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FUTURE OF FREEDOM

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Life is like music; it must be composed by ear, feeling and instinct, not by rule.

— Samuel Butler

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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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Why I Favor Limited Government, Part 2

by Jacob G. Hornberger

In 1954 The Foundation for Economic Education published a book entitled *Government: An Ideal Concept,* by its founder and president, Leonard E. Read. In the book, which was critical of the anarchy paradigm, Read pointed out that the only force that a government can legitimately exercise is defensive force, which necessarily encompasses the three functions of government that I set forth in part 1 of this essay: (1) to punish people who initiate force against others, such as murderers, robbers, rapists, thieves, burglars, and the like; (2) to provide a judiciary for people to resolve disputes; and (3) to defend the nation in the event of a foreign invasion.

As I explained in part 1, these three functions do not violate the libertarian nonaggression principle, the principle that holds that people should be free to live their lives any way they want, making any choices they want, so long as their conduct is peaceful.

In his book, Read supported taxation to fund those limited functions of government. He maintained that taxation to fund limited government was different from taxation to fund a welfare state. In the first instance, he said, everyone is receiving the benefits of limited government and, therefore, has no real cause to complain that his rights are being violated. In the welfare-state instance, the money is being taken from one person and given to another person and, therefore, is clearly legalized theft.

Read's defense of taxation for the purposes of limited government drew criticism from some of his supporters. They pointed out that taxation necessarily involves the initiation of force against people even if the money is only funding limited government.

In my opinion, Read's critics were clearly right. For example, if a person refused to pay his taxes under a tax-supported limited government, officials would place a lien on his property, foreclose the lien and sell the property, and then initiate

force against the tax resister by forcibly evicting him from his home in order to deliver possession of the property to the person who purchased it at the foreclosure sale.

So, does that mean that the concept of limited-government is fatally flawed because it requires taxation to fund it, as anarchists maintain? Not at all! The solution is voluntarily funded limited government. If people are free to decide for themselves whether or not to fund limited government, no one's rights are being infringed.

Anarchists respond that voluntarily funded limited government is an impossibility. They say that government inherently involves taxation. If there is no taxation, they say, there can be no government.

But a close analysis shows that their assertion is without foundation. That's because the existence of government, as well as its specific powers, is separate and distinct from how it is funded.

Consider a hypothetical community that has a government whose powers are limited to punishing murderers, rapists, and thieves. Its annual budget is $5 million, which it collects every December for use in the coming year.

One day, a multi-millionaire gives $50 million in trust to the city government, on the condition that it suspend all tax collections for 10 years. The city agrees to the deal. Every December, the trustee sends the city $5 million, the same amount that would have been collected in taxes. No one has to pay any taxes.

The city government remains intact. Its powers to punish violent people who infringe on the rights of others remain the same. The only difference is that the money that is funding the government is coming from a source other than taxation.

The existence of government, as well as its specific powers, is separate and distinct from how it is funded.

The principle is no different with respect to any other form of voluntary funding of government. Lotteries. Raffles. Donations. Fees. The manner in which the government is being funded is separate and distinct from what its powers are.

Anarchists respond, "But people might not fund government and if they don't, the government would not be able to exercise its powers. Therefore, it's not really government." Anything is possible but the fact is that most people believe that

government is important. When people believe that something is important, most of them are usually willing to fund it.

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Consider churches, for example. Lots of people believe they are important and many, but certainly not all, of them, fund them. Churches are usually open to the public, even to those who don't donate to the church. The "free rider" problem obviously doesn't stop people from continuing to donate to churches. There is every reason to believe that the same principle would apply to government.

Voluntary support

In his book, Leonard Read expressed skepticism for the concept of voluntarily funded limited government. He suggested that big donors would have a disproportionate influence in how government would be operated.

But such is not necessarily the case. While big donors to churches, for example, might receive some preferential treatment on relatively small things, it is rare that ministers and church committees run their operations in accordance with the dictates of big donors. Moreover, with government powers limited to those three essential functions, there isn't a whole lot that political influence can accomplish.

Moreover, it would not be difficult to divide government into separate branches — one that collects the money and the other that distributes it.

In its June 1993 issue, a publication called *The Public Interest* published a fascinating and thought-provoking essay entitled "The End of Taxation?" by James L. Payne, research fellow at the Independent Institute and the author of several books on government. Payne received his Ph.D. in political science from the University of California at Berkeley and has taught at Yale, Wesleyan, Johns Hopkins, and Texas A&M. He writes,

> For a people so ready to cast off ancient customs, Americans have been strangely reluctant to question the practice of taxation…. There are signs that this intellectual free ride is coming to an end. Sophisticated new research has begun to document what common sense long suggest-

> ed, namely that taxation, far from being an efficient money machine, is an extremely wasteful way to raise money.

Have there been many societies in history that have foresworn taxation and relied on voluntary support? The answer is not a surprise: no. Of course, under the Articles of Confederation, which lasted for more than a decade, the federal government had no power to tax (which gives us a pretty good idea of how our American ancestors viewed taxation). Nonetheless, that's not a perfect example because the federal government relied on contributions from the state governments, which derived their revenue from taxation.

"That sum, uncounted by any official, unknown to any but himself, he was asked to drop with his own hand into a strong public chest."

In his book *Power and Market,* the libertarian Austrian economist Murray Rothbard recounts a fascinating, real-life story of voluntarily funded government:

> A few writers, disturbed by the compulsion necessary to

the existence of taxation, have advocated that governments be financed, not by taxation, but by some form of voluntary contribution. Such voluntary contribution systems could take various forms. One was the method relied on by the old city-state of Hamburg and other communities — voluntary *gifts* to the government. President William F. Warren of Boston University, in his essay, "Tax Exemption the Road to Tax Abolition," described his experience in one of these communities: "For five years it was the good fortune of the present writer to be domiciled in one of these communities. Incredible as it may seem to believers in the necessity of a legal enforcement of taxes by pains and penalties, he was for that period … his own assessor and his own tax-gatherer. In common with the other citizens, he was invited, without sworn statement or declaration, to make such contribution to the public charges as seemed to himself just and equal. That sum, uncounted by any official, unknown to any but himself, he was asked to drop with his own hand into a

> strong public chest; on doing which his name was checked off the list of contributors…. Every citizen felt a noble pride in such immunity from prying assessors and rude constables. Every annual call of the authorities on that community was honored to the full."

Let's not forget the instances in recent history in which people have voluntarily made contributions to government.

A footnote in the book states in part,

> Dr. Warren's article appeared in the Boston University Year Book for 1876. The board of the Council of the University endorsed the essay in these words: "In place of the further extent of taxation advocated by many, the essay proposes a far more imposing reform, the general abolition of all compulsory taxes. It is hoped that the comparative novelty of the proposition may not deter practical men from a thoughtful study of the paper." (See the *Boston University Year Book III* (1876), pp. 17–38.)

Rothbard, who himself was an anarchist, was opposed to the idea of voluntarily supported limited government. Nonetheless, the example he provided gives us a glimpse of the practicality of voluntarily funded government.

Finally, let's not forget the instances in recent history in which people, rich and poor alike, have voluntarily made contributions, both large and small, to government, including donations to help defray expenses in public (i.e., government) schools, to help reduce the size of the national debt, and even to alleviate the financial crisis in Greece.

Referring to the Greek crisis, an article in *Fortune* stated that "thousands of people rushed to contribute towards the 1,600,000,000 Euros goal, causing the Indiegogo page to crash under the wave of donations." Mark Zuckerberg made a $220 million donation to public (i.e., government) schools, and Bill and Melinda Gates's public-school donations are in the billions of dollars. Last year a donor donated $2.2 million to help pay down the national debt.

Let's also not forget that with the abolition of taxation, including the income tax, people would have lots more money at their disposal to

make donations to what they consider to be worthy causes.

Private services

Let's now move on to another critique that some anarchists make about limited government — that it prohibits people from competing in the provision of private police forces and judicial services.

Yet nothing could be further from the truth. In the United States today, anyone is free to provide any private police forces and judicial services he wants and, in fact, many do.

That's what private security services are all about. They serve as a supplement to the government's police forces. Private businesses and homeowners hire private security services all the time. A search for "security services" on the Internet shows that there is a vibrant, competitive market for private police services. And it's all legal.

It's the same with judicial services. Arbitration is a good example. People often voluntarily agree to provisions in their contracts for arbitration in the event of a dispute. An arbitration agreement means that the parties intend to avoid the state's judicial system to resolve their dispute. If a conflict arises, the parties appear before the arbitrator and make their case, and the arbitrator enters judgment for one side or the other. A search on the Internet for "arbitration services" reveals that it too is a dynamic, competitive market. And it's all legal.

In fact, there are even services on the Internet that provide for private jury trials, where litigants try their cases outside the state's judicial system. One service I saw advertised, "less expensive, out of the public eye, speedy resolution, random selection of potential jurors, and over 100 years of collective judicial and legal experience." And it's all legal.

Within the federal court system, we have district courts all across the land. While they have certain jurisdictional and venue rules as to what types of cases can be brought to each federal district court, plaintiffs in civil suits often have a choice of which district court to file their suit in.

A search on the Internet for "arbitration services" reveals that it too is a dynamic, competitive market.

It's no different in state courts. Each state has a wide range of district courts across the states. Again, there are rules on jurisdiction and venue, but even then plaintiffs often have a choice among more than one

district court in which to file their suit. Sometimes there is even overlapping jurisdiction between state and federal courts and the plaintiff is free to file his suit in both. This competitive phenomenon is sometimes known as "forum-shopping," a process in which litigants seek the court in which they are most likely to prevail.

There are also ecclesiastic courts. For example, there are tribunals within the Catholic Church that operate independently of the state system and actually annul marriages, even though Church annulments have no legal standing.

It sometimes befuddles me as to why anarchists disfavor the idea of voluntarily limited government, at least here in the United States, especially since the U.S. system is the evolutionary outgrowth of the very system that anarchists often praise and extoll — i.e., the development of the common law and the development of the law merchant, both of which arose within the governmental system of England, a system in which the state had a monopoly over the use of force.

That brings us to a related critique that some anarchists make of limited government: that under limited government the state will not permit private judicial systems to use force in the enforcement of their judgments. What they are getting at is that while people are free to use arbitration or private jury trials to resolve their disputes, if a litigant loses and refuses to comply with the judgment, the prevailing party must file suit in a government court to enforce the judgment. That's because under limited government, the state wields a monopoly over the use of force in society. The state decides when force is justified and under what circumstances.

The U.S. system is the evolutionary outgrowth of the very system that anarchists often praise and extoll.

Although they praise the common-law and law-merchant systems that arose and developed under the English governmental system, where the state had a monopoly over the use of force, anarchists say that a government system violates principles of individual liberty and the free market.

In actuality, however, as we will see as we progress through this essay, it does the opposite — it protects individual liberty and the free market and maintains peace in society. We will examine how the state's

monopoly over the use of force in society is actually one of the greatest attributes of limited government, while, at the same time, analyze a fatal flaw in the anarchist paradigm.

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

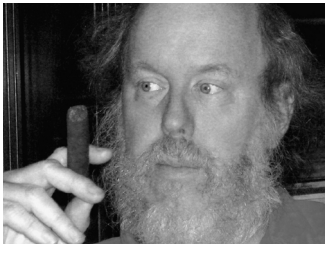
NEXT MONTH:
"Why I Favor Limited Government, Part 3"
by Jacob G. Hornberger

And what is a good citizen? Simply one who never says, does or thinks anything that is unusual. Schools are maintained in order to bring this uniformity up to the highest possible point. A school is a hopper into which children are heaved while they are still young and tender; therein they are pressed into certain standard shapes and covered from head to heels with official rubber-stamps.

— H.L. Mencken
Prejudices: Sixth Series

Obama's Forgotten Victims

by James Bovard



The White House kept one seat vacant in the gallery during Obama's State of the Union Address in January "for the victims of gun violence who no longer have a voice." This was part of Obama's crusade for new federal restrictions on firearms ownership.

But shouldn't there have also been chairs left empty to memorialize other casualties — including those "who no longer have a voice" thanks to Obama administration policies?

While trumpeting the private death toll from guns, Obama ignored the 986 people killed by police in the United States last year according to the *Washington Post's* database. Many police departments are aggressive — if not reckless — in part because the Justice Department always provides cover for them at the Supreme Court. Obama's "Justice Department has supported police officers every time an excessive-force case has made its way" to a Supreme Court hearing, the *New York Times* noted last year. Attorney General Loretta Lynch recently said that federally funded police agencies should not even be required to report the number of civilians they kill. The FBI was required by a 1994 law to track such killings but largely ignored its legal obligation. The Obama administration has provided more than $18 billion in aid and equipment to local and state law-enforcement agencies since 2009. Yet the president presumably feels no responsibility when recipients of federal aid unjustifiably gun down innocent Americans.

To add a Euro flair to the evening, Obama could have draped tricolor flags on a few empty seats to commemorate the 42 medical staff, patients, and others slain last October 3 when an American AC-130 gunship blasted a French Médecins Sans Frontières hospital in Kunduz, Afghanistan. The U.S. military revised its story several times but admitted in November that the carnage was the result of "avoidable … human error." Regrettably, that bureaucratic phrase lacks the power

to resurrect victims. The French medical-assistance group has demanded an independent investigation of the U.S. attack on its facility but the Obama administration has stonewalled.

Speaking of the Border Patrol, Obama could have dignified his speech by at least recognizing their scores of victims.

No plans were announced to designate a seat for Brian Terry, the U.S. Border Patrol agent killed in 2010. Guns found at the scene of Terry's killing were linked to the Fast and Furious gunwalking operation masterminded by the Alcohol, Tobacco, Firearms and Explosives (ATF) agency. At least 150 Mexicans were also killed by guns illegally sent south of the border with ATF approval. The House of Representatives voted to hold Eric Holder, the attorney general at the time, in contempt for refusing to disclose Fast and Furious details, but Obama did not dwell on that topic in his State of the Union address. But it would be difficult to find a more brazen example of brazen misuse of firearms than that ATF debacle.

Speaking of the Border Patrol, Obama could have dignified his speech by at least recognizing their scores of victims. The *Los Angeles Times* reported last year that the Border Patrol's internal investigations cleared all agents involved in 67 shootings, including those which left 19 people dead. Cases included those of a 15-year-old Mexican boy who was killed for throwing rocks and a 17-year-old Mexican who threw rocks from the Mexican side of the border near Nogales, Arizona. The *L.A. Times* noted, "Unlike domestic police departments, the 21,000-member Border Patrol released almost no public information about shootings, including the outcome of its investigations, until recently." An independent analysis by a group of law-enforcement experts "found a pattern of agents firing in frustration at people throwing rocks from across the border, as well as agents deliberately stepping in front of cars apparently to justify shooting at the drivers." But since those killings did not involve privately owned firearms, Obama ignored them.

Drone attacks

On a more festive note, Obama could have saved seats for a wedding party. Twelve Yemenis who were celebrating nuptials on Dec. 12, 2013, would not have been able to

attend Obama's speech because they were blown to bits by a U.S. drone strike. The Yemeni government — which is heavily bankrolled by the U.S. government — paid more than a million dollars in compensation to the survivors of innocent civilians killed and wounded in the attack. Obama could have also mentioned how his administration is massively supporting the war that Saudi Arabia launched on Yemen; the Saudis have been bombing with little or no regard for the death toll of innocents.

Obama could have mentioned how his administration is massively supporting the war that Saudi Arabia launched on Yemen.

Four seats could have been left vacant for the Americans killed in the 2012 attack in Benghazi, Libya — U.S. Ambassador Christopher Stevens, Foreign Service Officer Sean Smith, and CIA contractors Tyrone Woods and Glen Doherty. But any such recognition would rankle the presidential campaign of Hillary Clinton, who has worked tirelessly to sweep those corpses under the rug. It would also be appropriate to include a hat tip to the thousands of Libyans who have been killed in the civil war unleashed after the Obama administration bombed Libya to topple its ruler, Muammar Qaddafi. Democratic presidential candidate Hillary Clinton, who was secretary of State during the U.S. bombing campaign, declared that the Obama intervention in Libya was "smart power at its best." Hopefully the Obama-Clinton Libyan debacle will receive more attention as voters begin paying more attention to Clinton's presidential campaign.

Obama loves to salute promising young Americans, but 16-year-old Abdulrahman Anwar al-Awlaki did not get a chance to attend. That Denver-born boy was killed in a U.S. drone strike on Oct. 14, 2011, while he was in Yemen looking for his father (who was killed in a CIA drone strike two weeks earlier). If that kid's name had been Bob, he might still be around to cheer Obama's anti-gun crusade. When Robert Gibbs, former White House press secretary and senior advisor to Obama's reelection campaign, was asked in 2012 about "an American citizen that is being targeted without due process, without trial," Gibbs replied, "I would suggest that you should have a far more responsible father if they are truly concerned about the well-being of their children."

Scores of innocent women and children have been killed by Obama's drone strikes in the past seven years. The administration has whitewashed the killings of men by presuming that any "military age male" (from the late teens to middle age) killed in a missile strike was automatically guilty — even though there was usually no evidence linking the victims to terrorist groups. But the feds have managed to keep almost all the information on drone carnage bottled up — except for occasional leaks by insiders appalled at the pointless killing.

Scores of innocent women and children have been killed by Obama's drone strikes in the past seven years.

An indeterminate number of chairs could have been left vacant for the Syrian and Iraqi women, children and men who have been beheaded, maimed, or otherwise slaughtered as a result of the massive arms shipments the Obama administration provided to Syrian "moderate" rebel groups who defected to al-Qaeda affiliate Jabhat al-Nusra or other terrorist groups, including the Islamic State. As Rep. Tom McClintock, R-Calif., lamented in late 2014, "ISIS is armed to the teeth — with American equipment." Rep. Justin Amash (R-Mich.) objected, "So, the guy who sells guns from our government to radical Syrian rebels lectures law-abiding Americans about selling guns to each other." Unfortunately, the American media have largely given Obama a free pass on the atrocities committed as a result of the U.S. intervention in Syria.

Huffing and puffing

So what did Obama talk about instead?

- Taking a dig at some of the Republican presidential candidates, Obama scoffed at "calls to carpet-bomb civilians." Apparently, it is far wiser to blow up wedding parties instead.
- Obama boasted that his programs are helping African nations "feed their people." But he neglected to mention that the largest U.S. food aid program, Food for Peace, is notorious for dumping food and bankrupting foreign farmers in some of the world's poorest nations, such as Haiti.
- Obama lamented that he had not been a great unifier in his seven years in the Oval Office. He said that a president with the "gifts of Lincoln ... might have better bridged the divide" between Amer-

icans. So burning down Atlanta would help? Massachusetts abolitionist Lysander Spooner offered the best refutation to Abraham Lincoln's claim that the Civil War was fought to preserve a "government by consent." Spooner observed, "The only idea ... ever manifested as to what is a government of consent, is this — that it is one to which everybody must consent, or be shot."

- Obama evoked "our commitment to the Rule of Law." It was a bad sign that no one in the House chamber guffawed in response. Obama has ruled as an elective dictator for most of his presidency. But as long as he continues to perform the rituals of the American republic — such as the State of the Union address — he is still received with as much respect and deference as Roman emperors speaking to the gutless Roman senate.

- Obama warned of people who "use the Internet to poison the minds of individuals." I tried not to take this charge personally, because I enjoy blogging and sending out Twitter messages. How does the Obama administration define "poisoning" minds? Federally funded Fusion Centers have attached the "extremist" tag to gun-rights activists, anti-immigration zealots, and individuals and groups "rejecting federal authority in favor of state or local authority" — even though many of the Founding Fathers shared the same creed. A 2012 Homeland Security report went even further, stating that being "reverent of individual liberty" is one of the traits of potential right-wing terrorists.

There were not enough seats in the entire House to designate the casualties of the Obama administration at home and abroad. Presidents have the prerogative to huff and puff in State of the Union addresses. But Obama's righteous indignation would have more credibility if his litany had fewer glaring omissions.

James Bovard serves as policy advisor to The Future of Freedom Foundation and is the author of a new ebook memoir, Public Policy Hooligan, *as well as* Attention Deficit Democracy *and eight other books.*

NEXT MONTH:
"Congress Goes on Another Blind Spending Spree"
by James Bovard

Can a Business Overcharge Its Customers?

by Laurence M. Vance

How many times have we heard someone say that he was overcharged for something? The answer to the question of whether a business can overcharge its customers seems, on the surface, to be quite obvious. Yet, it is a question that has more than one answer.

At the end of last year, Whole Foods Market, a supermarket chain specializing in organic food, agreed to pay half a million dollars to New York City to settle allegations that it had overcharged its customers for prepackaged foods.

Also at the end of last year, Martin Shkreli, a former hedge-fund manager who went on to head three pharmaceutical companies, was arrested by the FBI after being indicted on charges of securities fraud and conspiracy. What is relevant here about the infamous Mr. Shkreli is that he was not arrested for what he did a few months prior, which some people would have liked to have seen him arrested for: buying the rights to a life-saving prescription drug and then overcharging for it.

Although both of those instances involve businesses that "overcharged" their customers, there is an important distinction between the two cases that should be maintained. Only in one case can a business legitimately be said to have overcharged its customers.

Fraudulent overcharging

Back in June of last year, the New York Department of Consumer Affairs (DCA) accused Whole Foods Market of overcharging New York City customers for some prepackaged foods by overstating the weight of the products being sold. According to the DCA, "Tests of 80 different prepackaged products bought in the company's nine New York stores showed that all were labeled with erroneous weights." Products mislabeled included vegetable platters, chicken tenders, and coconut shrimp.

The DCA accusation led the Whole Foods Market co-CEOs to apologize in an online video and pledge that the company would take steps to prevent overcharging its customers in the future, including increasing worker training. The company also vowed to give away any products that customers discovered were mispriced. Naturally, the bad publicity resulted in a drop in sales. And to make matters worse, the DCA fined Whole Foods Market $1.5 million for all the violations it found. A lawyer for the company said it would fight the fines sought by the DCA because they were "excessive." It should be noted that the money collected would not be refunded to consumers but instead go into the city's budget.

A Whole Foods Market spokesman said that its $500,000 settlement with the DCA late last year was reached "in order to put this issue behind us so that we can continue to focus our attention on providing our New York City customers with the highest level of quality and service." The settlement was "in the best interest of the people of the City of New York and our stakeholders." The settlement also requires Whole Foods Market to provide extra training of its New York City employees who weigh and label products and conduct quarterly in-store audits to ensure that products are indeed accurately weighed and labeled. "Whether it's a bodega in the Bronx or a national grocery store in Manhattan, we believe every business needs to treat its customers fairly and, with this agreement, we hope Whole Foods Market will deliver on its promise to its customers to correct their mistakes," said DCA Commissioner Julie Menin.

That Whole Foods Market overcharged its customers has more to do with fraud than it has to do with price.

That Whole Foods Market overcharged its customers has more to do with fraud than it has to do with price. If a package is supposed to contain x number of pieces of a product, said to contain x number of ounces of a product, or if a product is alleged to weigh x number of pounds and it doesn't, then it is labeled fraudulently. That could lead the purchaser of a product to be overcharged (if a package contains less product than it is supposed to) or undercharged (if a package contains more product than it is supposed to). That is true if a product is

sold by number, volume, or weight, but is not the case if a product is sold by the unit. For example, roast beef, ham, and cheese might be sold at the deli counter for different amounts per pound, but also sold together for a fixed price on a platter. Charging consumers for a pound of meat or cheese while giving them less than a pound of meat or cheese is a genuine overcharge. However, no one could be overcharged for voluntarily purchasing a platter of meat and cheese sold by the unit no matter what the price was.

Turing acquired the exclusive U.S. rights to Daraprim from Impax Laboratories for $55 million.

There are other ways that a business can fraudulently overcharge its customers. If an item rings up at a higher price than is marked on the package or that the store signage indicates, or if it simply rings up at a higher price than it is supposed to, that is a genuine overcharge. If the premium variety of a good has a higher price than the regular variety, but the package actually contains just the regular variety, then the customer is being overcharged when he pays the extra amount for the higher quality item but doesn't actually get what the package says he is getting. The same principle applies to a service. If a carpet cleaning service is supposed to clean the carpets throughout a house but omits to clean one room while still charging the customer for cleaning the whole house, then a fraudulent overcharge has taken place.

But some things that are considered to be overcharges are not overcharges at all.

False overcharging

Former hedge-fund manager Martin Shkreli founded the biotechnology company Retrophin Inc. in 2011. The company's board replaced him in 2014 and filed a $65 million lawsuit against him in 2015 over his use of company funds and "stock-trading irregularities and other violations of securities rules." Shkreli founded Turing Pharmaceuticals in February of 2015 with three drugs in development acquired from Retrophin. On August 10, Turing acquired the exclusive U.S. rights to Daraprim, the trade name of the drug pyrimethamine, from Impax Laboratories for $55 million. Pyrimethamine is used both as an anti-malarial drug and as a treatment for the parasitic disease toxoplasmosis. According to the Centers for Disease Control, toxoplasmosis is considered to be a

leading cause of death attributed to foodborne illness in the United States. Pyrimethamine is often used in combination with two other drugs to treat HIV-positive patients with compromised immune systems. The drug is on the nineteenth edition of the World Health Organization's list of essential medicines. Daraprim has been available since 1953. The market for the drug is small, with only about eight thousand prescriptions filled a year. Although the patent on the drug has expired, no generic version is available in the United States, even though several companies do make and sell a generic version of Daraprim abroad.

Although the patent on the drug has expired, no generic version is available in the United States.

After acquiring Daraprim from Impax, Retrophin raised the price of the drug from $13.50 per tablet to $750 per tablet—a 5,500 percent increase. According to a letter to Turing Pharmaceuticals from the Infectious Diseases Society of America (IDSA) and the HIV Medicine Association (HIVMA), "Under the current pricing structure, it is estimated that the annual cost of treatment for toxoplasmosis, for the pyrimethamine component alone, will be $336,000 for patients who weigh less than 60 kilograms and $634,500 for patients who weigh more than 60 kilograms. This cost is unjustifiable for the medically vulnerable patient population in need of this medication and unsustainable for the health care system." In the United Kingdom, Daraprim sells for less than a dollar a pill.

The Pharmaceutical Research and Manufacturers of America and other medical specialty and patient-related organizations joined the IDSA and the HIVMA in criticizing the overcharge. Presidential candidates Hillary Clinton, Bernie Sanders, and Donald Trump weighed in as well. Clinton termed the price hike "outrageous," and said that "price gouging like this in the specialty drug market is outrageous." Sanders talked about the "greed" of the drug makers, and said, "They can do it. They can get away with it. They can make outrageous sums of profits and money on this and that's what they're doing." He and Rep. Elijah Cummings introduced a bill in Congress aimed at curbing drug prices. Explained Sanders, "Our job in Congress is to say to these drug companies, 'You can't keep ripping off the American people. You can't force folks to be in

a situation where they can't purchase the medicine they desperately need.' That's what we should be doing." Trump remarked about Shkreli, "That guy is nothing. He's zero. He's nothing. He ought to be ashamed of himself." At the time, Shkreli was dubbed "the most hated man in America." After the uproar over the Daraprim price increase, Shkreli promised to reduce the price by an unspecified amount, but then later said that he would not reduce the price after all. He pledged instead to negotiate volume discounts with hospitals.

In the absence of fraud, can a business overcharge its customers?

So, did Retrophin overcharge its customers? Did Shkreli overcharge for Daraprim? At what level of price increase could purchasers of Retrophin be said to be overcharged? How much would the price of Daraprim have to rise for Retrophin to be overcharging its customers? By what percentage would the price of Daraprim have to increase for Retrophin to be overcharging its customers? Would it make any difference if Retrophin had competition and there were other companies that sold forms of pyrimethamine? Would it make any difference if Retrophin raised the prices of all of its drugs at the same time or by the same amount? Would it make any difference if one of Retrophin's competitors also began overcharging its customers? Would it make any difference if all of Retrophin's competitors increased the prices of any or all of their drugs? Would it make any difference if Retrophin wasn't a "lifesaving" drug? Would it make any difference if Daraprim were still protected by a patent? Would it make any difference if a generic version of Daraprim were available? Would it make any difference whether there were or weren't a shortage of Daraprim? Would it make any difference if health-insurance companies said they would still pay for Daraprim even with the price increase? Does it matter that Daraprim was available much more cheaply in other countries? Is there anything that could justify Daraprim's price increase?

But it's not just Retrophin and Daraprim that are at issue here. And it's not just the pharmaceutical industry. In the absence of fraud, can a business overcharge its customers? Any business, whether it sells products or performs services or both: gas stations, department stores, convenience stores, furni-

ture stores, hardware stores, barber shops, auto-repair shops, pet stores, restaurants, landscapers, carpet cleaners, tanning salons, gyms, sporting-goods stores, bakeries, home-improvement warehouses, movie theaters, ice cream parlors. In the absence of fraud, is it possible for any of those places of business to overcharge its customers?

Fair and just prices

In the absence of fraud, deception, and coercion (but not necessarily in the absence of ignorance, laziness, or greed), and in the presence of a willing buyer and a willing seller, any price of a good or service is a fair and just price. A fair and just price is the market price. A fair and just price is any price voluntarily agreed to by a buyer and a seller that a buyer is willing to receive and a seller is willing to pay. It does not exist independently of a transaction between a buyer and a seller. As economists of the Austrian school maintain, value is subjective and subject to change. No good or service has intrinsic value. A fair and just price is not related to what a good or service is "worth." Because value is subjective, voluntary exchanges always result in win-win situations for both buyers and sellers.

Prices are independent of labor, expenses, cost, and risk. They are based on the laws of supply and demand. Fair and just prices are not related to what a good costs to manufacture or a service costs to provide. That does not mean that prices are arbitrary. Prices, as George Mason University economist Don Boudreaux has explained, "(1) reflect underlying realities and, in doing so, (2) inform producers and consumers about how best to coordinate their actions with each other, and (3) give incentives to countless producers and consumers to adjust their actions to each other in coordinating ways."

Fair and just prices are also prices that are not constrained by some arbitrary government maximum, minimum, or regulation.

Fair and just prices are also prices that are not constrained by some arbitrary government maximum, minimum, or regulation. Laws against overcharging — price gouging or predatory pricing — violate the property rights of resource owners, they hinder the price system's signaling ability, they contribute to the misallocation of resources, and they cause shortages. A fair and just price is both impos-

sible and immoral for any governmental body to calculate, suggest, institute, or regulate. It is impossible because government is not omniscient; it is immoral because government has no authority to intervene in the free market. And as the economist Ludwig von Mises pointed out, "Once price control is declared a task of government, an indefinite number of price ceilings must be fixed and many of them must, with changing conditions, be altered again and again."

The government doesn't need to monitor the prices that pharmaceutical companies charge for their drugs in order to make sure that Americans aren't overcharged. The government needs to get out of the business of regulating drugs, health insurance, hospitals, physicians, and medical care; eliminate Medicare and Medicaid; and let the free market work.

Laurence M. Vance is a columnist and policy advisor for The Future of Freedom Foundation, an associated scholar of the Ludwig von Mises Institute, and a columnist, blogger, and book reviewer at LewRockwell.com. Visit his website: www.vancepublications.com. Send him email: lmvance@laurencemvance.com.

NEXT MONTH:

"Conservatism and Libertarianism"
by Laurence M. Vance

Among the many misdeeds of the British rule in India, history will look upon the act of depriving a whole nation of arms as the blackest.

— Mohandas Gandhi
My Experiments with Truth

A Few Thoughts on Machiavelli

by Joseph R. Stromberg

The Italian Renaissance politician and writer Nicolò Machiavelli (1469–1527) remains controversial. His defenders see him as a tough-minded "realist" and the founder of proper political science. Some writers find two Machiavellis: an advisor to aspiring despots, or (alternatively) a sincere republican theorist bent on freeing Italy from foreign rule. Either way, Machiavelli's analysis of such categories as fortune, necessity, and virtue ended in an argument for releasing states from the chains of ordinary morality. States have to proceed in terms of *raison d'état* ("reason of state") and *Realpolitik* and this very necessity proves the right. Monarchy or republic, Machiavelli's *state* gets to do what it wants.

English liberal Kathleen Nott (see below) complained in 1977 of a whole "Machiavelli rehabilitation industry." Today, Machiavelli's patented excuses for power politics are found everywhere. Machiavellianism runs through popular culture — film, TV series, spy dramas, and police shows, and even news reporting — infecting public attitudes. America's two venal war parties, the wars they undertake, and a hypertrophy of alleged "realism" owe their good fortune in part to Machiavelli.

A Machiavellian spectrum

Devotees of power politics from Left to Right admire Machiavelli. Historian Joseph Femia observes that Italian fascists failed to embrace Machiavelli rhetorically only because "their liberal and democratic enemies had already laid claim to his legacy."

The once-famous American writer Max Lerner (New Dealer and Cold War liberal) admired Machiavelli, writing in 1950 that Machiavelli was "the first modern analyst of power," who discovered "a grammar of power" and embraced "tough-minded methods" and "unsentimental realism." Machiavelli's "political realism" was compatible with democratic republicanism,

provided that leaders were able and willing to embrace "ruthless measures." Our very own New England Puritans had possessed the gift, Lerner noted.

English sociologist Steven Lukes has noted the implicit Machiavellian ethics in the writings of many Marxists: "The long-term character of marxist consequentialism, focusing on the future benefits of future persons, [makes] it markedly less sensitive than even utilitarianism to the moral requirement of respecting the interests of persons in the present and immediate future." (Like Machiavelli, Marx himself had a republican side.)

Machiavelli's central claim was that "extraordinary objects cannot be accomplished under ordinary rules."

Neither has the political Right been short on Machiavellian thinkers. One thinks immediately of James Burnham, a Cold War conservative and ex-Trotskyist, who wrote a manifesto called *The Modern Machiavellians* in 1943. Here, too, we find conservative political scientist Harvey Mansfield (one of many Straussian Machiavellians), along with truckloads of neo-conservatives, flanked by a whole congregation of American liberal imperialists.

But our task here is to engage some outstanding critics of Machiavellianism.

Lord Acton

In 1891 Lord Acton, English Liberal (and Catholic) historian, wrote an introduction to Lawrence Burd's new English edition of Machiavelli's *Prince.* Being Acton, he naturally wrote a medium-sized essay packed with supporting quotations in Latin, Spanish, French, Italian, and German. His theme was that kings, dukes, foreign ministers, and even princes of the Church had long acted on Machiavelli's principles, even when they denied them publicly.

Machiavelli's central claim was that "extraordinary objects cannot be accomplished under ordinary rules." Both clerics and secular princes had said much the same thing, even without Machiavelli's guidance, but not because they "were in thrall to mediaeval antecedents." Neither did medieval thinking account for their approval of regicide or official assassinations without trial. Acton added, "It is easier to expose errors in practical politics than to remove the ethical basis of judgments which the mod-

ern world employs in common with Machiavelli."

Machiavelli's 19th-century offspring was "the doctrine of the justice of History, of judgment by results." This view was typical of "philosophers of the Titanic sort" along with many "masters of living thought." (Acton mentions Pascal, Bacon, Locke, Maine de Biran, Ranke, Fustel, Mommsen, Hegel, and Cousin, among others.) Bacon had anticipated Machiavelli by writing, "It is the solecism of power, to think to command the end, and yet not to endure the means."

For all these thinkers, the sure sign of a great statesman was that he dispensed with everyday morality.

Jacques Maritain

French Thomist philosopher Jacques Maritain wrote in 1955 that before Machiavelli, rulers often got a "bad conscience" from violating morality. After him, they saw it as "a matter of right." Further: "Radical pessimism regarding human nature [was] at the basis of Machiavelli's thought." Statesmen must therefore "abandon *what ought to be done for what is done*." Machiavelli thus set up "an illusory but deadly antinomy between what people call *idealism* (wrongly confused with ethics) and what they call realism (wrongly confused with politics)." Machiavelli "simply denies to moral values … any application in the political field." Here was, Maritain thought, a "purely artistic conception of politics."

"It is the solecism of power, to think to command the end, and yet not to endure the means."

Machiavelli's virtue — *virtù* — was thus "brilliant, well-balanced and skilled strength." It entailed a state-centric religion and the "artistic use of evil." The resulting system differed completely from any real (and Christian) notion of the common good, in which "constructive peace ... is the health of the state"; whereas, if "the aim of politics is power, war is the health of the state."

Richelieu was a moderate Machiavellian, while Bismarck was a transitional figure. Positivism and Hegelianism fostered "absolute Machiavellianism" and allowed statesmen to draw on "endless reserves of evil." Maritain counters that it "is never allowed to do evil for any good whatsoever." Politics severed from ethics becomes one of "those demoniacal principalities of which St. Paul spoke." Machiavellianism could produce only "the misfortune of men, which is the exact opposite

of any genuinely political end." Its "successes" benefited particular rulers in the short run; its attendant evils long outlasted them. (Here indeed are high time-preference and the short attention span!) Thus Machiavellianism cannot succeed, even on its own terms, but breeds "ruin and bankruptcy."

"Machiavellianism devours itself," leaving behind ruins, war memorials, and glorious stories for the credulous.

What struck Maritain about Machiavellianism in its fascist and communist incarnations was its "ferocious impatience," which revealed its adherents "as mere squanderers of the heritage of their nations." (We may add Cold War and post–Cold War U.S. leaders to the list of squanderers.) It would be far better, Maritain wrote, to cultivate "justice and moral virtues," and forego finding "necessary" exceptions outside all law and morality. That was because "justice tends by itself toward the welfare and survival of the community" and also because "the political whole is not a substantial or personal subject, but a community of human persons," whose rights and duties (I would add) may not be set aside by rulers temporarily acting in the name of the political whole. "Machiavellianism devours itself," leaving behind ruins, war memorials, and glorious stories for the credulous.

Ronald V. Sampson

Sampson, a lecturer in Politics at Bristol University, was a master anti-Machiavellian. In *The Psychology of Power* (1968), he summed up Machiavelli's system as follows: "The key to success for princes … is first to create an élite; secondly to give them a vested interest in identifying the prince's power and privilege with their own; and thirdly, to afford them the necessary coercive means to fasten their yoke on those who need to be so ruled but who may not be expected altogether to relish it." Now this is exactly Machiavelli as lionized by Mansfield (*Machiavelli's Virtue,* 1998 [1966]), but Sampson did not accept this "realistic" view of politics. (Sampson commented that Machiavellians show "symptoms of suppressed irritation at the first signs of moral earnestness.")

Machiavelli posited "a fundamental, unchanging human nature." *Raison d'état* implies that "any act whatsoever will admit of ultimate justification, if it is necessary to the safety of the community." But

he "fatally underestimated … the human capacity for moral response." *Raison d'état,* said to "secure the safety of the state," actually aims at "the wealth, power and security of the ruling group," a fact that greatly undercuts its proclaimed status as "a new sovereign absolute … to which every other human interest and value must give way."

> Machiavellians consciously exploit an older communal and Christian morality of "altruism and self-sacrifice."

Sampson notes that Machiavellians consciously exploit an older communal and Christian morality of "altruism and self-sacrifice" while subordinating it to their practical foreign policy ends. On their view, "he who denies the facts of political power is insane," as is "he who denies their normative status." We *must* have states (they reason) and states must make war; it follows that we must bow to History's iron necessity in its successive phases, nicely symbolized by the Treaty of Westphalia (1648), the French Revolution, and the "annihilation of Hiroshima in 1945." Here is the key "realist" fallacy, namely, that "man lives by *raison d'état*."

Kathleen Nott

Nott sees "the supporters of order and discipline" as people who "simply prefer to be obeyed." Their implicit Machiavellianism gives to "the preservation of the state … an absolute priority." That seems "natural" to them, and since "natural" entails "right," they declare the argument won. It now becomes "moral" to do anything that you can in fact do. Further, despite much contrary evidence, Machiavellians imagine that skillfully wielded force will usually "win." Machiavelli equated might and right, but Nott finds it more important that "he divided power from right," so that "public" (= state) actors could proceed under their own substitute "morality."

But the public has never fully bought this sideshow, and rulers work at appearing to conform to ordinary morality; that task makes them resort to "fraud and deception." (Consider how wars are orchestrated in the post–Cold War United States.) In democratic states, rulers must claim that their measures involve "the ultimate benefit of the community conceived as a whole."

Nott notes that science, too, has its own *raison d'état* and blithely takes "the risk of completely alter-

ing our mental and cultural climate" — in the name (of course) of our supposed future good. And the privilege of being outside ordinary morality "is being claimed in many other fields and studies," including economics and business, so that "collective immorality" marches on. (Such moral exemptions are traceable in part to William of Occam.)

Sampson thought Machiavelli correct in admitting "that the practice of power politics cannot by any logic be reconciled with the precepts of morality."

Machiavellians perhaps sincerely believe that the devilish truth about human nature makes them do it. They may even see themselves as *rentiers* on Judeo-Christian values. Certainly they require "self-sacrificing, dedicated and patriotic" citizens who take rulers' public rhetoric at face value.

Ends, means, and foreseeable consequences

If Machiavelli were only a value-free analyst of how things work, we might learn much from him about actions and consequences. But we cannot accept his exclusion of politics from the moral realm. Such a removal took place, of course, but its "success" may be doubted. Sampson thought Machiavelli correct in admitting "that the practice of power politics cannot by any logic be reconciled with the precepts of morality." Sampson preferred to reexamine power politics rather than morality.

That brings us, somewhat inevitably, to the World Court's (ICJ) feeble advisory opinion on the legality of using nuclear weapons (July 1996). Fixated on the extreme case where *a state's* "very survival would be at stake," the judges got nowhere. Dissenting, Judge George Jean Weeramantry argued that "no credible legal system could contain a rule within itself which rendered legitimate an act which could destroy the entire civilization of which that legal system formed a part.… [A] rule of this nature, which may find a place in the rules of *a suicide club,* could not be part of any reasonable legal system...." (Italics added.) As Maritain wrote in 1950, such rules mean "that *the people* will pay for the decisions made by the State in the name of their Sovereignty.… The woes of the people settle the accounts of the unaccountable supreme persons or agencies.…"

Machiavellianism and its near-cousins utilitarianism and consequentialism have justified many god-forsaken causes. Recall the many essays from September 2001 to

March 2003 explaining how an invasion of Iraq would kill *only* a few thousand Iraqi civilians but would stop Saddam Hussein from killing hundreds of thousands. With pretensions of mathematical certainty, idle speculators proclaimed the success and moral rightness of a proposed war of aggression. Such juggling of lives — many thousands about-to-be-saved and a *few* about-to-be-killed — underwrote a completely foreseeable disaster. Machiavelli might approve.

Joseph Stromberg is a historian and free-lance writer.

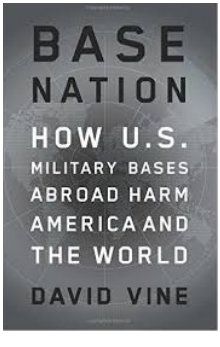
Rather than a democracy, we increasingly have an elective dictatorship. People are merely permitted to choose who will violate the laws and the Constitution.

— James Bovard
Attention Deficit Democracy [2006]

Welcome to Base Nation

by Matthew Harwood

Base Nation: How U.S. Military Bases Abroad Harm America and the World (New York: Metropolitan Books, 2015), 432 pages.



There is much in U.S. history that Americans should not be proud of. Chattel slavery. The genocide of indigenous populations. Jim Crow. The U.S. war on terror currently under way and still with no end in sight. But few are aware of what the U.S. military did to the inhabitants of Diego Garcia, a small atoll in the Indian Ocean.

Between 1968 and 1973, the U.S. military forcibly removed the population of the island, which the United States acquired from Great Britain for $14 million, to build a military base. With the help of the British, the inhabitants, known as Chagossians, were forced onto overcrowded cargo ships in miserable conditions. The dispossessed were then dropped off on the islands of Mauritius and the Seychelles with no compensation for their homes or their suffering. Destitute and shocked, many Chagossians spiraled into *sagren* — profound sorrow. Some died. The *Washington Post* called what happened to the island's people an "act of mass kidnapping." The U.S. military has a nickname for Diego Garcia. It is called "the Footprint of Freedom."

In less than 250 years, the United States has gone from being a country that mistrusted a standing army on its own shores to one where its military bases and service members garrison the planet. In *Base Nation,* David Vine, an associate professor of anthropology at American University, documents how a country founded on anti-imperialist ideals has erected a massive network of military bases that would make the Romans blush in its audacity and scope. Have no illusion: U.S. military bases are the infrastructure of the American empire. Strategically built since the United States gained glob-

al supremacy after World War II, U.S. military bases send an unmistakable message: It's our planet. Everyone else just lives on it.

The nuts and bolts of empire

Currently, Vine estimates that the Pentagon controls approximately 800 bases outside of the territorial United States. Why must he rely on his own well-documented estimate? Because the Defense Department doesn't even know or, more likely, doesn't want us to know. Vine notes that the military's most recent count, which tallied 686 "base sites," excludes even well-known bases in Kosovo, Kuwait, and Qatar that aren't secrets.

> Vine estimates that the Pentagon controls approximately 800 bases outside of the territorial United States.

That same imprecision extends to the cost of what Vine refers to as "base nation." According to the Pentagon, America's "Overseas Cost Summary" came in at $22.7 billion in fiscal year 2012. But that's pure nonsense, says Vine. The Pentagon's calculations don't account for obvious things, such as ships outside of U.S. waters, personnel health care and other assorted benefits, base rent payments to host countries, and, absurdly, basing costs in active war zones. All told, Vine estimates that the United States spent nearly $170 billion on base nation in 2012. That's some serious dough, and he isn't wrong to conclude that "every base that is built overseas signifies a theft from American society." But like the true number of bases, the real number is a mystery.

Bases and expansion

The construction of base nation started during the early years of the young republic. "While scholars generally identify Guantanamo Bay as the first U.S. military base abroad, they strangely overlook bases created shortly after independence," Vine observes. "Hundreds of frontier forts helped enable the westward expansion of the United States, and they were built on land that was very much abroad at the time." Vine is wise to the "salt water" fallacy, or the belief that the United States didn't become an imperial nation until it set sail for conquest in the Spanish American War. In that self-serving version of history, the native populations were just squatters awaiting the arrival of the continent's absentee owners.

Though military bases have always been a U.S. foreign-policy

tool, they didn't become the nuts and bolts of American hegemony until World War II and its immediate aftermath as hot war turned cold. The policy justifying hundreds of overseas bases staffed by hundreds of thousands of service members is known rather deceptively as the "forward strategy." The gist of it was simple: encircle the Soviet Union and deny it the ability to expand as well. Yet that dogma tying bases to U.S. national security persists today, even though the Soviet threat hasn't existed for nearly three decades. For instance, the opening words of a U.S. Army War Study from 2005 are: "U.S. national security strategy requires access to overseas military bases."

Vine disagrees, and his book is very much a lengthy indictment of how U.S. belief in the forward strategy both directly and indirectly does considerable damage to U.S. national security, particularly America's reputation abroad. That should come as little surprise, considering the United States has a knack for building or acquiring bases on soil controlled by authoritarian regimes.

Vine's prime example of that is Honduras. The United States has always seen Latin America as its backyard, and it has constantly had to tend to that Honduran patch. Between 1903 and 1925, the United States intervened in Honduras eight times. In 1954, it used a banana plantation on Honduras's soil to train the rebel army that deposed the democratically elected government of Jacobo Arbenz in Guatemala. Three decades later during Central America's disastrous civil wars, the entire nation was dubbed the "USS Honduras," "a stationary, unsinkable aircraft carrier, strategically anchored at the center of the war-torn region." From the Soto Cano Air Base, the United States supported the murderous regimes in Guatemala and El Salvador while using Honduras as a training ground for the bloodthirsty Contras, who committed atrocity after atrocity in Nicaragua. It's safe to say that U.S. bases aren't the harbingers of liberal democracy and human rights that their proponents say they are.

U.S. bases aren't the harbingers of liberal democracy and human rights that their proponents say they are.

Then there are the very real security concerns of overseas bases. One of the very reasons al-Qaeda attacked the United States on 9/11 was U.S. military presence in Saudi

Arabia, Osama bin Laden's home. That anger over U.S. military basing on ostensibly sovereign soil isn't the irrational response of jihadis. It's shared by Puerto Ricans, Okinawans, Italians, Hondurans, and many others across the globe, who regularly protest the economic, environmental, and political problems that arise or are exacerbated when the U.S. military puts down roots.

"If there's no problem having foreign soldiers on a country's soil," observed Ecuador's president Rafael Correa, "surely they'll let us have an Ecuadorian base in the United States." But Correa doesn't need to go that far with his quip. The United States doesn't want foreign troops on others' foreign soil either, even if U.S. basing strategy ensures that's precisely what will happen. Russia has already announced plans to establish bases in the Seychelles, Singapore, and, more dangerously, in Nicaragua and Venezuela. China, Vine adds, will probably try to acquire or build bases in Africa and around the Indian Ocean.

The latter half of the 20th century was about the nuclear arms race. The 21st century could be marked by "base races," as the likes of China and Russia try to turn a unipolar world multipolar. The prospects for peace are not good.

Home away from home

The postwar beginnings of base nation were a scandal. It was a man's world, and a young man's world at that. When American boys were stationed in Germany after the end of World War II, tensions between service members and the locals occurred immediately over "fraternization" — American GIs having sex with local women, not all of it consensual. As Vine writes, "Even when outright force was not involved, the nature of sexual relationships between GIs and German women — romance, prostitution, or assault — was often hazy at best."

> The United States doesn't want foreign troops on others' foreign soil either.

The military's solution to the fraternization problem was to allow service members' families to join them in Germany in 1945. As the American population swelled, the military requisitioned more German land to segregate service members and their families from the locals. This led to the construction of "Little Americas," bases "that resemble insulated, self-contained American towns that allow their inhabitants to hardly ever leave" the complex, which would spread across the world.

From bases constructed to look like the America Dream to the giant Walmart-like PXs selling comfort at a discount price, Vine is adept at describing the creepiness of base life when you remember what men and women are there to do. "Throughout my visits to various bases, I repeatedly had to remind myself about the role they play in waging war — such is the distance one can feel from conflict in these manicured Little Americas, with all their comforts and conveniences." These pseudo-suburban bubbles are designed to make living the military life, combined with good pay and generous housing allowances, worth the risk of death.

But always just below the surface is the macabre. People watch out for "notification teams," the men and women in Class A uniforms who deliver the bad news to loved ones. Base residents know the news is coming because when a death occurs, "there's a three-day blackout on Internet and phone contact with the unit that has lost a member." The unit's loved ones hold their breaths, hoping the notification team doesn't roll up on their doorstep. "People say that after getting the news," writes Vine, "widows will hurt themselves, while widowers will hurt others."

Base construction, operations, and maintenance also means money, lots and lots of money for private defense contractors. The Pentagon's overreliance on contractors, Vine writes, is due to the evolution of the U.S. military from a conscripted force to an all-volunteer one. In other words, you won't find many service members peeling potatoes anymore, something my grandfather said he did a lot of during his time in the Navy during World War II.

Base construction, operations, and maintenance also means money, lots and lots of money for private defense contractors.

According to Vine's calculations, the Pentagon spent about $385 billion on contractors between late 2011 and 2013. A good portion of that money vanished. The Commission on Wartime Contracting has estimated that waste and abuse in just the Iraq and Afghanistan wars amounted to $31 billion to $60 billion. One of the most corrupt companies is also the military's top defense contractor, Kellogg, Brown & Root. The company received $44.4 billion in contracts between October 2001 and May 2013, according to Vine's analysis. Yet in 2009, the Pentagon's auditor went

before the Commission on Wartime Contracting and testified that the company was responsible for the "vast majority" of suspected incidents of combat-zone fraud.

"We're profiteers," a defense contractor representative said at a London conference called "Forward Operating Bases 2012." Vine recalls the admission had only a "touch of irony." In another enlightening remark at the conference, a representative from General Dynamics asked, referring to Afghanistan, "What if we have peace break out?" Maj. Tim Elliot replied, "God forbid!"

If war is the health of the state, then the empire represented by base nation is the fleecing of Americans' hard-earned dollars by crony capitalist interests.

The tiny base movement

Because large bases on foreign soil often result in protests and political instability, the Pentagon's basing strategy has evolved toward "cooperative security locations," or what is known more simply as "lily pads." Generally located in poor and weak countries, lily pads are relatively cheap bases where the U.S. military can train and preposition weapons and supplies for when needed in a pinch. While the story remains that lily pads are the property of the host country, say in the Philippines or throughout Africa, they are for all intents and purposes U.S. military bases.

The Pentagon, it seems, is learning to be more discreet, even if there is no real change in U.S. imperial ambitions. Towards the end of *Base Nation,* Vine recalls journalist Robert D. Kaplan's visits to various lily pads across the globe. Upon arrival, he heard over and over again, "Welcome to Injun Country." As Vine gravely notes, "One doesn't go to 'Injun Country' just for the scenery. One goes looking for Injuns."

And that can mean only more and more "Footprints of Freedom," with all the dangers they bring, as the U.S. national security establishment tries to extend the American century into the 21st.

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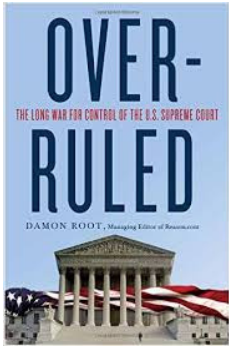
The Battle for the Supreme Court

by George Leef

Overruled: The Long War for Control of the U.S. Supreme Court by Damon Root (Palgrave Macmillan, 2014), 274 pages.



Every case that comes before the U.S. Supreme Court has its unique factual setting and contentious legal issues, but in a large percentage of them, the decision ultimately comes down to this: Should the Court defer to the legislative and executive branches and thereby allow democracy to work, or should it overrule what they have done if their handiwork violates the Constitution?

With all the furor over facts and holdings in individual cases, people are apt to miss the bigger picture — the different judicial philosophies that shape judges' views.

The clash of those philosophies is the subject of an excellent book by Damon Root, *Overruled: The Long War for Control of the U.S. Supreme Court.* Root, a senior editor at *Reason,* explores the great divide between justices who believe that they should usually defer to the presumed wisdom of the politicians who enacted a law, and justices who instead believe they should skeptically examine challenged laws, giving legislators no deference, and invalidating laws that unjustifiably infringe upon people's liberty.

Justices in the former camp usually uphold laws and regulations because they think that the majority is entitled to rule. Those in the latter camp are not so sanguine about politics and vote to overturn laws and regulations when they see them as conflicting with individual rights.

In the book, Root gives us an easily read and understood history of that battle going back to the years following the Civil War. He covers a lot of constitutional cases and the people involved in them.

Many of the cases involve the Fourteenth Amendment — whether a state law does or doesn't run afoul of it. That amendment's groundwork was laid in the 1866

Civil Rights Act, whose chief architect, Rep. John Bingham, stated that the law was meant to protect Americans' "right to work in an honest calling … and to be secure in the fruits of [their] toil." In order to secure those rights against the attitudes of many politicians, in 1868 Bingham pressed for an amendment protecting them.

Only a few years after the ratification of the Fourteenth Amendment, a case arose that tested its vitality.

Only a few years after the ratification of the Fourteenth Amendment, a case arose that tested its vitality. The Louisiana legislature had enacted a law that conferred a 25-year monopoly on a private corporation in a blatantly corrupt special-interest deal. All rivals were simply legislated out of business. Did that law violate any part of the Fourteenth Amendment? Did it deprive citizens of their privileges or immunities or of their liberty or property without due process of law?

In one of the century's most consequential of Supreme Court decisions, by 5 to 4, the majority said that the law was constitutional. In what are known as *The Slaughterhouse Cases,* Justice Samuel Miller found no violation of the Fourteenth Amendment by giving an extremely narrow reading of the law that confined the Amendment's reach to only a tiny number of "national" rights. Setting up an obvious strawman, Miller wrote that a more expansive reading "would make the Court a perpetual censor on all legislation of the states."

Miller's opinion exemplifies the deferential philosophy at work. Never strike a law down if any possible reading of the Constitution could "save" it.

Lochner

Leading the *Slaughterhouse* dissenters was Justice Stephen Field, whom Root regards as the progenitor of the Court's engaged, libertarian wing. Field responded to the majority that Louisiana's law attacked "the right of free labor," which he saw as one of "man's most sacred" and one that the Fourteenth Amendment was clearly intended to protect.

That was the beginning of a lengthy battle between the two factions. By the time of Field's retirement in 1897, his side was largely in control, and would remain so well into the 20th century.

The first big case of the new century that clearly pitted the two factions was *Lochner v. New York.* New

York's legislature had enacted a law regulating many aspects of the baking business and it included a limit on the number of hours a baker could work. That part of the law was challenged as a violation of the Fourteenth Amendment and, 5-4, the Supreme Court agreed. Justice Rufus Peckham's majority opinion held that the right to decide how much time to work was within the liberty protected by the amendment.

That holding infuriated Justice Oliver Wendell Holmes Jr., who had been appointed by Theodore Roosevelt in 1902. In a famous dissent, Holmes fumed that it was none of the Court's business to get in the way of what "the people" wanted, whether wise or not. He insisted that the Court should defer to the legislature. As Root writes, "He wanted to paint the majority as a bunch of wild-eyed libertarians hell-bent on subverting democracy."

Field's philosophy prevailed in *Lochner,* but generations of law students have heard that the decision was egregiously wrong because judges shouldn't "impose their values." In reply, the Fieldians would say, "The justices didn't impose anything, but merely kept the state legislature from imposing its ideas on a matter that the Constitution leaves to individual liberty."

Holmes and his "defer to the legislature" allies were mostly in the minority for the next few decades. A particularly interesting case Root discusses is *Buchanan v. Warley,* a 1917 case where the issue was the constitutionality of a segregationist housing law enacted in Louisville. In *Buchanan,* we meet the remarkable lawyer Moorfield Storey. Root rightly says of him, "If today's libertarian legal movement had a patron saint, Moorfield Storey would be it."

Oliver Wendall Holmes insisted that the Court should defer to the legislature.

Storey was a steadfast opponent of statism in all its forms — imperialism, militarism, and abuses of executive and legislative power. Although white, Storey served as the first president of the National Association for the Advancement of Colored People. He brought and argued the case against Louisville's segregation ordinance.

Most progressives, however, had no problem with segregation, which, after all, was just an instance of government planning designed to help "society" function more smoothly. Why second-guess politicians who think they know what housing patterns are best? And pro-

gressives certainly had no sympathy for the property rights and liberty arguments advanced by Storey.

The Supreme Court sided with Storey and declared the law unconstitutional. Justice William R. Day's opinion held that under the Fourteenth Amendment, people of all races are entitled to acquire property without state laws discriminating against them.

But what did Holmes think? The decision is listed as unanimous, but Holmes actually wrote a dissent arguing that the Court should defer to the political will. He decided against filing it, though. Root comments, "Perhaps even Holmes had to flinch at the idea of casting the lone vote in favor of Jim Crow."

Unfortunately, the period of largely libertarian jurisprudence was terminated by the statist thinking ushered in by the Great Depression.

During Franklin Roosevelt's first term, Congress obligingly passed a host of bills supposedly meant to alleviate the economic misery gripping the nation, but the legislation trampled all over individual rights the Constitution protected, as well as far exceeded the powers of Congress under Article I. The Court, in a series of decisions, struck down laws such as the National Industrial Recovery Act. Despite the cries that the laws were "essential," a majority of the Court refused to bow in deference to Congress and the president.

That led to Roosevelt's infamous "Court packing plan" in late 1936. The threat was enough to swing Chief Justice Charles Evans Hughes and Justice Owen Roberts his way in the crucial 1937 *Jones & Laughlin Steel* case, where the Court, ignoring all precedents, upheld the National Labor Relations Act.

A majority of the Court refused to bow in deference to Congress and the president.

Root says of that, "All told, it was one of the most striking turnarounds in legal history. In less than a decade, the Supreme Court had not only rendered liberty of contract a dead letter, it had embraced a sweeping form of judicial deference toward state and federal legislation while also greatly expanding congressional power…."

Brown

Judicial deference held sway for the rest of the 1930s, 1940s, and 1950s. The Court was so uninterested in cases involving property rights and economic liberty that it would uphold the most blatantly authoritarian, anti-competitive statutes so

long as there might have been any "rational basis" for politicians to have enacted them. That is to say, such laws always survived and the Court's message (as in, for example, *Williamson v. Lee Optical*) was: "Don't waste your time litigating these issues because we're not listening."

Ah, but what about one of the most famous cases of the century, *Brown v. Board of Education*? The NAACP Legal Defense Fund mounted a challenge to state school segregation, hoping that the Court would breathe some life back into the Fourteenth Amendment and declare school segregation unconstitutional.

All thoughts of deference to state officials were shelved as the Court unanimously ruled in favor of the NAACP. Root notes, however, that one of the most esteemed liberal jurists of the day, Judge Learned Hand of the Second Circuit, denounced *Brown* in a 1958 speech, saying that the Court should not have substituted its values for those of the Kansas politicians.

Hand's point was that the deferential justices dropped their philosophy when it came to a dispute they cared about. We would see that again in the 1963 case *Griswold v. Connecticut,* where the legality of Connecticut's law against the sale of contraceptives was at issue. Justice William O. Douglas wrote the majority opinion striking down the law, an opinion famous for its verbal arabesques about how a constitutional right of privacy is formed from "emanations" and "penumbras" of various parts of the Bill of Rights.

Root ably covers the rise of the libertarian legal movement beginning in the 1980s.

That decision certainly showed no deference to the state politicians who enacted the law. But, as Root shows, there is something strange about the opinion. Although Douglas tried hard to make sure that nobody thought he was resurrecting *Lochner* thinking, the precedents he cited were all based on *Lochner.* Again, a justice who was ostensibly committed to letting the people rule went Justice Field's way when "the people" had done something he disagreed with, something that deprived individuals of freedom he thought they should have.

Root ably covers the rise of the libertarian legal movement beginning in the 1980s, with the Institute for Justice and the Cato Institute leading the way. Their idea was to combat the widespread disregard

for economic liberties and the tendency of courts to blithely defer to the supposed wisdom of the political branches. The formula they came up with: find cases with "sympathetic clients, outrageous facts, and evil villains."

That approach has led to some signal victories over ugly state and local regulations that suppress competition to aid politically powerful interest groups. It has also led to some big wins at the top, notably the Supreme Court's ruling in *District of Columbia v. Heller,* which held that the Second Amendment protects individuals in their right to keep and bear arms.

The libertarians have been encouraging what Institute for Justice attorney Clark Neily calls "judicial engagement," which is to say, judging that looks beneath the bland assurances that laws and regulations are "in the public interest" to search for interest-group favoritism or mere animosity.

They've won some big cases, but lost others where judicial deference prevailed. One of those was the eminent domain battle in *Kelo v. New London.* Writing for the majority, Justice John Paul Stevens insisted that the Court had to defer to legislative wisdom and allow local officials to go ahead with their redevelopment plan. (Later, the whole plan fell through and the area today is a rubble-filled vacant lot.)

Deference also carried the day in the first Obamacare case, *NFIB v. Sebelius.* Chief Justice John Roberts followed Holmes's admonition that it is the "duty" of judges to uphold a law if at all possible and regurgitated his contention that it's none of the Court's business whether a law is good or bad. Alas, that view is very much alive and kicking.

The "long war" for the Court will certainly go on. Politicians and interest groups who like the status quo with its vast, largely unchecked governmental power will keep up the pressure for judges who can be expected to defer to that power. People who believe that judges should be awake to the violations of constitutional rights that the political process so often leads to, will try to put such jurists on the bench. This conflict is central to the overarching battle between the philosophies of libertarianism and statism and the fact that the Holmesians on the Court now often lose is encouraging.

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