I hope so, would see that person as a villain. That is, taking the rightful property of one person to give to another, to whom it does not belong, is considered theft, and it is theft even if the proceeds are used for selfless purposes. It is theft whether two people or 300 million people agree to taking another's property.

Finally, charitable efforts to help one's fellow man in need are noble. Reaching into one's own pockets to help is praiseworthy and laudable. Reaching into someone else's pockets to do so is despicable and worthy of condemnation.