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*Aim at the sun, and you may not reach it; but
your arrow will fly higher than if aimed at an
object on a level with yourself.*

— Joel Hawes

FUTURE OF FREEDOM

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The Future of Freedom Foundation is a nonprofit educational foundation whose mission is to advance liberty and the libertarian philosophy by providing an uncompromising moral, philosophical, and economic case for individual liberty, free markets, private property, and limited government.

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The U.S. Executions of Charles Horman and Frank Teruggi, Part 3

by Jacob G. Hornberger



As soon as World War II ended, the U.S. government proceeded to convert the Soviet Union from a wartime partner and ally to a new official enemy of the United States, one that Americans were told posed a greater threat to the country than even Nazi Germany. The ensuing “cold war” brought about the most fundamental change to America’s governmental system in U.S. history, a change that ultimately led to the murder of Charles Horman and Frank Teruggi at the hands of their own government.

In his Farewell Address in 1960, Dwight Eisenhower alluded to this monumental change in America’s constitutional structure and in American life:

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence — economic, political, even spiritual — is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources, and livelihood are all involved; so is the very structure of our society.

Eisenhower was referring to the vast U.S. military establishment that was permitted to remain in existence after World War II as a permanent feature of American life. It was an apparatus that the American people had never before had during peacetime. Keep in mind, after all, the deep antipathy that the Founding Fathers had had toward standing armies, militarism, and military establishments, as I pointed out in part 2 of this series (see the November *Future of Freedom*).

A vast permanent military establishment wasn’t the only big change for postwar America. Two years after World War II, the National Security Act brought into ex-

istence the Central Intelligence Agency, a super-secret federal agency that would ultimately wield the same type of omnipotent powers wielded by totalitarian regimes, including the powers to kidnap, detain, torture, assassinate, and execute people without due process of law.

The combination of a vast permanent military establishment and the CIA came to be known as the “national-security state.” It comes as no surprise that this new governmental apparatus soon became the most powerful and influential part of the federal government.

Fear

The driving force behind the growth in power of the national-security establishment was an overarching fear of communism that U.S. officials inculcated in the minds of the American people. U.S. Sen. Arthur Vandenberg told President Harry Truman that Truman would have to “scare hell out of the country” in order to secure approval of a \$400 million foreign-aid grant to “contain” communism in Turkey and Greece.

Fear became the coin of the realm for Americans living under the national-security state during the Cold War. Fear of the Soviet Union. Fear of Red China. Fear of North Korea.

Fear of North Vietnam. Fear of communists and communism.

That’s what fueled the decades-long obsession with Cuba after Fidel Castro ousted the pro-U.S. dictator Fulgencio Batista from power and then declared that Cuba would be independent of U.S. control.

**Fear became the coin of the realm
for Americans living under the
national-security state.**

Keep in mind that Cuba under Castro never attacked the United States or even threatened to do so. It was always the other way around. The United States has always been the aggressor against Cuba, as manifested by the national-security state’s invasion at the Bay of Pigs, terrorist attacks against Cuban businesses, and assassination attempts against Castro.

Few Americans raised any moral concerns about that. Still shell-shocked after the horrors of World War II and having been inculcated during wartime with a mindset of deference to authority, Americans passively accepted what U.S. officials were saying about the gravity of the communist threat and the need for ever-increasing military and intelligence budgets. The deep fear of communism and the ardent

anti-communist fervor throughout the Cold War gripped Americans so fiercely that conscience and moral principles were subordinated to “national security,” which became the most important term in the American lexicon, notwithstanding that it had no objective meaning and was found nowhere in the U.S. Constitution.

The CIA and FBI even extended their anti-communist crusade to America’s civil-rights movement.

From the late 1940s through the 1980s, U.S. officials in the military, CIA, and FBI went on an anti-communist crusade in America. They spied on American citizens who were suspected of being communists or socialists. They tapped people’s phones. They encouraged Americans to become snitches against their neighbors. They secretly conducted surveillance against members of the U.S. Communist Party and the Fair Play for Cuba Committee, and in fact did everything they could to infiltrate and destroy both organizations.

They even extended their anti-communist crusade to America’s civil-rights movement. That’s what their surveillance of Martin Luther King was all about. They were con-

vinced that King was a mole for the worldwide communist movement. That’s why they spied on him, tapped his telephone, and blackmailed him in the hopes of driving him to commit suicide.

Attacking liberties

As a libertarian, the last thing I would ever do is defend socialism or communism. Libertarianism stands in direct opposition to all forms of statism. But as a libertarian I also stand for the right of every person to believe in and promote whatever philosophy he wants and, equally important, to actively participate in the political process to advance his particular philosophy.

As Thomas Jefferson observed in the Declaration of Independence, every person has the natural, God-given right to life, liberty, and the pursuit of happiness, each in his own way, and it is the duty of government to ensure the protection of fundamental rights.

That’s not what the U.S. national-security establishment did during the Cold War. In the name of anti-communism it attacked people’s fundamental God-given rights. In fact, that is one of the real ironies of the Cold War — that the U.S. national-security state was employing communist methods to sup-

press American communists and socialists in the alleged attempt to keep America safe from communists and socialists. Such communist-like methods included not only attempts to destroy or ruin Americans who believed in socialism and communism but also such dark-side practices as medical experimentation on unsuspecting Americans, coups, torture, kidnappings, assassinations, and partnerships with criminal organizations and brutal dictatorships.

The Cold War anti-communist crusade engendered by the U.S. national-security state also embroiled the United States in major wars in Korea and Vietnam, wars that violated our own constitutional system owing to the lack of congressional declarations of war. Both conflicts were nothing but civil wars, but U.S. officials scared the American people into believing that without U.S. intervention, the communists would soon be on their way to the United States.

In fact, throughout the Vietnam War U.S. officials steadfastly maintained that South Vietnam was a domino that, if permitted to fall, would produce a cascading effect that would ultimately mean a communist takeover of the United States. It was all a delusion. At the

end of the Vietnam War, the Pentagon and the CIA lay defeated, but the United States never fell to the communists. Yet more than 58,000 American soldiers were dead and many more wounded. Many of those soldiers had been forced, through conscription, to “serve their country” by fighting and dying in a faraway land for nothing.

The U.S. national-security state was employing communist methods to suppress American communists and socialists.

The advent of the national-security state, combined with an overarching fear of communism, also led to what author Chalmers Johnson called an empire of military bases all over the world, along with a foreign policy of intervention in the affairs of other nations. It was all justified under the rubric of keeping America safe from the communists and communism.

As could be predicted, U.S. national-security officials began extending their war on American communists and socialists to Americans who were opposing their war in Vietnam. U.S. officials looked on antiwar advocates as “subversives” and even as traitors — that is, people who were refusing to support

the troops and trying to bring down the U.S. government, no doubt with the aim of bringing a communist regime into power.

The subversives

That was clearly the national-security mindset with respect to Frank Teruggi. Recall the previously discussed secret FBI surveillance reports on Teruggi. He was “in contact with an anti-war dissident in Munich.” He was a member of a group called “the Chicago Area Group for the Liberation of the Americas.” He was working for a Chilean newspaper named FIN, which provided “Chilean information for the American left.” He “attended a ‘Conference on Anti-Imperialist Strategy and Action’ held by returned Peace Corps volunteers.” He was a member of “political organizations supporting socialism and national liberation movements in Latin America.”

What is wrong, in a criminal sense, with any of those activities? What’s wrong with opposing a war, especially one that is being waged illegally, immorally, and unconstitutionally? What’s wrong with working for a newspaper that caters to leftists? What’s wrong with being a socialist, communist, progressive, leftist, liberal, conservative, liber-

tarian, or anything else? What’s wrong with opposing the U.S. government’s imperialism, which includes coups, assassinations, foreign aid to dictatorships, and meddling in the political affairs of other countries?

What’s wrong with opposing the U.S. government’s imperialism?

Aren’t such activities what genuine freedom is all about? If people aren’t free to subscribe to and advocate different, even unpopular, political and economic philosophies and to oppose governmental policies and practices, then how can they be considered genuinely free?

The truth is that it wasn’t Teruggi who was the subversive or the traitor. He was doing nothing more than exercising fundamental rights, the type of natural, God-given rights to which Jefferson referred in the Declaration of Independence. Teruggi had every right in the world to subscribe to any political or economic philosophy he wished and to oppose any governmental policy or practice.

The real subversives and the real traitors were the people within the U.S. national-security state apparatus, an apparatus that was alien to the founding principles of our na-

tion, an apparatus that had been grafted onto our governmental system without even the semblance of a constitutional amendment, an apparatus that took America down to the dark road to communist-like policies and practices, an apparatus that scoffed at the U.S. Constitution, an apparatus that warped American values, corroded people's morals, and stultified the consciences of the American people.

Indeed, another of the many ironies of the Cold War was that U.S. national-security state officials were doing the same sorts of dark things to pro-communist and pro-socialist Americans that communist officials in the Soviet Union, Eastern Europe, East Germany, North Korea, North Vietnam, and Red China were doing to anti-communists.

Another irony in all this is that Teruggi's so-called socialist beliefs were no different from the progressive beliefs of many U.S. presidents in the 20th century, especially Franklin Roosevelt in the 1930s and Lyndon Johnson in the 1960s.

Unfortunately, illegal and unconstitutional surveillance of Amer-

icans who subscribed to progressive beliefs or who opposed the U.S. war in Vietnam wasn't the only thing that U.S. national-security state officials did. Obsessed with the delusory fear that communism was coming to the United States by means of the election of a socialist-communist president in Chile, U.S. officials embarked on one of the most extraordinary foreign interventions in U.S. history, one that would ultimately result in the assassination, kidnapping, rape, torture, disappearance, or murder of tens of thousands of innocent people, including two Americans named Charles Horman and Frank Teruggi.

Jacob Hornberger is founder and president of The Future of Freedom Foundation.

NEXT MONTH:
“The U.S. Executions of Charles Horman and Frank Teruggi, Part 4”
by Jacob G. Hornberger

Bastiat on the Socialization of Wealth

by Sheldon Richman



That ... veil which is spread before the eyes of the ordinary man, which even the attentive observer does not always succeed in casting aside, prevents us from seeing the most marvelous of all social phenomena: real wealth constantly passing from the domain of private property into the communal domain.

Wealth marvelously passing from the private to the communal domain? It sounds like a state socialist's redistributionist fantasy!

But wait — Frédéric Bastiat, the great laissez-faire radical, wrote those words in his book *Economic Harmonies*, chapter 8, provocatively titled “Private Property and Common Wealth.”

He repeats the point throughout his fascinating chapter:

And so, as I have already said many times and shall doubtless say many times more (for it is the greatest, the most admirable, and perhaps the most misunderstood of all the social harmonies, since it encompasses all the others), it is characteristic of progress (and, indeed, this is what we mean by progress) to transform onerous utility into gratuitous utility; to decrease value without decreasing utility; and to enable all men, for fewer pains or at smaller cost, to obtain the same satisfactions. Thus, the total number of things owned in common is constantly increased; and their enjoyment, distributed more uniformly to all, gradually eliminates inequalities resulting from differences in the amount of property owned.

Here's what Bastiat had in mind. In a competitive marketplace with advancing technology, as the effort required to produce and, hence, acquire things diminishes, the price of gaining utility falls. For example, if the average worker had to work

two hours, 40 minutes, to buy a chicken in 1900, but only 14 minutes as the 21st century approached (actual statistics), Bastiat would say the chicken “is obtained for less *expenditure of human effort*; less *service* is performed as it passes from hand to hand; it has less value; in a word, it has become gratis, [though] not completely.” In other words, most of the utility that had to be paid for with painful effort in 1900 was free by 2000. (By “less value,” Bastiat meant that the market price has fallen, not that the chicken was less useful.)

“The goal of all men, in all their activities, is to reduce the amount of effort in relation to the end desired.”

Thus, progress through the market order consists in ever more people satisfying more of their wants with less and less effort. Bastiat calls this a move from private property to common wealth because he roots property in effort, and greater wealth is available to all with less effort. What makes that possible? Technological innovation. As Bastiat puts it, “Production has in large measure been turned *over to Nature*.”

The goal of all men, in all their activities, is to reduce the amount of effort in relation to the end desired and, in order to accomplish this end, to incorporate in their labor a constantly increasing proportion of the forces of Nature.... They invent tools or machines, they enlist the chemical and mechanical forces of the elements, they divide their labors, and they unite their efforts. How to do more with less, is the eternal question asked in all times, in all places, in all situations, in all things....

The gratuitous co-operation of Nature has been progressively added to our own efforts....

A greater amount of gratuitous utility implies a partial realization of common ownership.

But technology only makes this “marvelous social phenomenon” possible. What makes it actually happen? Competition, of course. If one producer attempted to charge the older, higher price — if he tried to capture the returns to what Bastiat called “the contribution made by Nature” — he would be inviting competitors to undersell him (un-

less government privileges, such as licensing or “intellectual property” blocked competition). Rivals would be able to undersell because a lower price would still recover the costs of the human effort involved in production. Competitive entrepreneurship drives prices down toward costs. As F.A. Hayek put it, “*The empirical observation that prices do tend to correspond to costs was the beginning of our science.*” (On the relationship between cost and price, see my essay “Value, Cost, Marginal Utility, and Böhm-Bawerk” at <http://bit.ly/1luxrsT0>.)

Bastiat did not want his praise of the expanding communal realm to be mistaken for communism.

Bastiat, like his predecessor Adam Smith, acknowledged that this process of passing wealth from the private to the communal domain is driven by people’s self-interest: “What other stimulant would urge them forward with the same degree of energy?” Today it is largely unappreciated that the market order — private property, competitive entrepreneurship, free pricing, profit/loss — aligns private and public interest as no other institutional setting possibly could. (For a pre-Austrian, Bastiat got an amaz-

ing number of things right, but he got one thing badly wrong when he rejected the idea that trade requires a double inequality of value. (See my essay “The Importance of Subjectivism in Economics” at <http://bit.ly/1luxrQkC>.)

Recognizing plunder

To be sure, Bastiat did not want his praise of the expanding communal realm to be mistaken for communism, although he expected that to happen. (“I anticipate it, and I am resigned to it.”) Unlike the communist, he favored the socialization of the fruits of *nature*, not of human effort:

By the communal domain is meant those things that we enjoy in common, by the design of Providence, without the need of any effort to apply them to our use. They can therefore give rise to no service, no transaction, no property. Property is based on our right to render services to ourselves or to render them to others for a remuneration. What the communist proposes to make common to all is not the gratuitous gifts of God, but human effort, or service.

So communism and the communal domain have nothing in common but a word root. Bastiat suggested that more people might favor free markets if they understood the distinction he was making:

If the legitimacy of private property has appeared doubtful and inexplicable, even to those who were not communists, it seemed so because they felt that it concentrated in the hands of some, to the exclusion of others, the gifts of God originally belonging to all. We believe that we have completely dispelled this doubt by proving that what was, by decree of Providence, common to all, remains common in the course of all human transactions, since the domain of private property can never extend beyond the limits of value, beyond the rights laboriously acquired through services rendered.

And, when it is expressed in these terms, who can deny the right to private property?

While Bastiat appeared sanguine about what was going on around him, he understood that the reigning political-economic system

indeed enabled the illegitimate privatization of what in a free market would have gone into the communal realm. “Of course, I know that in practice the ideal principle of property is far from having full sway,” he wrote. “Against it are conflicting factors: there are services that are not voluntary, whose remuneration is not arrived at by free bargaining; there are services whose equivalence is impaired by force or fraud; in a word, plunder exists.” Bastiat, who coined the phrase “legal plunder,” of course had the state in mind as the chief culprit.

Some people have an aversion to free markets because they mistakenly believe “free market” means corporatism and illegitimate gains.

Why is Bastiat’s distinctive framing of the case for the free market worthwhile? Because there is, I believe, an untapped potential constituency for radical libertarian ideas among people who have an aversion to free markets only because they mistakenly believe “free market” means corporatism and illegitimate gains. Before those people can be persuaded by libertarian arguments, we must get their attention, and the best way to do that is

to present the free market as a process that embodies social cooperation and, à la Bastiat, the “socialization” of wealth.

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two other books published by FFF. Visit his blog, “Free Association,” at www.sheldonrichman.com.

NEXT MONTH:
“Leonard P. Liggio
(1933–2014)”
by Sheldon Richman

When studied with any degree of thoroughness, the economic problem will be found to run into the political problem, the political problem in turn into the philosophical problem, and the philosophical problem itself to be almost indissolubly bound up at last with the religious problem.

— Irving Babbitt

The Food-Security Charade

by James Bovard



Federal spending on food aid has skyrocketed in recent decades, and the feds are now feeding more than 100 million Americans. Yet, according to the Agriculture Department (USDA), far more Americans are “food insecure” now than before the mushrooming of subsidized feeding programs. But rather than seeing this as evidence of a government failure, a chorus of activists and pundits insist that it proves that even more people should be encouraged to depend on Uncle Sam for their next meal.

The USDA announced last September that 14.3 percent of American households suffer from “food insecurity.” There are 49 million people living in those households, and the media coverage presumed

that all those residents were either hungry or “food insecure.” But the USDA’s report states that many residents — especially children — in such households actually do not go hungry or suffer doubts about food. That statistical contortion is typical of a report seemingly crafted to provide cover for bureaucrats while permitting politicians to fan public fears.

Over the past 15 years federal surveys have profoundly muddled Americans’ understanding of the hunger problem. During the Clinton administration, the USDA began using a “food insecurity” survey that had been initially created by the Food Research Action Center (FRAC), a left-wing advocacy organization renowned for hyping hunger. FRAC’s goal is to vastly increase the number of Americans receiving government food aid — and it slanted the questions accordingly.

One of the USDA’s surveys’ preliminary screening question asks, “In the last 12 months, did you ever run short of money and try to make your food or your food money go further?” Why should we be concerned that shoppers want their food dollars to go further? That was formerly taught as a virtue in high-school home-economics classes. Now it is a pretext for federal alarm.

The USDA defines food insecurity for a family as being “uncertain of having, or unable to acquire, enough food to meet the needs of all their members because they had insufficient money or other resources for food.” The USDA noted, “For most food-insecure households, the inadequacies were in the form of reduced quality and variety rather than insufficient quantity.”

“Worry” about being able to buy sufficient food is the number-one source of food insecurity. If someone states that he feared running out of food for a single day (but didn’t run out), that is an indicator of being “food insecure” for the entire year — regardless of whether he ever missed a single meal. If someone felt he needed organic kale but could only afford conventional kale, that is another “food insecure” indicator. If an obese person felt he needed 5,000 calories a day but could only afford 4,800 calories, he could be labeled “food insecure.”

Democrats have a long history of demagoguing this particular report. After the 2009 food-security report was released, Barack Obama announced that “hunger rose significantly last year.... My administration is committed to reversing the trend of rising hunger.” Obama’s

comment spurred a *Washington Post* headline, “Hunger a growing problem in America, USDA reports,” while the *New York Times* chimed in with a story titled, “Hunger in U.S. at a 14-Year High.”

The USDA’s most recent report, which focuses on food insecurity and not hunger, spurred the usual deluge of misleading media coverage. A Voice of America headline proclaimed, “USDA: Hunger Threatens 1 in 7 Americans.” A *Philadelphia Inquirer* headline lamented, “USDA: Despite slight improvement, hunger persists.” The *Sioux Falls Argus Leader* announced, “Hunger a growing problem for South Dakota.”

If someone states that he feared running out of food for a single day (but didn’t run out), that is an indicator of being “food insecure.”

In its 2013 report on food insecurity, the USDA asserted that federal food programs “increase food security by providing low-income households access to food, a healthful diet, and nutrition education.” But food insecurity is far more widespread now than in 2007 (11.1 percent versus 14.3 percent now), even though the number of food-stamp recipients has soared from 26 million to 46 million in the meantime.

Actually, rising government dependency may help explain rising insecurity. A 2007 *Journal of Nutrition* study concluded that families receiving food stamps are more than 50 percent more likely to be food-insecure than similar households not on food stamps. Three years later, the Government Accountability Office stated that food-stamp participants “tend to be more food-insecure compared to” eligible nonparticipants. A Harvard School of Public Health 2013 study also found that enrolling in the food-stamp program failed to significantly boost participants’ food security regarding dietary quality.

In 2012 “seven times as many [low-income] children are obese as are underweight.”

Perhaps relying on others for one’s next meal spurs insecurity. Many food-stamp recipients spent the entire month’s allotment on the same day they received it. Some reports indicate that binge buying is sometimes followed by binge eating.

Though the food-security survey results are touted as evidence of widespread hunger, another USDA survey debunked that conclusion. The USDA’s Agricultural Research Service conducts periodic surveys

on “What We Eat in America.” The most recent survey (2009-2010) revealed that children 2 years old to 11 in households with less than \$25,000 in annual income consume significantly more calories than children in households with incomes above \$75,000. The same report showed that black children in the same age group consume significantly more calories than white children. (*The Journal of the American Medical Association* noted in 2012 that “seven times as many [low-income] children are obese as are underweight.”)

Secrecy

Some of the “food security” problem may result from how food stamps are spent, but the Obama administration maintains an iron curtain of secrecy around the program. Rep. Tom Marino (R-Penn.) introduced the SNAP Transparency Act last year to compel the USDA to disclose the food items for which food stamps are used. Marino complained, “Congress has virtually no information to ensure that the program is operating effectively.” The Association of Health Care Journalists, the National Association of Science Writers, and other organizations endorsed Marino’s legislation, but Democratic lawmakers

made sure it went nowhere. But that also makes a mockery of the millions of dollars of federally funded research on low-income diets and nutrition problems. The feds would rather withhold the key information than risk disclosures that might demolish the pretense that food stamps are a “nutrition program.”

“Food security” is something invented by government statisticians to serve political purposes.

“Food security” is something invented by government statisticians to serve political purposes. The USDA uses a radically different standard when it estimates “food security” for foreign nations, basing its judgments on whether residents may be presumed to consume at least 2,100 calories per day. A recent USDA report declared that only 13.9 percent of the population in the world’s 76 poorest nations are “food insecure.” According to the USDA, American households suffer far more “food insecurity” than do families in Angola, Mozambique, and Pakistan. It claims that most developing nations have zero problem with “food security” — a conclusion that would shock the

downtrodden residents in those countries.

The USDA’s food-security survey has been harshly criticized by experts in the past. The National Academy of Science (NAS) recommended in 2006 that the USDA radically overhaul the survey. The USDA juggled the terminology, adapting the phrase “low food security” to signify that survey respondents reported “reduced quality, variety, or desirability of diet” with “little or no indication of reduced food intake.” The NAS panel recommended that the “USDA should explicitly state in its annual reports that the data presented in the report are estimates of prevalence of household food insecurity and not prevalence of hunger among individuals.” The panel also recommended that “resource-constrained hunger (i.e., physiological hunger resulting from food insecurity) ... should refer to a potential consequence of food insecurity that, because of prolonged, involuntary lack of food, results in discomfort, illness, weakness, or pain that goes beyond the usual uneasy sensation.”

The NAS panel lamented that there is little solid data on individual hunger in the United States and urged the government to develop

reliable gauges of hunger. That is a sound recommendation, but it is appalling that it would be necessary to make such a proposal more than 40 years after Richard Nixon first declared war on hunger. Decade after decade, politicians have talked as if higher federal food-aid spending would automatically banish hunger from the land. Nixon also set a precedent followed by the vast majority of subsequent politician-hunger warriors by failing to reform federal farm policies that sharply inflated food prices to all consumers while claiming to be concerned about the poor. Federal policies currently make sugar, milk, peanut butter, and many other basic products far more expensive than they would otherwise be. But neither Obama nor the hunger lobby has exerted elbow grease to end policies that brutalize Americans at the grocery checkout.

Some Americans are suffering badly, but the USDA has never tried to accurately count them. The department is far more enthusiastic about pretending to measure “food insecurity” (instead of hunger) because it produces vastly higher numbers to justify expanding federal food programs. An honest survey of actual problems could wreak havoc on bureaucratic job security.

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NEXT MONTH:
**“Forgotten Civil War Atrocities
Bred More Carnage”**
by James Bovard

Abe Lincoln never went to high school or college. In fact, he spent very little time in any kind of “educational institution.” But was he uneducated? On the contrary, he ranks high among the well-educated men of all centuries, including our own. When Benjamin Franklin first went to Paris as envoy from the newly formed Confederacy of American States, crowds lined the street to see him ride to and from his lodgings. This was not because he represented an upstart little nation fighting for its independence. Instead, it was because he was already world-famous as a scholar, scientist, and philosopher. Of formal schooling he had almost none; but even by today’s standards, he was a highly educated man.

— V. Orval Watts

The Origins and Intentions of Copyright

by Joseph S. Diedrich



In a victory for media Goliaths, the Supreme Court recently ruled that TV-streaming service Aereo “perform[ed] ... copyrighted works publicly” and therefore violated copyright law. The ghost of Grokster haunts us. Napster rolls in its grave. Copyright’s muscular hands have once again strangled innovation.

What is the purpose of copyright law? Conventional wisdom asserts that it protects the rights of authors, spurs creativity, fights plagiarism, and benefits the public as a whole. The *Aereo* decision, however, clearly benefits big media without advancing any of copyright’s ostensible aims. A look into the origins and intentions of copyright

will demonstrate that this is neither a fluke nor a misunderstanding.

The roots of copyright lie in the soil of state-granted privilege. Invented in 1450, the Gutenberg printing press empowered writers throughout the Western world. Authors rejoiced, as their works could now be disseminated as never before. That included potentially seditious or sacrilegious works, much to the chagrin of the State.

To combat the threat, governments cozied up with publishing houses. In 1556 in England, the stationers’ guild became royally chartered as the London Company of Stationers. Along with the charter came a *quid pro quo* agreement. The company was entrusted with the obligation of “seizing, taking, burning ... books or things ... contrary to the form of any statute, act, or proclamation.” In exchange, it enjoyed an exclusive monopoly over the printing of all materials — old and new — throughout the kingdom.

Initially organized under the Roman Catholic rule of Queen Mary I, the Stationers Company spent much of its time censoring Protestant works. Upon Mary’s death and the crowning of Elizabeth, religious affiliations flip-flopped. The whimsical nature of the monarchy didn’t bother the Sta-

tioners, however. Both the company and the crown reaped the benefits of their insidious arrangement for decades. As University of Georgia law professor L. Ray Patterson puts it, “The power to burn offending books was a benefit to the sovereign (a weapon against unlawful publications), and a boon to the stationers (a weapon against competition).”

When Parliament became more liberal, it allowed the Stationers’ monopolistic privilege to expire. As a result, the Stationers became quite worried. No longer would they enjoy an obscene economic advantage.

In the case of copyright, the lobbyists were publishers, not authors.

Censorship to the point of book burning was not a high priority for the British government. Parliament ignored the Stationers’ initial pleas for statutory protection on the grounds of censorship.

The Stationers recognized that authors needed a publishing company. Dissemination of a work to any degree required a printing press, ancillary equipment, and substantial labor hours. The vast majority of individuals lacked the immense capital required to produce salable copies. With this in mind, the Sta-

tioners concocted the argument that authors should own the words and expressions they create.

The Stationers understood that authors eager for dissemination would sell their new property to publishers. Even so, it seemed like a liberal argument. Indeed, as Ludwig von Mises once wrote, “The program of liberalism, therefore, if condensed into a single word, would have to read: *property...*” Parliament accepted the Stationers’ new argument, and the first Western copyright law soon followed.

Patterson recounts what happened next: “Parliament eventually responded to the plea for an author’s copyright with the Statute of Anne in 1710. The characterization of the statutory copyright as an author’s copyright, however, is one of the great canards of history.”

Whom was the Statute of Anne, the first of its kind, intended to protect? As with any law, looking to whoever was lobbying for its passage provides the answer. In the case of copyright, the lobbyists were publishers, not authors. After all, why would authors seek to prevent the proliferation of their works?

From the outset, publishers sought to reinforce their existing privilege and deepen their pockets. The state provided the most effec-

tive means of doing so. In a way, copyright law subsidizes publishers by artificially mitigating the risk of doing business. Elements of mercantilism also crept into early copyright laws. Attempting to create incentives for homeland production, laws often invalidated copyrights if a work was subsequently published in a foreign nation.

Scarcity

Note that copyright was not and is not about the economic and social well-being of authors. Nor is it about spurring innovation and creativity. Nor is it about plagiarism.

Plagiarism and copyright are distinct. While plagiarism entails the misattribution of another's work to oneself, copyright deals with the reproduction of properly attributed materials. Plagiarism, in fact, had been viewed as morally wrong and socially unacceptable since the Middle Ages. For example, when an Italian composer named Bononcini plagiarized a madrigal, he was ostracized. His music career all but ended, and he died in poverty. Laurence Sterne, Samuel Taylor Coleridge, and Oscar Wilde were all accused of plagiarism.

Nor is copyright about property. Rather than protecting rights to existing property, copyright *invents*

(or better yet, *conjures*) property. The State cannot grant, create, or augment property rights. The best it can do is prevent the violation and diminution of property rights (if it can even do that). Given the constraints of the physical world, property rights are de facto necessary for the peaceful allocation of scarce resources and the survival of mankind. As shown by John Locke, Murray Rothbard, Hans-Hermann Hoppe, and countless others, property exists as a natural consequence of scarcity.

Property rights are de facto necessary for the peaceful allocation of scarce resources and the survival of mankind.

Absent a system of exclusive control, conflict over the use of scarce resources is unavoidable. On the other hand, conflict over the use of nonscarce resources does not naturally occur. Property rights dissuade conflict over scarce resources, but actually *promote* conflict over nonscarce resources. Intellectual property and property rights in scarce goods cannot logically coexist. As libertarian legal theorist Stephan Kinsella writes,

[By] merely authoring an original expression of ideas, by merely thinking of and recording some original pattern of information, or by finding a new way to use his own property ... the IP [intellectual-property] creator instantly, magically becomes a partial owner of others' property. He has some say over how third parties can use their property. IP rights change the status quo by redistributing property from individuals of one class (tangible-property owners) to individuals of another (authors and inventors). *Prima facie*, therefore, IP law trespasses against or "takes" the property of tangible property owners, by transferring partial ownership to authors and inventors. It is this invasion and

redistribution of property that must be justified in order for IP rights to be valid.

Thankfully, technology has thrown a wrench into the copyright racket. While the Supreme Court can temporarily suppress a particular innovation, it cannot silence a crescendo of freedom. With the advent of computers, the Internet, and peer-to-peer networks, authors no longer need publishers. Vanished are the up-front costs and capital investment that formerly precluded self-dissemination. The foundation on which copyright lies will soon collapse under its own weight.

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The more a person dislikes the strange and thinks his own ways superior, the more he regards it as his mission to civilize others.

— Friedrich A. Hayek

Uniting Constitutional Protection for Economic and Social Liberties, Part 2: The Great Depression and the Great Divide

by Steven Horwitz



In part 1, I traced the evolution of “substantive due process” jurisprudence under which the Supreme Court protected a variety of unenumerated rights, both economic and personal, through the Due Process Clause of the Fifth and Fourteenth Amendments.

Many of the unenumerated rights that had been protected by the much-maligned *Lochner*-era Court began to fall by the wayside in the face of shifting cultural beliefs about the necessity of greater government intervention, especially in the economic realm. The Great

Depression made it much harder, in the eyes of the public and the intellectuals, to defend the liberty of contract associated with the *Lochner* case. Put most simply, the burden of proof of constitutionality underwent a significant change from what libertarian legal scholar Randy Barnett calls a “presumption of liberty” to a presumption of constitutionality.

Until the New Deal era, the burden of proof lay on the state to demonstrate that a challenged law was within the defined powers of the legislature and did not violate the presumed, and broadly read, liberties of the people, including rights not explicitly enumerated in the Constitution. Since then, the presumption is that laws passed by the democratic process (assuming “due process of law”) are constitutional unless the challengers can demonstrate that such a law violates the rights enumerated in the Constitution or those that have been established by the Court to be “fundamental” even if not enumerated. The result has been the gradual extension of state power and erosion of liberties, except in those areas that are explicitly enumerated (such as the Bill of Rights) or that the Court has chosen to define as fundamental (e.g., privacy).

The key to this reversal of the constitutional burden of proof is found in *United States v. Carolene Products Company* (1938). In several decisions earlier in the decade, the Court had begun to undo the *Lochner* approach of putting the burden of proof on the state to show that legislation was “necessary and proper,” was explicitly authorized by the Constitution, and did not override accepted unenumerated rights. By *West Coast Hotel Co. v. Parrish* (1937), the reversal was largely complete, with the Court appearing to defer totally to the democratic process to a degree that the notion of judicial review itself might be rendered superfluous. In *Carolene Products*, the Court pulled back from that precipice and began to define the terms under which it would proceed for a number of decades.

As long as the legislation in question was reasonably perceived to be able to solve some problem, then it would pass the test of constitutionality.

The relevant passage is the famous “Footnote Four.” In the text of Justice Harlan Fiske Stone’s majority decision the Court argued that the legal restrictions on the market

for the milk substitute at the center of the case should be presumed to be constitutional “unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” Stone then qualified that presumption of constitutionality in the first part of Footnote Four:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

As long as the legislature could construct an argument that the legislation in question was reasonably perceived to be able to solve some problem (and that it did not violate one of the enumerated fundamental rights noted in Footnote Four), then it would pass the test of constitutionality. That gave, if not carte blanche, at the very least a wide latitude to the legislature and substantially weak-

ened the grounds from which the Court could overrule legislation.

Privacy

The Footnote Four approach stood for more than 20 years until it was attenuated somewhat in *Griswold v. Connecticut* (1965), which dealt with a state law making the sale of contraceptives illegal, for both the parties to the exchange and anyone who assisted in the exchange. The law was challenged and the Court agreed that it was unconstitutional. What was important about the case was the way in which it reached that conclusion. Justice William O. Douglas had to find a way to avoid going back to *Lochner*-type arguments, yet still find protection for activities that were not explicitly enumerated as rights in the Bill of Rights or otherwise fit the criteria laid out in Footnote Four. The Court concluded that the law violated the “right to privacy,” which, of course, is found nowhere in the text of the Constitution. Interesting to note, the Court did so by relying on the decisions in *Meyer* and *Pierce* (discussed in part 1) as precedent for such an unenumerated right.

The problem, therefore, was how to ground that right constitutionally without going back to the Four-

teenth Amendment, which would both violate the procedure laid out in Footnote Four and open the door to the unenumerated economic rights of the *Lochner* era that were overturned during the New Deal. Douglas’s solution was to find the right to privacy in the “penumbras, formed by emanations” of the various rights protected in the Bill of Rights. By the logic of Footnote Four, it was not a right deserving of presumptive protection and the high burden of proof on the state that would accompany it. Nonetheless, the Court had established the right to privacy, and 27 years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court would solidify it by referring to a “realm of personal liberty which the government may not enter.” It again referred to a number of cases, including *Meyer* and *Pierce*, to substantiate that view.

Justice Douglas had to find a way to avoid going back to *Lochner*-type arguments.

Barnett argues that *Casey* “exemplifies the current approach to constitutional rights.” In this approach, which he calls “Footnote Four-Plus,” it is the Court that decides which unenumerated rights

in the Constitution are worthy of being declared “fundamental rights” and getting the higher level of protection demarcated in Footnote Four. Generally, the liberties associated with noneconomic activities have received the protection of being “fundamental,” while economic ones have not.

The Footnote Four-Plus approach has allowed the Court to pick and choose among liberties guided, presumably, by any particular set of justices’ sense of which rights are deserving of such protection at the particular time in question. Although this approach is better than the original Footnote Four jurisprudence, which did not recognize unenumerated rights at all, scholars such as Barnett argue it suffers mightily from the appearance of capriciousness.

That perception of capriciousness may well lie at the center of debates over “judicial activism,” in the sense that courts that define those liberties associated with liberalism or conservatism as fundamental cause the other group to charge “judicial activism.” When the Court defines the liberties a group likes as fundamental, then the Court is just

perceived to be doing its job in preventing legislative overreach. With Footnote Four and the stigma of the *Lochner* era having pushed the Court down a path where it has to protect noneconomic unenumerated rights in a way rightly seen as capricious, it is no surprise that the Supreme Court has become a lightning rod in the culture wars, especially when the approach taken in *Griswold* became the foundation for *Roe v. Wade* and the rest of the Court’s abortion jurisprudence.

In part 3, I will suggest a way out of this dilemma.

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NEXT MONTH:
“Uniting Constitutional
Protection for Economic and
Social Liberties, Part 3”
by Steven Horwitz

[The] basis of our constitution is in opposition to the principle of equal political rights [if it refuses] to all but freeholders any participation in the natural right of self-government....

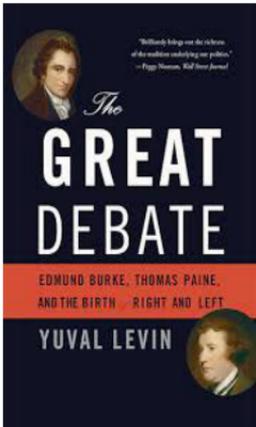
And even among our citizens who participate in the representative privilege, the equality of political rights is entirely prostrated by our constitution ... [if it gives] to every citizen of [one county] as much weight in the government as to twenty-two equal citizens in [another].... If these fundamental principles are of no importance in actual government, then no principles are important, and it is as well to rely on the dispositions of an administration, good or evil, as on the provisions of a constitution.

— Thomas Jefferson

“Both Together, They Made a Very Good Book”

by Joseph R. Stromberg

The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Left and Right by Yuval Levin (Basic Books 2014), 235 pages.



Yuval Levin’s well-written *Great Debate* is full of useful material, understandable explanation, and interesting reflections. It flows along smoothly and even entertainingly, unless that is a cuss word in serious circles. Levin goes through the Burke-Paine controversy in good order, with copious and apt quotations. He creates a real sense of what was at stake in

this “great Anglo-American debate”: an argument that opposed justice and progress to order and conservation (as these partisans saw things). Here is a “disagreement within liberalism” that still plagues us today.

Each man was a theorist and an activist. Educated outside the Anglican Establishment, each had risen socially. They shared associates, had met, and were correspondents for a time. Arriving in London, the Irish-born Edmund Burke (1729–1797) showed great literary talent. Falling in with the Rockingham Whigs, he spent nearly three decades in Parliament. With five years of formal schooling, the English-born Thomas Paine (1737–1809) was a staymaker (a maker of whalebone strips for corsets) and excise man before finding his niche as a political writer. Taking up the American cause, Paine wrote *Common Sense* and *The Crisis Papers*, and found employment in the revolutionary struggle.

While Burke had advocated conciliation with America in the 1770s, the French Revolution put Burke and Paine at odds. Reacting to the radical, pro-French tendencies of certain English Whigs, Burke penned *Reflections on the Revolution in France* (1790). Paine

replied with *The Rights of Man* (1791 and 1792).

Cruxes of matters: Paine

Rather than follow the book chronologically, let us examine the large patterns of ideas that Levin unearths. For Paine, men are naturally equal individuals, full stop. They form society out of self-interest, and their resulting social relations lack inherent authority. Individual consent alone justifies any social “contract,” and the public good is reckoned by adding up private goods. Government’s only rightful job is to apply principles discovered by individual reason to external circumstances. Together, science, learning, and commerce will rescue mankind from the endless mistakes recorded by history, and republican governments grounded on election and popular sovereignty will follow the orderly, abstractly lawful examples of nature. Not surprisingly, Paine’s allegiance to ideas crowded out patriotism. (So far, Paine might seem to be writing Cliff’s Notes on John Locke, but American philosopher John Wild in *Plato’s Modern Enemies and the Theory of Natural Law* argued that in terms of pre-17th-century natural law, Paine was actually much sounder than Locke.)

Government was no great mystery, but merely needed correct principles and methods. In the war between reason and ignorance, scientifically verified truth would overthrow existing religion and irrational prejudices. Liberated thinking would ensure correct choices. Republican political forms allowed for rapid, cumulative learning; hence there was no need for mixed government (that is, some combination of monarchy, aristocracy, and democracy), continuous political parties, or checks and balances *within* a republic. Quite consistently, Paine favored centralized government for America. Anticipating Marx, he praised commerce as a force that would uproot existing social relations.

Quite consistently, Paine
favored centralized government
for America.

With a legal document for its constitution, Paine’s ideal government would broadcast its ideological principles and could always undergo further simplification. To overthrow injustice and build this new order, Paine embraced revolution. The French Revolution only failed, he wrote, because it was “incomplete”! Absent bad govern-

ments, peace would prevail and soon enough, a federation of republics might abolish war. The resulting Age of Reason would realize “the Adam of a new world.”

Burke

Burke saw human nature as realized *within* society. Social customs and practices were men’s “second nature.” *Real* improvement came about within a particular society’s cultural inheritance and relied on internally derived standards and measures, including historically acquired *rights*. Like liberty, justice was embedded historically and locally. Prescription — a word Burke often invoked — presumed the superiority of institutions tested in actual governing — the outcome of accumulated social choices. *Born into* existing social relations, men necessarily had duties they had not willed. For Burke, any real social contract bespoke these complex relations and was, therefore, quite unlike “a partnership agreement in a trade of pepper and coffee...” Good government, whatever its form, was better than government merely ideal. Inequalities were necessary, and as important intermediate institutions, fixed social classes worked against despotism. On similar grounds, Burke defended political parties.

Taking abstract reason as severely limited, Burke opposed “metaphysical” speculation in politics. Government was practical; its end was happiness. It was better to do right, even under incorrect theory. Dealing with actual cases, politics could sometimes achieve untheorized precision. Projects of geometric remodeling unsettled society and asked that every existing practice defend itself, whereas prescription went hand in hand with prudence, whose standard was good and evil, not truth or falsehood. On this view, English liberty was an entailed inheritance. The common law duly ratified its orderly change and growth. Burke himself had been deeply involved with piecemeal reform in the penal law, the conduct of the East India Company, and the status of Catholics in Ireland, i.e., engaged (as he saw it) in the “Old” Whigs’ practice of conservation and correction.

Burke saw human nature as realized *within* society.

For Burke, the rights claimed by Paine simply did not exist, the Revolution of 1688 notwithstanding. In the 1770s it was Parliament that broke with *prudence* and drove Americans to revolutionary mea-

tures. Burke shrouded social beginnings “in a veil”: a state’s origins most likely rested on successful historical crimes, and a literal “return” to beginnings might therefore be perilous. Revolution’s gains could never offset the harm of unleashing those fanatical madmen who thought nothing of wasting their own provinces.

The argument about past and tradition leads back once more to community versus individual.

What mattered more than some “founding” moment was the later stepwise emergence of an organic regime. Burke’s claim that old institutions long-adapted to sundry societal pressures embodied accumulated wisdom allowed him to narrow greatly the supposed gap between nature and artifice. A nation that actually tried to return to its origins would merely abolish itself by unleashing untamed appetites. Rationalists overlooked sympathies and sentiments embodied in myth and ended by making sophisticated apologies for violence. So acting, France had decomposed into a faction. Britain might be next.

A friend of Adam Smith, Burke made a negative defense of capital-

ism, or commerce: excessive regulation was disruptive and poverty was inevitable. Levin believes Burke wrongly linked capitalism with stability. Paradoxically, Levin writes, Burke could favor less regulation because he distinguished less between society and state.

The hands of time

Levin takes the proper relation of generations as especially problematic in liberal societies. This question, he believes, unifies the whole dispute: Burke’s gradual, internal reform versus Paine’s programmatic revolution. Politically, Paine wished for an “eternal NOW,” where different generations do not constitute a single, continuous people. Here, hereditary institutions seem irrational, while republican forms permit both change and continuity within reasonable bounds. These forms thus make it possible to escape “the ravages of time,” thereby furnishing the “constant maturity” that liberalism requires. Even though politics is necessarily present-minded, republicanism can supply ongoing consent consistent with “temporal individualism.”

Burke, with his cross-generational “contract,” urged respect for established orders, including the nobility. Those now living bear re-

sponsibility for the future. The argument about past and tradition leads back once more to community versus individual, and disagreement over the “status of the past in political life” is thus a battle over how best to manage change. Here Paine, writes Levin, was a “rationalist, technocratic, and progressive,” Burke a reformist; but the debate (Levin holds) remains one within liberalism.

Levin recommends “a progressive liberalism and a conservative liberalism.” Paine’s idea that the state should liberate individuals led on to modern liberalism’s welfare state and, today, the American Left combines “material collectivism and moral individualism.” The American Right shows “a deep commitment to generational continuity” (Levin is surely dreaming a bit), even if rightists use Paine’s (or Jefferson’s) language and lack all Burkean sensibility when urging “that we must empower ... families, churches, and markets” to utilize accumulated (and dispersed) knowledge.

Observations within, or without, liberalism

But if this debate was *within* Anglo-American liberalism, how did it come into being? Historian

Edmund Morgan’s *Inventing the People* (1988) describes how the 17th- and 18th-century English gentry turned the rhetoric of popular sovereignty (or self-government) into a weapon against the king. For them of course, Parliament was the “self” that governed; it actually was the sovereign people. The king was along for the ride and no others need apply. Alas, there were others — Levelers (so-called), radical Whigs, Paine, and the North Americans — who learned to deploy the imagined “people” against Parliament. (Morgan details how centralizing Federalists deployed operationally empty slogans about “the People” against the states in 1787-1789.)

Paine, writes Levin, was a “rationalist, technocratic, and progressive,” Burke a reformist.

At a later stage in these arguments, Burke served as interpreter and spokesman for the gentry and their claims, as philosopher Alasdair MacIntyre has noted. An outsider who broke into England’s elite, Burke understood the social structure that that elite controlled better than they understood it themselves. Ruth Bevan’s very interesting *Marx and Burke: A Revisionist View* (1973)

compared Burke's sociological acumen with that of Marx. But what use did Burke make of those gifts?

Certainly, Burke's rather thoroughgoing economic (i.e., laissez-faire) liberalism seems somewhat out of phase with his professed traditionalism — so much so that it leaves his broadsword defense of the English ruling classes on rather shaky footing. For there, the rulers' "rascally, paltry origins" (as Paine said) were nakedly obvious: from Henry VIII's confiscation of monastic lands to the Whig Oligarchy's self-rescue in 1688, when they deposed James II. The origins of their properties and power were, that is, entirely *too recent* for Burke's purposes. A defense of established oligarchic agrarian capitalism couched in the language of feudal reciprocity necessarily missed its mark by miles, coming just when industrial capitalism (paired with a commercial empire built by constant overseas wars) loomed on the horizon. Burke's gasconade about antique chivalry fit well with his complaints about an age of "sophisters, economists, and calculators." But as J.G.A. Pocock in *Virtue, Commerce, and History* (chapter 10) shows, Burke tended to denounce the inflationary bankers, debt-mongers, and such-like characters he spotted in France,

while passing over great heaps of them readily found in Britain.

Burke's rather thoroughgoing economic liberalism seems somewhat out of phase with his professed traditionalism.

John Taylor of Caroline, a Virginian contemporary of Burke and Paine, pictured the English state as "a confederation of parties of interest ... the church of England, the paper stock party, the East India company, the military party, the pensioned and sinecure party, and the ins and outs, once called whigs and tories," arrayed under the monarchy and excluding the bulk of the people. Thus "no British nation" existed aside from these organized interests (*An Inquiry into the Principles and Policy of the Government of the United States*).

Burke's real contributions survive in the works of Friedrich Carl von Savigny, G.W.F. Hegel, Robert Nisbet, Michael Oakeshott, and others. There was one genuinely interesting conservative after Burke, but he was (damn the luck) an agrarian radical who also owed something to Paine, namely, William Cobbett (1762–1835).

Paine would seem to have fared better than Burke, ideologically

speaking. There is no end to latter-day liberals who claim parts of his legacy. From the first, the American republic-for-expansion (Machiavelli’s concept) obsessively promoted commerce and business enterprise. When, some years ago, Tony Blair talked up “Enterprise Britain,” he too acted within a broad liberal tradition. Both governments might claim Paine’s authority. But there is a missing link. American progressives (those latter-day “Adams of a new world”), and their “conservative” enemies alike, are all deeply entangled with a left-wing English Protestantism of which the deist Paine was a perfect representative in his way. (It seems an oversight that the words *Protestant* and *Dissenting Protestant* hardly appear in Levin’s book; nor *Gnosticism*, come to that.)

Last word

Where does this leave us, then, as heirs of a famous debate? In simplest terms, we must remain impressed with many of Paine’s complaints about the old order but also with Burke’s sense of the manifold dangers of revolution. One tends to agree with essayist William Hazlitt’s (1778–1830) friend, the Rev. Joseph Fawcett (1758–1804), “who had Paine’s ‘Rights of Man’ and Burke’s ‘Reflections on the French Revolution’ bound up in one volume; and who said that, both together, they made a very good book.”

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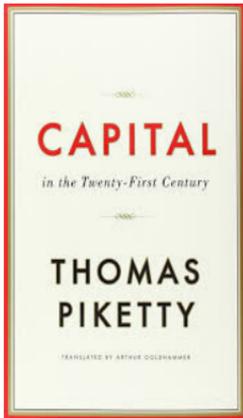
In large states public education will always be mediocre, for the same reason that in large kitchens the cooking is usually bad.

— *Friedrich Wilhelm Nietzsche*

Ignoring the Difference between Free Markets and State Capitalism

by Kevin Carson

Capital in the Twenty-First Century by Thomas Piketty, translated by Arthur Goldhammer (Belknap 2014), 696 pages.



The basic phenomenon that Thomas Piketty devotes this book to describing is simple: “When the rate of return on capital significantly exceeds the growth rate of the economy..., then it logically follows that inherited wealth grows faster than output and income.”

His historical account of wealth accumulation, the mass of statisti-

cal evidence he musters in support of it, and his analysis of present-day trends are all an excellent read. His weakness lies, not in his description, but in his prescription: his analysis of the root causes of the concentration of wealth and the remedies he proposes.

In every case Piketty ignores the extent to which the rate of return on land and capital is influenced by state intervention in the market. If there’s truth to his indictment, it’s an indictment against corporatism, not free markets.

For example, he argues that the tendency of rent to exceed growth has nothing to do with market imperfections. He largely ignores the dependence of rates of return on property on the legal structure; he writes that the growth of inequality in France after the Revolution paralleled that in England, despite the Civil Code’s having “abolished all legal privileges” and “guaranteed absolute equality before the laws of property as well as freedom of contract...” In so arguing, he misses Henry George Jr.’s fundamental distinction between “equality under the law” and “equal laws.” “Equality of rights and opportunities” is insufficient without regard to what rights and opportunities are equally held. We’ve all no doubt heard Ana-

tole France's observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

Like Marx, Piketty accepts neoliberal (state) capitalism as the largely spontaneous result of the market.

Piketty is much concerned with the return to capital, but a major share of things that count as part of the capital stock on which "rent" is received would not even count as property in a genuine free-market regime. Human slaves were one such form of "property," with an enormous capital valuation on the market, until 1865 in the United States. Today rents on property whose title originally traces to the enclosure of vacant and unimproved land, and rents on the "ownership" of ideas, fall under the same heading.

Like Marx, Piketty accepts neoliberal (state) capitalism as the largely spontaneous result of the market. Marx devoted a major part of *Capital*, vol. 1, to the history of the expropriation of peasant land in England, which vastly reduced opportunities for comfortable subsistence and self-employment and increased the size of the labor force

competing for work, and thereby drastically shifted bargaining power from workers to owners of capital; nevertheless he still argued that surplus value was inherent in wage labor as such.

For all his delving into 19th-century French and English literature, Piketty pays precious little attention to the origins of those big fortunes off which the rentier classes lived. According to no less a literary figure than Honoré de Balzac, great fortunes are founded on great crimes. From the late Middle Ages on, the peasantry was robbed of its customary property rights in most of the land of England — first by the enclosure of the open fields for sheep pasturage, and then by Parliamentary Enclosure of common pasture, wood, and fen in the 18th century. And the origins of many great American fortunes, as Michael Hudson points out ("Piketty's Wealth Gap Wake Up," *Naked Capitalism*, April 25), are the same as those of the post-Soviet kleptocrats today: fraud, bribery, and enclosure or political "privatization" of the commons.

"The diffusion of knowledge"

Piketty argues that the main force for international convergence in standards of living is "the diffu-

sion of knowledge”: poor countries catch up by adopting the technologies and skills of the developed world. But he fails to mention the extent to which state policies promoted by the developed world deliberately impede that process. The extended terms on general-purpose technology patents under the Uruguay Round of GATT mean that western corporations can maintain a legal monopoly on the latest generation of production technologies in many cases, and relegate Third World countries to supplying labor and raw materials for western-owned facilities. And when native populations do have access to ownership of the latest technology, western corporations can still dictate terms by using trademarks and patents to enforce a monopoly on disposal of the product (as is the case, e.g., with the way trademark law enables Nike to outsource actual production of their sneakers by independent factories for a few bucks a pair, and then mark up the price a hundredfold in western retail chains).

Piketty also neglects the tendency of overaccumulation to lead to crises of surplus investment capital and falling rates of profit, absent Hamiltonian state policies to artificially increase the need for capital.

He does note in one place that large public debts can affect returns on private wealth, and elsewhere that “too much capital kills the return on capital,” but he doesn’t acknowledge it as part of a larger phenomenon by which the government employs surplus capital that would otherwise remain idle.

Poor countries catch up by adopting the technologies and skills of the developed world.

He claims that Marx’s prediction of a falling direct rate of profit “turned out to be quite wrong,” despite Marx’s himself having listed a number of state policies in the section on monopoly capitalism in *Capital*, vol. 3, that might counteract that tendency. Absent direct government subsidies to the corporate bottom line, subsidized production inputs, direct government expenditure to absorb surplus capital and idle industrial capacity, subsidies and other promotions to artificially capital-intensive forms of production, and regulatory cartels and administered pricing that enable the extraction of superprofits from the consumer by means of the exchange process, the real rate of profit left over would arguably be far lower than at present.

And of course all the tendencies toward surplus capital, overproduction, and underconsumption that 20th-century economists such as Keynes remarked on are the result, not of the action of an unfettered market, but of state intervention.

As Piketty notes, increased productivity and technological progress can counteract the tendency toward accumulation of wealth. That's not to say they always will, of course. The outcome hinges on how easily the increased productivity from new technology can be enclosed, that is restricted by the government, as a source of rent. Historically, since the rise of the first class systems and states, there has been an arms race between the technologies of abundance and enclosure.

Today the main direction of technological progress is ephemeralization — the rapid cheapening of capital inputs required for a given form of production. Piketty seems to overlook that change. The effect is to radically reduce the overall need for investment capital, and greatly increase the ratio of capital stock to profitable investment outlets. The natural outcome is an increasingly decentralized economy of small-scale production, in which the means of production are afford-

able to ordinary people producing for each other in small shops, and the great mass of the population can comfortably meet its subsistence needs without dependence on the rentier classes' capital.

The top 1 percent, which in the past got most of its income from returns on property, now get it from managerial and professional salaries.

The rentier classes attempt to counter this natural tendency through the state, using artificial property rights and artificial scarcities — patents and copyrights, for example — to enclose the technologies of abundance as a source of rent.

Perverse incentives

One outstanding feature of Piketty's book is his analysis of the changing composition of the incomes of the top 1 percent. The top 1 percent, which in the past got most of their income from returns on property, now get it from managerial and professional salaries; today you have to go to the top 1/10 of a percent to find a group of people who live mainly off rents and investments. It's not so much the super-rich propertied classes whose in-

creased income has come at the expense of ordinary wage earners, but the upper stratum of the salaried managerial classes. According to David Gordon in *Fat and Mean: The Myth of Management Downsizing*, managerial and supervisory salaries went from around a quarter of total labor compensation in the 1970s to 40 percent in the 1990s. That means that if management salaries returned to their share of total labor income as it stood in the 1970s, the wages of production workers could be increased by about a third.

Management has perverse incentives to grab a larger slice of a smaller pie, by gutting human capital and other long-term productive assets.

The state-enforced corporate form enables management, by appealing to the myth of shareholder ownership, to act as de facto residual claimants and expropriate the value and productivity gains contributed by other stakeholders such as production workers, whose distributed knowledge, skills and social relationships constitute “human capital” that often adds more to total firm equity than physical capital. As a result, management

has perverse incentives to grab a larger slice of a smaller pie, by gutting human capital and other long-term productive assets in order to maximize short-term returns and game their own compensation. The irony is that, by using “shareholder value” as a legitimizing ideology for their own power, they actually hurt the long-term interests of shareholders as well as workers.

So managerialism is at least as responsible as increased returns on land and capital for the lower quintiles’ shrinking share of the economic pie. The irony is that the panacea of educationism and universalizing college attendance — favored by the center-left and necons alike — is one of the chief factors exacerbating managerialism. The main effect is simply to inflate formal educational requirements for doing anything and everything.

Piketty is most famous for his policy prescription of more progressive taxes on high incomes and a tax on wealth to counter what he sees as a natural tendency toward concentration. But as we have already seen, concentration and accumulation of wealth are not “natural tendencies” at all, but the result of massive and ongoing state intervention to facilitate the ex-

traction of rents from society by privileged classes.

Even at the height of industrial gigantism and capital-intensiveness in the mid 20th century, most of the returns on land and capital depended on state enclosures and state-enforced monopolies of various sorts. Simply voiding all artificial titles to vacant and unimproved land or ideas, repealing all regulatory cartels, entry barriers, monopolies, and so forth would have destroyed the great bulk of the returns on land and capital. And today, arguably, the technologies of abundance are making such monopolies unenforceable regardless of whether states formally repeal them. What file-sharing, encryption, and the cracking of DRM (digital rights management) have already done to the music and movie industries, open-source micromanufacturing and intensive horticulture techniques such as Permaculture, which make intensive use of capital and land, will do to the industrial monopolists.

Piketty's proposed wealth tax is a secondary intervention to correct the evils resulting from the primary state interventions that redistributed wealth upwards in the first place. It amounts to a Ptolemaic epicycle, or an extra step in a Rube Goldberg machine. The logical answer to artificially high rents on property and the concentration of wealth is to abolish the state-enforced interventions that create those rents in the first place, and let unrestricted competition drive them to zero and break up illegitimate concentrations of wealth.

Rather than adding new layers of government intervention to ameliorate evils created by government in the first place, let's eliminate the original interventions that created those evils.

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