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FUTURE OF FREEDOM

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The precepts of the law are these: to live honorably, to injure no other man, to render every man his due.

— The Institutes of Justinian

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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Why I Favor Limited Government, Part 4

by Jacob G. Hornberger

On June 27, 1986, the International Court of Justice entered a money judgment in favor of the Republic of Nicaragua and against the United States of America. Nicaragua had sued the United States for having illegally mined Nicaraguan waters as part of the U.S.-supported Contra rebellion against Nicaragua's Sandinista regime. The court ruled that the U.S. government had violated international law and ordered the United States to pay reparations to Nicaragua, which were later said to be in the neighborhood of $12 billion.

There was one big problem insofar as Nicaragua was concerned, one that has bearing on the paradigm of anarchy: the U.S. government refused to comply with the court's judgment.

Nicaragua was stymied. The only way that a judicial judgment can be enforced against a recalcitrant litigant is through the use of force. As a practical matter, that means that someone must go out and begin seizing cash and other assets of the party against whom judgment has been entered.

What if the litigant forcibly prevents his property from being seized? In that case, whoever has the more powerful force is going to be the one that prevails.

Nicaragua was never able to collect its judgment. In order to do so, it would have had to employ force to begin seizing assets belonging to the U.S. government. For example, the Nicaraguan navy could have traveled to Florida, seized a U.S. army base, and begun selling off the seized property in order to collect its judgment.

But we all know what that would have meant. The U.S. military would have stepped in and through overwhelming force would have smashed the Nicaraguan military. The litigant with the superior force would have prevailed over the litigant with vastly inferior force at its disposal.

The problem of finality of judgment and enforcement of judgment that would inevitably arise under

anarchy would be comparable to the situation involving Nicaragua and the United States, because under anarchy, there would be various independent competing judicial entities, each of which would have authority to issue its own judgments in matters relating to civil disputes.

Under anarchy, there would be various independent competing judicial entities.

Suppose, for example, that the Minnesota Defense League (MDL) were to issue a monetary judgment of $10 million in favor of one of its members against a member of the China Defense League (CDL), which is located a few miles away. When three agents of the MDL approach the front gate of the well-fortified enclave of the CDL seeking to collect the $10 million, they encounter 20,000 well-armed Chinese troops, whose commander informs the three MDL agents that the CDL does not recognize the jurisdiction of the MDL to enter such a judgment and, therefore, that its member will not comply with the MDL's judgment. The CDL orders the three MDL agents to leave.

What does the MDL do? The three agents charged with enforcing MDL judgments could employ force against those 20,000 Chinese troops, but we all know how that would end. Without question, the agents would simply return home and the civil judgment would go uncollected, just as Nicaragua's judgment against the United States went uncollected.

Recall the hypothetical criminal case with which we ended the previous segment. The North Korean Defense League (NKDL) had seized and convicted a member of the Minnesota Defense League and sentenced him to die. The MDL, in turn, had seized a member of the NKDL, accused him of a crime, and then offered to trade him for the MDL member. Recall that under our hypothetical, the MDL had a few hundred members and the NKDL had 10,000 well-armed troops.

We ended that segment with the question, What would be the result of those two cases?

Anarchists have a ready response, one that goes to the heart of the anarchy paradigm: Under anarchy, they maintain, people would work things out because resorting to violence would be too costly.

In many instances, the anarchists are right. The competing agencies would have to weigh the

costs and benefits of resorting to force. In many instances, they might well decide that it would be better to work things out with the other side by reaching some sort of compromise.

But the fact is that in many instances, people simply do not work things out. The parties are simply unable to reach a meeting of the minds with respect to what would be a settlement that would satisfy both sides.

What then?

In that instance, the side with the vastly inferior force will very likely let the side with the vastly superior force get its way, just as Nicaragua did against the United States. Under our hypothetical, the MDL agents would undoubtedly acquiesce to the conviction and execution of their member and return home.

In many instances, people simply do not work things out.

On the other hand, however, there might well be instances where the entity with the vastly superior force concludes that resorting to violence would be well worth it in terms of costs and benefits.

For example, let's assume that in our hypothetical, the NKDL unconditionally demands the release of its member and that the MDL refuses. The NKDL analyzes the situation: 10,000 well-armed North Korean troops versus a few hundred armed MDL members. It is entirely conceivable that the NKDL will decide to attack rather than walk away. It might well decide that the costs of losing a few hundred men in a war are outweighed by the benefits of smashing the entire MDL, arresting the members who participated in the kidnapping of their member, sentencing them to years of hard labor, and seizing assets of the MDL in compensation for all the damage that the MDL has caused the NKDL.

Final judgment

That type of problem doesn't happen under limited government. In the criminal law, for example, either the state or the federal government charges a person with a crime. The defendant can't say, "Wait! I've got the right to be tried by my own court," as he could claim under anarchy. He has to submit to the power of the state or federal court, whose judgment is going to be final. The defendant, of course, can appeal to the appellate courts but ultimately there is still going to be one final judgment, which is going

to be enforced against the defendant by agents of the government, either state or federal.

There aren't going to be conflicting judgments entered by independent, competing courts. There isn't going to be one armed force facing another armed force. There is going to be one final judgment. If that judgment declares that the defendant is guilty and must serve time, he will have to submit to the overwhelming force of the government. If he resists, he will encounter the overwhelming power of the state.

The same principle applies in the civil law — that is, to civil disputes that arise between people in society. Recall part 1 of this essay, where I pointed out that one of the legitimate functions of government is to provide people with the means by which they can peacefully resolve their disputes. Under limited government, people have the right to go to court and present their grievances to a jury of ordinary citizens drawn at random from the community. Of course, a trial doesn't guarantee that a just verdict is going to always be reached, but at least it guarantees people a process by which they can present their case and have it considered by a jury or judge.

Equally important, it enables the parties to have one final judgment in the case, rather than conflicting judgments entered by independent, competing courts. That one final judgment can then be enforced by the prevailing party against the losing party. And it's the state, not the litigant, that does the enforcing. If the losing party resists with violence, the state will put him down with vastly superior force.

One of the legitimate functions of government is to provide people with the means by which they can peacefully resolve their disputes.

Let me give you an example of this phenomenon from real life. When I first started practicing law, I was representing a local bank that had lent a man around $10,000. When the note became due, the man refused to pay. He had the money — there was no question about that: he owned a nice jewelry store. I suppose he just figured that the bank would never go through the trouble of collecting a $10,000 debt, which was rather small in the larger scheme of the bank's operations.

The bank asked me to sue to collect the debt. After the man ig-

nored my letter demanding payment, we filed suit against him, which he ignored. We secured a court judgment against him for the money owed plus interest and attorney's fees.

Under limited government, the bank itself cannot use force to collect its judgment.

I sent him a copy of the judgment and requested payment, which he again ignored. At that point, there was only one thing that could be done to get the bank's money — secure enforcement of the judgment. That necessarily entailed force because it involved seizing the man's assets against his will. Under limited government, the bank itself cannot use force to collect its judgment. That's the job of the state.

Notice something important here: The man didn't have the right to go to a competing court, plead a defense, and possibly secure a conflicting judgment, as he could under anarchy. If that were the case, the problem would naturally arise over which conflicting judgment would prevail. Under limited government, if the man had any defenses to the lawsuit, he was required to present them as part of the case in which the bank filed its suit, so that there would be one final judgment in the case, with either the bank winning or the debtor winning.

To enforce its judgment, the bank secured the issuance of what is called a "writ of execution," a type of judicial process that stretches back to the development of American and British common law. It is a special type of court order commanding the sheriff to collect the judgment, authorizing him to use force against the defendant. A court clerk placed the writ into the hands of the sheriff.

I was curious how this was going to play out and so I asked the sheriff if I could accompany his deputies when they went out to enforce the judgment. He said yes. On the appointed day, I accompanied the deputies, who were armed, to the man's jewelry store, where there were customers in the store. The deputies asked for the owner and informed him that they were there to collect the bank's judgment. They showed the owner the writ of execution.

The man objected and said he wasn't going to pay a dime. At that point, I began pointing at various items of very expensive jewelry and asked the deputies to begin seizing them. The judicial procedure would

have been to seize the jewelry and then later sell it at public auction, with the proceeds being used to satisfy the judgment.

The deputies began seizing the jewelry. The man objected vehemently but there was nothing he could do. If he used force against the armed deputies, they would have arrested him. If he had used deadly force, they would have responded accordingly. The man went into the back of his store and returned with the full amount of cash owed and handed it to the deputies, who deposited it into the registry of the court, which then sent it to us, in full satisfaction of our judgment.

That's one of the great advantages of limited government. One final judgment, which can be enforced through the overwhelming power of the state. No wars between competing courts.

When things don't work out

Another example of the principle of finality of judgment was the case of Kim Davis, the Kentucky clerk who refused to issue marriage licenses to same-sex couples because to do so would violate her religious convictions. The problem was that the U.S. Supreme Court had ruled that state clerks were required under the U.S. Constitution to issue such licenses. Davis refused to comply with the order of a U.S. District Judge to issue such licenses. The judge cited Davis for contempt and ordered her to jail until such time she would comply with the law (or resign her position).

What if both sides dig in their heels, insist on their own judgment, and refuse to comply with the other side's judgment?

Some anarchists maintained that the jailing was outrageous, but it was nothing of the sort. It is simply one of the means by which final judgments under limited government are enforced against losing litigants who refuse to comply with a judicial ruling. Under U.S. law, the U.S. Constitution is the supreme law of the land and, therefore, overrides conflicting judicial rulings or actions of state officials. Davis knew that but nonetheless refused to comply with the Supreme Court's judgment. By having her jailed until she complied with his orders, the federal district judge was simply enforcing the final judgment that had been entered by the U.S. Supreme Court. Davis ultimately submitted, complied with the judgment, and was released. There was never any

bloodshed as a result of the conflict or the resolution of the conflict.

Compare that type of situation to anarchy, where independent judicial entities can each issue a conflicting judgment. Which judgment will prevail? What if both sides dig in their heels, insist on their own judgment, and refuse to comply with the other side's judgment? What then?

The jewelry-store owner placed a higher value on the money than he did on the impact that his loan default had on his reputation.

Anarchists respond with what has become a core principle of anarchy: The notion that people will find a way to work out their differences in an amicable way. But as any judge in the land will tell you, such is clearly not the case. It certainly wasn't the case with Kim Davis. Indeed, go into any courtroom in the country on any given day and the likelihood is that there is a trial going on. That's a case in which the parties did not work out their differences.

Indeed, seek out the case-law reporters for the 50 states and for the federal district and appellate courts and the U.S. Supreme Court. You will find millions of reported judicial opinions, every one of which reflects a real-life case in which the litigants did not work things out, which is why they ended up going to trial. And after each trial and after each judicial decision, there was one final judgment that the winner could enforce against the loser.

Anarchists also maintain that under anarchy, people would not violate their contracts because they would be too concerned with their reputations. If they violate their agreements, anarchists hold, people would be less likely to deal with them. In support, anarchists cite the practices and customs of the law merchant in the Middle Ages, which we will focus on in the next segment.

However, as much as that might be the case in most instances, it certainly is not the case in all instances. Consider the jewelry-store owner. He obviously placed a higher value on the money than he did on the impact that his loan default had on his reputation. And my hunch is that his customers, who were only interested in buying jewelry, didn't care either.

What we are dealing with is a matter of relative values. Some people might value reputation more than money. Others might value the money more highly.

Here's another example from real life. The same bank I was representing had issued a letter of credit to a Mexican citizen involving millions of U.S. dollars. Some months after the letter had been drawn on, the Mexican government devalued the peso, and the man now stood to lose a vast portion of his fortune, owing to the need to pay the bank in U.S. dollars. The man refused to pay. He obviously figured that he'd rather have the millions of dollars and a bad reputation than a good reputation and be broke.

With those principles in mind, let's now examine various historical examples that anarchists cite in favor of the anarchy paradigm.

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

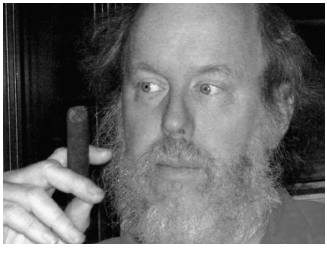
NEXT MONTH:
"Why I Favor Limited Government, Part 5"
by Jacob G. Hornberger

No man can put a chain about the ankle of his fellow man without at last finding the other end fastened about his own neck.

— Frederick Douglass

The TSA Treats Americans like Gitmo Detainees

by James Bovard



If you use hand sanitizer when traveling, the Transportation Security Administration can badger you as if you were a terrorist suspect. The TSA is the biggest hassle most Americans will encounter when they fly. I learned that firsthand while flying home from Portland, Oregon, last Thanksgiving morning.

I arrived at the airport two hours before my flight. As usual, I "opted out" of going through TSA's Whole Body Scanners. The agency's prize possessions are incompetent at detecting terrorist threats; the inspector general reported that they fail to detect 96 percent of weapons and mock explosives smuggled past them. The machines take birthday-suit snapshots of each traveler; the TSA claims photos are not retained but the agency has less credibility than Congress.

A TSA agent took me aside and gave me a vigorous pat-down. This is the usual routine I experience at airports and a small price to pay for a silent protest for my constitutional right to be free of unreasonable, warrantless searches.

After he finished, he tested his glove on an Explosive Trace Detector. I was surprised when the agent claimed his glove showed a positive alert for explosives. "What type of explosive was it?" I asked. "I don't know — it's a code," he replied. I asked how often the detection machine generates false positives. He said that was classified information. It was not like I had been hanging out at shooting ranges or missile-launch sites in Oregon.

TSA's explosive-detection tests are routinely triggered by the glycerin in soaps and hand sanitizers (which I used that morning). TSA spokesman Ross Feinstein admitted in 2013 that "commonly used items can render a false positive alarm during screening." The TSA's explosive test is akin to a police radar gun that exaggerates the number of speeders by a thousandfold. But regardless of the stratospheric error rate, the TSA claims absolute

power over anyone who triggers the alert.

I was told I would have to undergo a special pat-down to resolve the explosive alert. Two other agents came up and the three of them marched me off to a closed room with a sign, "Private Screening in Progress — Do Not Enter." The TSA agents shuffled along lackadaisically, almost certainly knowing it was a false alarm.

The lead agent began firmly pawing and patting me down, tugging on my shirt as if he suspected a Superman's cape was hidden beneath it. I offered to take it off; he said no. He pawed a bulky shirt pocket and demanded to know: "What's in there?"

I glanced down, dug deep into it, and retrieved half a peanut.

Then he groped the other pocket and repeated the command. I pulled it open and plucked out a small ball of lint.

While the search was proceeding, another TSA officer interrogated me to unmask my treachery: "How long were you in Portland? What were you doing? Where did you stay?" I curtly answered his queries and said I was accustomed to being asked much better questions by TSA Behavior Detection Officers (BDOs); besides, another TSA agent had already asked me the same questions while I was waiting in line before the screening checkpoint. (The inspector general and the Government Accountability Office both slammed the BDO program as an abysmal waste of tax dollars.)

With no witnesses, TSA agents are free to abuse travelers to their hearts' content.

Perhaps the TSA agents were perturbed that I was not kowtowing or maybe it was my caustic comments about their security theater. The lead TSA agent ordered me to hold up my pants by the belt loops (my belt had vanished long ago when I sent my possessions through the X-ray). He then amused himself by repeatedly grinding his palm into my groin. Did he think my private parts were a nuclear weapon? With no witnesses, TSA agents are free to abuse travelers to their hearts' content.

He eventually announced that the "examination" was finished. As soon as I was released from TSA custody, I retrieved my Nikon SLR from my carry-on bag and circled back to that room. Another TSA agent came up and announced that I was prohibited from photographing the security room. I told him

that I had just been interrogated there and I had a right to capture the scene. I later posted photos of that room online.

Perhaps I was targeted because I have repeatedly criticized TSA in articles and was denounced last year by TSA chief John Pistole for a *Washington Times* oped I wrote. Or perhaps such punishment is routinely dished out to people who opt out from Whole Body Scanners.

The post-incident report

On the Monday after the Thanksgiving encounter, I emailed the TSA asking how often its explosive detectors generate false alerts and how often alerts identify bona fide threats to air-travel safety. TSA "national spokesperson" Mike England replied, "I'm unable to answer these questions, as the answers are security-sensitive information." This cloak of secrecy is convenient for a process plagued by failures and abuses for more than a decade. The TSA press office was unable to provide a single example of when the explosive-detection tests had exposed someone who intended to detonate a device on an airplane.

I filed a Freedom of Information Act request seeking all TSA documentation on me and on the Portland incident as well as information on several other topics. Three months later, the TSA sent me eight airport surveillance videos involving me as well as copies of emails and statements from the agents who took me behind closed doors (two of which were written after I filed my information request). I was surprised that the TSA Office of the Chief Counsel was quickly involved in the response with email subject headings "Tort Claim." The videos had exhaustive coverage of my every movement in the Portland airport — even detailing which chair I chose after getting a Starbucks coffee. But there is a tell-tale gap. The video timeline notes "7:50:29 Group Arrives at Private Security Room. 7:50:55. Door Closes. 7:57:28 Door Opens." The seven minutes missing from the recording — like the 18-minute gap in one of Richard Nixon's Watergate tapes — are where travelers' rights vanish.

> "There are things that the average person comes in contact with every day" that trigger alerts.

The post-incident report by one agent in that room noted that "the pax [passenger] was asking about the false-alarm-rate of our machines. The LTSO [Lead Transportation Security Officer] explained

several times that 'there are things that the average person comes in contact with every day'" that trigger alerts. The agents talked as if, because innocuous items set off the detectors, the TSA's groin-jamming response is also innocuous. Aarin McCarthy, TSA's "Customer Service Support Specialist" at the Portland airport, noted in an internal email a week after I was searched that "I have received several other complaints lately about ETD testing and 'false positives'" at the Portland airport.

The TSA is proud of its Behavior Detection Officers but the BDO's statement on the incident made me burst out laughing. He wrote, "I asked the passenger what brought him to Portland and passenger informed me he was an activist/blogger and he attend [sic] a conference here talking about the government and its security." Some of my best friends are bloggers, but I clearly stated that I was a journalist; I did not mention any affiliations or whom I wrote for. I said I was in Portland to speak at a conference about liberty (the annual Freedom Seminar) — not about "the government and its security." Maybe he confused that response with my scoffing at their "security theater." I'm not sure whether the BDO was actually that clueless or whether there may be some other motive for his seeking to attach the "activist/blogger" label. TSA agents searched my carry-on shoulder bag several times but never noticed the U.S. Senate Press Gallery pass and metal necklace — even though they were not hidden.

In my FOIA request, I asked for "any and all records that the TSA might have regarding false positive explosive alerts generated due to commonly used items such as hand sanitizer, soap, etc." TSA provided nothing in response to that request.

I'm not sure whether there may be some other motive for their seeking to attach the "activist/blogger" label.

Millions of airline passengers use hand sanitizer every week. Yet, the TSA entitles itself to treat anyone who triggers false alerts more harshly than the Pentagon was allowed in 2013 to treat accused enemy combatants at Guantanamo Bay, Cuba. A Justice Department lawyer told a federal judge that intrusive new search procedures at Gitmo were no big deal: "It's basically like a TSA supplemental search.... The genital area is touched through the clothing with a flat

hand, the way the TSA does." Federal judge Royce Lamberth ordered "the military to stop touching the groins of detainees," the *New York Times* reported.

TSA also states that "a companion of his or her choosing may accompany the passenger"; I was never notified of that right.

An appeals court overturned his decision but not before the Justice Department lawyer sought to recant his TSA remarks because of "sensitive security information." But his revelations were no secret to scores of thousands of people who have been victimized by TSA supplemental searches. The TSA's pelvic pawing is especially traumatic to survivors of sexual assaults or those who have had surgery in that area.

Iron Curtain courtesy

Shortly before I received my FOIA response, the TSA finally obeyed a 2011 federal court order and issued a 157-page Federal Register notice justifying its Whole Body scanners and other checkpoint intrusions. The Federal Register notice is full of soothing pabulum about how travelers have no reason to fear the TSA, declaring that "passengers can obtain information before they leave for the airport on what items are prohibited." But it neglects to mention that the TSA can invoke ludicrous pretexts to grapple innocent travelers as if they were Top 50 Terrorist Suspects.

According to the Federal Register notice, "TSA offers passengers who must undergo a pat-down the opportunity to have the pat-down conducted in a private screening location that is not visible to the traveling public." I was not offered any opportunity; instead, I was marched off by three TSA agents to a closed room. The TSA also states that "a companion of his or her choosing may accompany the passenger"; I was never notified of that right.

A friend recently told me that she felt as if she were in East Germany when a TSA agent kept barking at her to raise her arms higher while passing through the scanner. Actually, I crossed East German borders many times before the fall of the Iron Curtain and always received better treatment than I experienced in Portland. Even when I was detained and interrogated for three hours near the Czech border in 1987, East German border guards were models of courtesy compared with the TSA.

The TSA's Federal Register self-vindication omitted any mention of

treating American travelers like Gitmo detainees. Americans should be able to travel without getting molested by federal agents. The TSA continues operating on the level of the troll in Monty Python's *Holy Grail,* who blocked a bridge while blabbering out idiotic questions.

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:
"Boy Scouts and the Love of Freedom"
by James Bovard

Free trade is such a simple solution for so many of the world's ills. It doesn't require endless hours of debate in the United Nations ... or any other worldwide debating society. It requires only that one nation *see the light and remove* its *restrictions. The results will be immediate and widespread.*

— W.M. Curtiss

Free Trade Is Fair Trade

by Laurence M. Vance

As relayed by Harvard economics professor and chairman of George W. Bush's Council of Economic Advisers, N. Gregory Mankiw, "The Princeton economist Alan Blinder once proposed Murphy's Law of economic policy: 'Economists have the least influence on policy where they know the most and are most agreed; they have the most influence on policy where they know the least and disagree most vehemently.'"

The quintessential example of this phenomenon is the near-unanimity of economists from across the political spectrum on the benefits of international free trade to participants in any country engaging in it. Opposition to free trade is political. Arguments against free trade — usually made by special-interest groups who stand to benefit the most from some form of protectionism — are generally nationalistic in tone, with an anti-foreign and anti-market bias cloaked in an appalling ignorance of basic economics. Modern American opponents of free trade, like the mercantilists of old, favor exports while at the same time disdaining imports, never stopping to realize that if everyone in every country shared their opinion, then the United States wouldn't export anything, as no trade would take place at all. What they really want is for the United States alone to be able to export its goods but not to have to import any goods from other countries.

Instead of condemning free trade outright, many modern American opponents of free trade say that they have nothing against free trade as long as it is fair trade. That is true in the case of both liberals and conservatives.

Fair-trade liberals

Liberal fair traders come in two varieties: union members and bleeding hearts.

Union members believe that free trade is inherently unfair to them. They think that it ravages American manufacturing, sends jobs overseas, and suppresses their

wages. Consequently, they consistently oppose the lowering of tariffs and trade barriers. They want to keep costs on imports high to "protect" their high-paying jobs from foreign competition. They also fear increased competition from domestic nonunion businesses that benefit from free trade. To union members, trade is fair when workers in other countries have the same labor rights as American workers do to organize and collectively bargain so as to increase their wages, expand their benefits, and improve their working conditions. Trade is fair as long as it doesn't affect U.S. companies that don't want to compete, modernize, change, or innovate.

Liberal fair traders come in two varieties: union members and bleeding hearts.

Bleeding-heart fair traders, like Karl Marx in *The Communist Manifesto,* equate free trade with exploitation. What began with signs posted in coffee shops saying "We sell only fair trade coffee" has now expanded to grocery stores carrying whole lines of "Fair Trade Certified" products. The fair-trade buzz words are terms such as "ethical sourcing," "sustainable agriculture," "community empowerment," and "environmentally friendly production." The fair-trade mantra is "Fair trade helps free trade work for the poor."

According to the nonprofit organization Fair Trade USA, the leading third-party certifier of Fair Trade products in the United States,

> We enable you, the consumer, to make a difference with your dollar. We help people and the planet work in tandem so both are healthy and sustained. We provide farmers in developing nations the tools to thrive as international business people. Instead of creating dependency on aid, we use a market-based approach that gives farmers fair prices, workers safe conditions, and entire communities resources for fair, healthy and sustainable lives. We seek to inspire the rise of the Conscious Consumer and eliminate exploitation.

Fair Trade USA's "rigorous social, environmental and economic standards work to promote safe, healthy working conditions, protect the environment, enable transparency, and empower communities to build strong, thriving businesses." Fair Trade USA "audits and certifies transactions between U.S. compa-

nies and their international suppliers to guarantee that the farmers and workers producing Fair Trade Certified goods are paid fair prices and wages, work in safe conditions, protect the environment and receive community development funds to empower and uplift their communities."

The terrible truth is that jobs in sweatshops may enable people, including children, in poorer countries to feed and clothe themselves.

That is all well and good. There is certainly nothing wrong with going to third-world countries and trying to institute health and safety standards, improve living and working conditions, advance labor rights, and change farming and environmental practices. And there is certainly nothing right about forced labor and worker oppression. But that doesn't mean that free trade is exploitive. It doesn't mean that Americans who choose not to pay higher prices for "fair trade certified" products should be shamed for not doing so. And it doesn't mean that foreign "sweatshops" and "child labor" are inherently evil. The terrible truth is that jobs in sweatshops may enable people, including children, in poorer countries to feed and clothe themselves. To limit imports from those countries or shame people into not buying the products they produce or the crops they harvest may actually hurt the very people that the trade restrictions are meant to help.

Fair-trade conservatives

Conservative fair traders frame their arguments more in terms of nationalism, nativism, and national security than economics. And while they generally share a commitment to a domestic free market, they have an aversion to free markets when they cross international borders. When a buyer and a seller are on the same side of a national border, conservative fair traders have nothing to say. But when the two are on opposite sides of a national border, they join with labor unions — which they otherwise disdain — in demanding that Congress restrict or stop the exchange. Trade is fair only when it takes place on "a level playing field." Because certain other countries don't have the regulatory burden, safety standards, and environmental laws that the United States has, trade restrictions of some kind must be imposed to make trade "fair." This is all predicated on the old mercantilist fallacy

that although exports are good, imports are bad.

The presidential candidacy of Donald Trump has led to a resurgence of conservative fair-trade rhetoric. "I am all for free trade, but it's got to be fair," says Trump. "For free trade to bring prosperity to America, it must also be fair trade." Since other countries are "beating" the United States when it comes to trade, Trump believes that the United States needs to raise tariffs on some products and impose new ones on others. The United States needs smarter trade negotiators to cut better deals and make better agreements with its trading partners. Manufacturing jobs need to be brought "back home where they belong." U.S. companies should make their products in America.

Free trade

What is free trade?

Free trade is the absence of any form of protectionism. This protectionism might consist of a tariff placed on some imported good, import quotas placed on certain items, the imposition of conditions that must be met in the exporting country before a good can be imported, regulations on trade, anti-dumping laws, restrictions on the importation of certain commodities, embargoes on goods from certain countries, pressuring some country to sign a "voluntary agreement" to limit the export of a particular good, or some other trade barrier that the government institutes. The idea is always that some domestic industry is protected by the government from foreign competition. That, of course, also always entails that a government trade bureaucracy be established to enforce the protectionism.

Free trade is the absence of any form of protectionism.

Although most advocates of fair trade would shy away from the term "protectionism," the only alternative to free trade is some form of protectionism. And regardless of what form the protectionism takes, there is no getting around the fact that protectionism is merely central planning. It is no different from the central planning that took place in the 20th century in communist countries such as the Soviet Union or takes place today in Venezuela, North Korea, and Cuba. All forms and levels of protectionism require central planning. Government bureaucrats must determine which domestic industries to protect, how to erect a particular trade barrier,

which goods should be subject to tariffs, how much the tariffs should be, which countries should be punished, which counties should be excluded, below what price dumping is determined to be taking place, which goods should be restricted, which goods should be subject to import quotas, what the number of the quota should be, how long the trade barriers should be maintained, and how often the need for protectionism should be reevaluated.

Protectionism is therefore no different from wage, price, and rent controls; minimum-wage laws; usury laws; price-gouging laws; or other forms of government economic interventionism.

Free trade is also the absence of any government trade agreements.

Free trade is also the absence of any government trade agreements. Government trade agreements are government-managed, centrally planned trade, not free trade. Trade agreements such as the North American Free Trade Agreement (NAFTA), Central America Free Trade Agreement (CAFTA), and the Trans-Pacific Partnership (TPP) are negotiated by governments, are hundreds of pages long, and relate to all kinds of things besides lowering tariffs and trade barriers. It is a misnomer to call them free-trade agreements. And the World Trade Organization (WTO) is not a free-trade organization. It is a globalist bureaucracy. No agreements, treaties, organizations, or oversight are necessary for free trade to take place. Trade does not need to be managed.

Free trade is really just about commercial freedom. Trade is simply commerce. No county literally tries to trade 1,000 bushels of bananas for another country's 1,000 bushels of tomatoes. Trade actually takes place between individuals and businesses, not countries. Although people often talk about the United States trading with China, France, or Japan, foreign trade really just occurs when entities in one country engage in commerce with entities in some other country. The Swiss government does not buy up watches from Swiss watchmakers and sell them to the U.S. government so that they can then be resold to American watch distributors or retailers. Trade between entities residing in two different countries should not be regarded as any different from what happens when two entities in the United States engage in commerce. Most arguments

for free trade miss the real issue. Free trade simply means that every individual and business in every country is free to trade, or conduct commercial activity, in any way with any individual or business in any other country. Free trade is a fundamental right. As explained by *Boston Globe* columnist Jeff Jacoby,

> Human beings, by virtue of being human, are entitled to worship as they choose, to own property, to emigrate from their country, and to form peaceable associations. Those are fundamental rights, not dependent on the government's political preferences or utilitarian considerations. The freedom to engage in mutual and honest commerce is just as fundamental, and it should be just as immaterial whether lawmakers approve of the bargain struck between seller and buyer. Jones shouldn't have to lobby public officials for the right to hire Smith or teach Smith or pray with Smith, or seek Smith's opinion. Nor should he have to win government approval for the right to sell his goods and services to Smith. Not even if Smith lives in another neighborhood, or another state, or another country.

"An understanding of the theory of comparative advantage is absolutely vital in any discussion of free trade."

Free trade is ultimately about freedom. But is not free trade dependent on the economic theory of comparative advantage? A conservative critic of government-managed trade agreements and the "free trade agenda" writes in the *New American* magazine that "an understanding of the theory of comparative advantage is absolutely vital in any discussion of free trade, because it is the linchpin that holds together all of the standard arguments supporting free trade." Comparative advantage is the idea that economic agents are most efficiently employed in activities wherein their relative efficiencies are superior to others. One agent has a comparative advantage over another in producing a certain good if it can produce the good at a lower relative marginal cost. As it relates to international trade, comparative advantage is all about the gains to be made from trade for individuals, businesses, and nations that result from the differences in factor endowments, la-

bor productivity, and technological competencies. A country may be better off if it specializes in the manufacture of certain products for export and import the rest, even if it has an absolute advantage in manufacturing in general.

Adam Smith recognized that the case for international trade was no different from the case for domestic trade.

What Adam Smith, the father of modern economics, wrote in *The Wealth of Nations* (1776) is still true today: "If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage." Smith recognized that the case for international trade was no different from the case for domestic trade — even down to the smallest level: "It is the maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy."

Although this is all true, the linchpin of free trade is actually freedom: the freedom of an entity in one country to buy goods from or sell goods to an entity in another country, for any reason, and without interference from the government. Just as free trade does not depend on trade organizations, trade treaties, trade agreements, an export-import bank, or government oversight, so free trade is not beholden to comparative advantage — or efficiency, factor endowments, technological competencies, or labor productivity. Free trade does not depend on a certain set of conditions that must first be met. And free trade is not beholden to the economic philosophies of some dead economist.

The foundation of free trade is freedom. As Edmund Burke, the great Irish statesman and philosopher of liberty, wrote in 1795, "Free trade is not based on utility but on justice." And as American political theorist John C. Calhoun wrote to the British free-trader Richard Cobden, "I regard free trade, as involving considerations far higher, than mere commercial advantages, as great as they are. It is, in my opinion, emphatically the cause of civilization and peace."

Free trade is fair

The conclusion is inescapable: free trade is fair trade.

Trade is not fair just when it doesn't result in a trade deficit. Both

liberal and conservative "fair traders" are always bemoaning the U.S. trade deficit. But the so-called trade deficit is simply a government accounting fiction. It doesn't matter whether American entities buy more from foreign entities than foreign entities buy from American entities. Governments in both countries shouldn't even be keeping track of trade surpluses or deficits. When we are told that the United States has a trade deficit with some other country, it shouldn't concern us any more than when one American state, county, or city has a trade deficit with some other American state, county, or city. It shouldn't concern us any more than when one business or individual has a trade deficit with some other business or individual. As the economist Walter Williams recently wrote, "I fear that the angst over trade deficits is simply a front for being against peaceful, voluntary trade among people of different nations."

Trade is not fair just when it doesn't "destroy" jobs. International trade does not destroy jobs, standards of living, industries, or communities. To the contrary, trade creates jobs, expands the size of the market, increases opportunities for manufacturers, boosts demand for products, allows us to consume more, gives us more variety, and drives economic growth. Trade may reallocate jobs and capital from lower-productivity to higher-productivity sectors of the economy, but there are not a finite number of jobs in each sector. No one says that a company in New York purchasing goods from a company in California destroys jobs in New York. Why do some people think things are suddenly different if a company in the United States purchases goods from a company in Japan? It is government regulations, mandates, and taxes that destroy jobs.

It doesn't matter whether American entities buy more from foreign entities than foreign entities buy from American entities.

Trade is not just fair when American companies get a good deal. Trade does not result in winners and losers. Trade is mutually beneficial. Trade is a win-win situation. No party loses anything by trading with another party. Trade is not a zero-sum game. There are no conditions that first have to be met before trade can beneficially take place. As the Austrian economist Ludwig von Mises explained, "The statement that one man's boon is

the other man's damage is valid with regard to robbery, war, and booty. The robber's plunder is the damage of the despoiled victim. But war and commerce are two different things." If both parties that engage in trade, that is engage in commerce, did not come out of the transaction better off than before they went in, then trade would not take place in the first place. Things are not any different just because the trade takes place across some invisible border line. In exchanges between individuals or businesses the supreme test of fairness is the voluntary consent of each party to the transaction.

All trade is fair trade.

Fair trade does not entail the government's devising new ways to "protect" American consumers from better products, more variety, or lower prices. Trade is fair when it is free.

Trade is fair when it doesn't involve government's subsidies, crony capitalism, or an export-import bank. Trade is fair when it is not hindered by tariffs, quotas, barriers, sanctions, or dumping rules. Trade is fair when it is not managed by government agreements, treaties, or organizations. Trade is fair when it is not overseen by a commerce department or trade representatives. Trade is fair when it is not subject to government interference, regulations, or restrictions.

Trade cannot be made more fair by making it less free.

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NEXT MONTH:
"The Right to Hire and Fire"
by Laurence M. Vance

Praxeology and Hostile Action

by Joseph R. Stromberg

Praxeology according to Mises

Ludwig von Mises saw praxeology — "the general theory of human action" — as the foundation of proper economic reasoning. Starting from the self-evident fact that men "act" so as to substitute more satisfactory states of affairs for those now existing, he believed he could build the basic toolkit of economic science by working deductively from secure first principles and their necessary implications, bringing in empirical data as needed. (See *Human Action*.)

Mises cited the French social philosopher Alfred V. Espinas (1844–1922) as the first writer to use the term "praxeology" (1890). (Actually, as Guido Hülsmann has noted, Louis Bourdeau used it in 1882.) In his *Ultimate Foundation of Economic Science* (1962) Mises called history and praxeology "the two branches of the sciences of human action." So far, a completed praxeology existed only within economics, but Polish philosopher Tadeusz Kotarbiński was working on a "praxeological theory of conflict and war."

Mises's disciple Murray Rothbard enumerated the sciences of human action in his *Man, Economy, and State* (1962). Many disciplines — psychology, ethics, aesthetics, and history — study men's ends. Technology deals with men's use of physical "means to arrive at ends." As a broader science, praxeology organizes the "formal implications of the fact that men use means to achieve various chosen ends." Economics was "so far the only fully elaborated subdivision of praxeology." He added, "Attempts have been made to formulate a logical theory of war and violent action," without saying who had done it. In a piece on Polish economist Oskar Lange in 1971, Rothbard referred to Kotarbiński and noted his interest in "efficient as well as hostile action."

In these brief comments Mises and Rothbard introduced an interesting project and one that does seem, at first, a topic worth pursu-

ing from within Austrian economics. But there is little to suggest that Austrian economists have done so. Nor did Mises or Rothbard develop such a theory. Instead, they wrote on war, war finance, et cetera, as political theorists or historians. The same is true of the various analyses of American military-industrial corporatism by Don Lavoie (1951–2001) and Robert Higgs. Neither proposed (as such) a praxeology of hostile action.

Tadeusz Kotarbiński's praxeology

In an essay on the general methodology of praxeology in 1937, Kotarbiński set his proposed science the task of "determining and systematizing all the riches of the diverse forms of action" to produce a "grammar of action" oriented toward practice (= successful action). In *Austrian Philosophy: The Legacy of Franz Brentano (*1994), philosopher Barry Smith provides a useful sketch of Kotarbiński's philosophy in most of its phases. Kotarbiński believed only material objects are fully "real"; some of them (human beings) can make and do (act). That perhaps rendered his account of institutions somewhat ad hoc, but his interests lay in technique and efficiency treated almost as moral imperatives. That his career continued through the communist period suggests that the Polish regime found his work relatively unthreatening.

Hostile action

Kotarbiński sketched out (in Polish) a praxeology of hostile action in *On the General Question of the Theory of Conflict* (Warsaw, 1938), with a summary in French ("Les Idées Fondamentales de la Theorie Générale de la Lutte," first published in 1936. We rely here on the French text.) Kotarbiński states that the theory of armed conflict presupposes a theory of conflict-in-general, and therefore rests on the general theory of action. Thus A, who acts in favor of a certain state of affairs, and B, who works toward an opposed state of affairs, have incompatible goals. Each side must make "lucid choices of means to his ends." The resulting actions are fourfold: positive, negative, aimed at change, or opposed to change.

> The theory of armed conflict presupposes a theory of conflict-in-general, and therefore on the general theory of action.

Victory comes when one side obtains its goal at the decisive moment. Some conflicts may remain unresolved. Material resources dif-

fer from material "put to work." One must maintain his freedom of action — even flight restores it. Executing a move removes the freedom to act differently. A menace can be better than attack and it is possible to menace the enemy on two sides. Any initial richness of alternatives will undergo degradation. One must strike before inertia sets in. Economize and save forces. Derange the enemy's coordination. Military amateurs sometimes prevail by making unexpected moves. We may leave to one side whether Kotarbiński tells us much more here than Sun Tzu, Napoleon with his maxims, or Clausewitz have done.

Leon Krzemieniecki and Roman Kalina write that Kotarbiński returned to this subject in later publications, including *A Treatise on Good Work* (1955, 1982). There he treated struggle as a kind of "negative co-operation" and wrote one chapter on the techniques of struggle. In 1984 he made a case-study of "eristics": the strategy of debate. (See "Agon — a term connecting the theory of struggle with belles-lettres," *Archives of Budo,* 2011, online.)

The limits of praxeology

As a theory (or method) of e*fficient action,* Kotarbiński's general praxeology seems rather widespread in the post–Cold War world: in academic writing on sports, military affairs, management, pastoral care, and other fields. The trend is noticeable in Poland and Scandinavia and looms large in French sociology (where praxeology first began). Inevitably, some writers have drawn connections between (or among) Austrian praxeology, praxiology (the usual European spelling), American pragmatism, and even Marxist *praxis* (= specifically human action centering on labor). It would be hard to assess the value of this recent work for ongoing reflection on social life.

A praxeology that offers "efficiency" advice to war-makers is not a self-evidently good thing.

As noted, there seems as yet to be no specifically *Austrian-school* praxeology of hostile action. But perhaps such a praxeology would be a vain undertaking. There are certainly many ways in which such a project could run off the rails. Cooptation by states is one: a praxeology that offers "efficiency" advice to war-makers is not a self-evidently good thing. It is not surprising that, currently, Kotarbiński's praxeology, which interested the Polish army in the late 1930s, turns up in pro–

NATO position papers by Polish scholars and is cited by U.S. military theorists at the Air University near Montgomery. In the Cold War, of course, it was game theory — with a superficially similar starting point and greater promise of quick results — that played the role of the (U.S.) state's chief war-making science. In so doing, game theory largely displaced any praxeological analysis of hostile action.

Conceiving the contestants in war as "two" giant single actors consisting of millions of people is more a cheat than a legitimate move.

Let us grant that analysis of individual choices between goods might support marginal utility analysis, which in turn might support an entire micro-economic outlook — *provided that* broad generalizations from individual choices and two-party exchanges can explain complex interactions over whole societies. But, even so, praxeology has definite limits. Rothbard himself gave up on sociologist Talcott Parsons's formalistic sociology (despite Parsons's attempted theorizing of action), once he realized its limits. As we have said, Mises and Rothbard in fact studied conflict *historically* — Mises in *Omnipotent Government* (1944), Rothbard in "War, Peace, and the State" (1963), and many other works.

For all his talk about methodological individualism, Rothbard knew that individuals act in ideological, institutional, and other social settings. A universal logic only speaks to basic problems. Rothbard himself admitted as much, when he described economics as the least *verstehende* (i.e., interpretive) human science of action (and thus the most general and formal), and history as the most *verstehende*: the most grounded in particulars ("Praxeology as the Method of Economics").

How to study conflict

A praxeology of hostile action might conceivably shed light on boxing matches, private feuds, or bar room brawls in terms of moves and countermoves. It would shed much less light on wars between nation-states. Conceiving the contestants in war as "two" giant single actors consisting of millions of people is (although often done) more a cheat than a legitimate move, since these "actors" are complex and call for analysis of institutions, hierarchies, ideas, culture, and the lot.

Looking outside of praxeology, we find economist Kenneth Bould-

ing, for example, who dealt with threats and counterthreats in the institutional context of competing states. Over time, he wrote, whole "threat systems" arise as "milorgs" (military organizations) beset with transportation costs, internal flows, inputs and outputs, and no exact "product," but able to do harm "much faster than good" ("Towards a Pure Theory of Threat Systems"). Other notable writers on large-scale violence are R.E. Canjar, Martin Shaw, Elaine Scarry, Joan Dyste-Lind, and French sociologist Pierre Bourdieu. Their works — along with those of Rothbard (cf. his remarks on violence in *Man, Economy, and State)* — suggest that a judicious reworking of the categories of critical sociology would prove broadly useful at a level above that of abstract individuals.

> Kotarbiński wrote that "what may be good from the praxeological point of view may be justly condemned on ethical grounds."

The point is to find the right level of abstraction or generality (as C. Wright Mills said) for dealing with actions as modified by institutional roles, expectations, values, ideologies, and hierarchies, and to develop an array of middle-level sociological constructs serviceable in the study of states and war. We need to draw on the language of "relations of state" (Ralph Raico), "surplus death" (Theresa Wirtz [aka R.E. Canjar]), the "production" and "social relations of violence," "symbolic" and "statist capital" (Bourdieu), "tribute systems," "coercive resources" (Dyste-Lind), state "command posts" and "hegemonic bonds" (Rothbard), and for that matter, decumulation of enemy capital (see recent reports on NATO targeting in Serbia), and the means of predation.

A different starting point

Kotarbiński himself admitted that "the more general a given praxeological maxim the more trivial the idea it contains." He also wrote that "what may be good from the praxeological point of view may be justly condemned on ethical grounds."

Despite such observations, it might be premature to abandon praxeological approaches to large-scale conflict entirely. Elaine Scarry's approach seems remarkably praxeological, but with important and necessary changes. Focusing on what people do in war, she states a first premise (which she calls "self-evident"): War is the *production of*

injury. Abandoning pairs of individuals, she adds a second premise: in war, organized human collectivities engage in what is formally "a contest" by *out-injuring* their adversaries. Under certain agreed fictions, the "victor" is the side that retains the power to injure, when the other side does not. Scarry then puts these fictions under withering fire, undermining the usual justifications for war as well a great many comforting belligerent metaphors ("Injury and the Structure of War").

Her revised premises thus produce insights that Kotarbiński necessarily missed, and they (while few in number) might indeed undergird further theoretical and historical work.

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[That] procedural safeguards have developed and have become part of our legal system manifests the deliberate judgment of the people that the integrity of the individual in a democracy is so valuable that it is more important that he be accorded a fair trial than that every culprit be punished.

— Leo Pfeffer

Economic Liberty and The *Slaughterhouse Cases*

by David D'Amato

Are economic rights and liberties among the "privileges or immunities" of citizenship protected by the Constitution's Fourteenth Amendment? That was the simple question before the Supreme Court in the *Slaughterhouse Cases,* the opinion which is today almost uniformly denounced in the legal academy. Scholars of all political and interpretive commitments have come to reject *Slaughterhouse* as among the Court's great mistakes; libertarian originalists have notably and forcefully agreed, arguing that the Fourteenth Amendment enshrined a libertarian theory of natural rights.

At issue in the cases was an 1869 Louisiana statute that granted a monopoly charter to a new private corporation, which was thenceforth to be the sole abattoir for the New Orleans area. Butchers would be permitted under the law to lease a stall at the facility, incorporated as the Crescent City Livestock Landing and Slaughterhouse Company, but they were forbidden to operate independently. The cases to which the title of the opinion refers were three actions challenging the validity of that statute. Many of the plaintiffs were traditional French butchers for whom the craft was an important piece of cultural heritage, a venerable tie to their ethnic roots in the Gascony region of France. They argued that the ability to practice their chosen vocation, free from the kinds of obstruction created by Louisiana's new law, was protected by the Constitution, particularly the Fourteenth Amendment.

The case is notable as the first time that the Supreme Court considered the meaning of this newly enacted amendment, which, as one of the three Reconstruction Amendments, changed the country's legal landscape. The Fourteenth Amendment eventually became the mechanism through which the Bill of Rights was "incorporated" and applied against the states, that is, through which the Bill of Rights came to protect American

citizens not only from the actions of the federal government but also the several state governments. Among libertarians, the *Slaughterhouse Cases* are known (if at all) for rendering the Privileges or Immunities Clause impotent, for — paraphrasing Justice Clarence Thomas — sapping it of any meaning.

Writing for the majority, Justice Samuel Freeman Miller maintained that the Louisiana statute was an appropriate exercise of the police power and that, while stringent, its measures were not "especially odious or objectionable" to the butchers. Justice Miller noted that if the statute had given the same privileges to the city of New Orleans itself, "no question would have been raised as to its constitutionality." He thus reasoned that the law's creation of a separate corporate entity, licensed as the exclusive site for the landing and butchering of livestock, was among the powers reserved for Louisiana's legislature. As former U.S. Solicitor General Paul Clement has said, "He [Justice Miller] knows what he's doing. He knows that he's just interpreted the Privileges or Immunities Clause down to nearly nothingness." Clement also notes that the dissenters contemporaneously and many of today's legal scholars argue that the decision "[reads] the Privileges or Immunities Clause out of the Constitution of the United States."

> The connection between the regulation and the perceived health-and-safety problem to be remedied is taken for granted.

That prevailing practices in the slaughter of animals at the time created serious public-health concerns is quite beyond dispute. Much less clear, however, is the relationship between this problem and the remedy, the monopoly established by Louisiana. As in so many economic-liberty cases today, the logical or causal connection between the regulation and the perceived health-and-safety problem to be remedied is simply taken for granted by both policymakers and courts. Because they regard government as imbued with supernatural powers, themselves requiring no explanation, its monopoly institutions are able to accomplish feats impossible to voluntary, private organizations.

The legal historian Michael Ross embodied this kind of gushing, deluded worship of coercive government power in an appearance on C-SPAN's excellent *Landmark Cases* series, assuring a caller that "in New Orleans, if someone with power

doesn't act, nothing gets done.... If a legislature didn't act, there'd still be butchers putting offal in the river by the water intake pipes." The greed and selfishness that Ross assumes to be predominant in human nature, dictating our social interactions, leading to predation and injustice, are lifted quietly and without explanation from his assumptions about government.

Opportunities for corruption are many in institutions that we allow to spend profligately.

It is apparently necessary, therefore, to remind Ross and the millions of others who share his ideas that government is composed of the very same vile, self-serving human beings. Just as corporate personhood is a legal fiction, so too is government itself a great fiction, merely a name we have decided to give to certain arrangements and actions. Notwithstanding any of our artifices of nomenclature, government comprises individual persons, all of whom have their own incentives, preferences, and predilections. Those facts are not miraculously suspended because we decide to call one organization a government as opposed to a corporation or any other name we give to the countless bodies of people that make up society.

Opportunities for corruption, self-dealing, and breaches of the public trust are many in institutions that we allow to spend profligately, that we exempt from competitive pressures, that we grant the power to purloin with impunity. As Henry Wilson astutely observes in his *Catechism of Individualism,* progressives and socialists of all stripes "propose to cure [the] evil ... of big concerns," i.e., of concentrated or monopoly power, "[by] making them bigger still — that is, handing them over to Government." Wilson's point goes to the fundamental flaw in resorts to the interventions of positive law as tools with which to remedy perceived social and economic problems. Even where there is not outright corruption, there are almost always negative unintended consequences. Indeed, had the *Slaughterhouse Cases* been decided differently, the Privileges or Immunities Clause might have been a formidable weapon in the fight against the legal oppressions of the Jim Crow-era South. Likewise, the fight for economic liberty today is largely a fight against the compelled impoverishment and marginalization of poor minority groups, black Americans in particular.

Vassalage

Libertarians have been at the forefront of decrying the Court's opinion in the *Slaughterhouse Cases*. For example, Randy Barnett argues that the Privileges or Immunities Clause, its original meaning properly heeded, protects a practically limitless universe of individual rights, the natural rights that we libertarians defend and hold dear. He criticizes the *Slaughterhouse* decision for eviscerating the Clause, for what he argues was a desertion of its original meaning. Constitutional law professor Kurt Lash has notably countered these arguments, defending the Court's opinion in *Slaughterhouse* and reading the Privileges or Immunities Clause to protect only "enumerated constitutional rights" — rights appurtenant to citizenship in the United States. The Privileges or Immunities Clause of the Fourteenth Amendment, Lash urges, is not to be conflated in its meaning or operation with the language of the Constitution's Comity Clause (also known as the Privileges *and* Immunities Clause), a piece of Article IV that entitles the citizens of all states "to all privileges and immunities of citizens in the several states." While the language is similar enough, Lash contends that the broad, though not unlimited, protections afforded by the Comity Clause are not the same as those contemplated by the Privileges or Immunities Clause. But Lash is among the few who stand by the Court's *Slaughterhouse* opinion. A host of legal scholars and constitutional lawyers have long argued that the Privileges or Immunities Clause, not the Due Process Clause, is the proper means through which to incorporate the guarantees of the Bill of Rights against the states. Indeed, Lash suggests that this is a position now held by a majority in the legal academy.

> Libertarians have been at the forefront of decrying the Court's opinion in the *Slaughterhouse Cases*.

Libertarian originalists such as Barnett have pointed to the *Slaughterhouse* dissents as better understanding the Privileges or Immunities Clause. In the longest of three dissenting opinions, Justice Stephen Field writes, reminding of the age-old conflict between what is right and what is legal, "No one will deny the abstract justice which lies in the position of the plaintiffs." The arguments of his dissent take no exception to legitimate exercises of a state's police power, but distinguish uses of

that power as pretenses under which the government has a free hand to abridge the rights of citizens. He observes that any legitimate health-and-safety goals were duly accomplished by the law's provisions dictating that all slaughter take place downriver from New Orleans and that all animals be inspected. In contrast, Justice Field avers that "the health of the city is in no way promoted" by the statute's grant of special monopoly privileges.

> Looked upon charitably, in the most forgiving light, the Constitution is perhaps suggestive of libertarianism.

The "right to pursue a lawful and necessary calling," he concludes, is among those protected by the Fourteenth Amendment. Because Field believes that the Fourteenth Amendment suffices to protect the rights of the plaintiffs, he declines to decide whether the Louisiana law also conflicts with the Thirteenth Amendment's prohibition of slavery and involuntary servitude, though he suggests that it does. Field sees the latent danger in the Court's opinion — that involuntary servitude might be reestablished not as chattel slavery on the basis of race, but as a modern form of vassalage under which citizens must pay tribute to privileged political favorites in order to work in their chosen occupation. In the almost century and a half since the *Slaughterhouse Cases,* Justice Field's dissenting opinion has been vindicated, its warnings seeming to foreknow the economic system of the present day, rife with licenses, privileges, and regulations.

Presented with the new originalist interpretation of the *Slaughterhouse Cases,* one's libertarian spirit rejoices at the same time as his instruction in law and history assure him that its convenient theories are too good to be true. It is remarkable that the original public meaning of the Constitution is indeed so obvious in its institution of high libertarian principles that only thoroughgoing libertarians have noticed. More plausibly (if depressingly), most of the public-policy tyrannies to which libertarians object, including the Louisiana law considered in *Slaughterhouse,* are quite within constitutional bounds. A "justice-based theory of constitutional legitimacy," such as that defended by Barnett and others, must fail on its own terms, for even those libertarians concede that the Constitution permits actions by the federal government that are patently unjust under

a libertarian natural-rights framework. Looked upon charitably, in the most forgiving light, the Constitution is perhaps suggestive of libertarianism, like the Magna Carta or the Declaration of Independence, a necessary, incremental step in the direction of individual rights and minimal government. And the originalists' robust judiciary finds little support in the historical record. In Federalist No. 78, Alexander Hamilton writes that the judiciary, "[having] neither force nor will, but merely judgment," is "incontestably ... the weakest of the three departments of power."

The Constitution empowers the legislative branch of the federal government — and those of the several states — to do a great many things that are objectionable to libertarians. Libertarians must therefore emphasize education, understanding that for liberty to obtain in the nation and in the world, people must comprehend and desire it. Liberty cannot be endowed from on high, with the Supreme Court as a judicial Sinai, sapiently guarding the freedoms of the American people against the vagaries of democratic overreach.

It is, moreover, naive to think that the judicial branch should desire the position that the new originalists would have it assume. The achievement of the results that libertarians desire requires both widespread understanding of the importance of freedom and mechanisms that properly channel incentives. It is not enough to simply assert, in the face of mountains of evidence to the contrary, that a Constitution creating a powerful, centralized national government was actually meant to institute a version of natural-rights libertarianism. Libertarians can fight for liberty — and celebrate cases that shelter it — without resorting to wishful thinking about the founding documents or the Framers themselves. Indeed, to make progress in the direction of a free society, we must avoid romanticized versions of the nation's history and laws; we must have a grounded and sophisticated understanding of them — including the Constitution. The Supreme Court's decision in the *Slaughterhouse Cases* was undoubtedly a miscarriage of justice from a libertarian standpoint. But it may have been quite right constitutionally.

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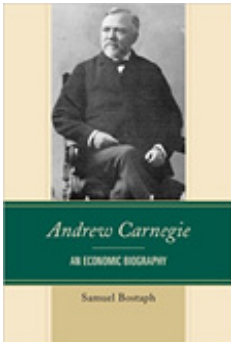
The Making of a Great Entrepreneur

by Burton W. Folsom Jr.

Andrew Carnegie: An Economic Biography, by Samuel Bostaph (Lexington Books, 2015), 124 pages.



Andrew Carnegie, that remarkable steelmaker, was a key player in the rise of the United States to becoming a world power in the late 1800s. More than that, Carnegie was one of the most spectacular entrepreneurs in all of U.S. history — ranked number four (behind Rockefeller, Gates, and Ford) according to the entrepreneur poll Blaine McCormick, chair of the management department in the Hankamer School of Business at Baylor University, and I recently conducted among prominent economists and business historians.

Carnegie has been the subject of several long biographies, but Samuel Bostaph, professor emeritus at the University of Dallas, has given us something different: a short economic biography that captures the high points in Carnegie's life and career. Bostaph's book is well written and balanced in its evaluation of the wily Scot.

Carnegie's background is instructive. Born in Scotland, his father, Will Carnegie, was a skilled hand-loom weaver whose trade was automated by new power looms. In 1848, seeking opportunity, Will, 13-year old Andrew, and the rest of the family joined relatives across the ocean in the Pittsburgh area.

Will Carnegie, even in America, never recovered from his trade's being replaced by a machine. His work record in the New World was spotty, and he died forlorn at age 51.

Young Andrew, by contrast, saw America as the land of opportunity, and eagerly sought to make his way. Starting as a mere bobbin boy in a textile mill in 1848 at $1.20 per week, Carnegie soon mastered the new technology of the day — the Morse Code for the telegraph industry — and he became a telegraph operator for the Pennsylvania Railroad. He then learned the details of railroading just as he later

mastered the steel industry — asking questions, reading, and absorbing details like a sponge.

"There was scarcely a minute in which I could not learn something or find out how much there was to learn and how little I knew," Carnegie later explained. Later, when he was CEO of the largest steel company in the world, he conceded that he wasn't the smartest guy in the room. But he usually got the best results because he had a high EQ (entrepreneurial quotient). He was a master of human nature, wise in taking risks, and a decisive leader under pressure.

When his bosses on the Pennsylvania Railroad saw his ambition, his sound judgment, and his ability to guide men, they promoted him. But by the early 1870s Carnegie shifted gears and founded his own steel company. He desperately needed orders for his tiny enterprise. After building a large factory, he craftily named it after J. Edgar Thomson, the regal president of the Pennsylvania Railroad. Soon he had orders from Thomson and a foot in the door to the American steel business.

Carnegie, brilliant as he was at reading people, hiring people, and promoting people, rose to the top because he made the best steel at the lowest cost. That was always the Scot's goal and Bostaph emphasizes that point.

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First, Carnegie was quick to innovate. Not an inventor, Carnegie sought to apply the best inventions of others, like the Bessemer process for making high-quality steel rails.

Second, Carnegie envisioned economies of scale before his competitors did. That meant Carnegie outbid others for major contracts by assuming he could regularly cut costs on big orders and thereby eke out the small profits others could not imagine.

Third, Carnegie promoted on merit, not seniority. That way he attracted talent, discarded the deadwood, and improved his company from the ideas and actions of his talented staff.

In 1870, steel rails sold for about $60 a ton, but by 1900 Carnegie was making better rails for about $11.50 per ton. No other company in the world could match him. When J.P. Morgan tried to buy his way into the steel business in the 1890s, Carnegie thrashed Morgan's new

companies so soundly that one observer thought Carnegie might capture the steel output of the whole world. Ever the master of timing, Carnegie in 1901 sold out to the eager Morgan for almost half a billion dollars. Morgan then founded U.S. Steel, mainly from Carnegie's operations, and the first billion-dollar corporation in U.S. history was born.

Human capital

Happy to retire, Carnegie became a prolific writer. He also became a philanthropist and gave almost all of his fortune away. In doing so, he sought to build human capital, not create dependents. Thus, he started a college and he also gave payments to build more than 2,800 libraries. He even started a fund to reward heroes; and he offered a pension to Grover Cleveland, who vetoed more bills than any of his predecessors. (It is not surprising that Cleveland vetoed the gift.)

Bostaph recognizes Carnegie's genius, and builds much of the book around that. With Carnegie's success in steel, the United States vaulted into world leadership in a key product of the industrial revolution. Without Carnegie, the United States might not have had dominating economic and military capacity in the early 1900s.

But Bostaph also describes Carnegie's failings. For example, despite his brilliant competitive edge, he often sought tariffs and eagerly joined pools (he didn't need either of them). Some of his efforts at collusion were intended to learn what others were doing and upstage them when possible. When he first joined the Bessemer Steel Association, its leaders assigned him a small share of the steel market. He then put on a show, yelling at his peers and threatening to undersell all of them if they didn't give him the largest share. They capitulated to him and that may say as much about the pitiful state of the early U.S. steel industry as it does about Carnegie.

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Carnegie had mixed labor relations. Sometimes he could be very innovative — he occasionally raised wages and he liked to give performance bonuses. But steel was an evolving international industry and he had to innovate to win the largest market share. When he ripped out old factories or adopted new technology, he sometimes cut wag-

es or fired hundreds of people. The Homestead Strike of 1892 led to violence, deaths, and hard feelings for many years.

Perhaps the churning and the changes needed to make steel profitably made such labor unrest inevitable. But in the case of the Homestead Strike, Carnegie was out of the country when it happened and he made little effort to resolve it, or to regularly apply his abundant interpersonal skills to his own labor force. The example of his father, automated and out of work for most of the rest of his life, seems not to have given Carnegie compassion for those in his own factories going through what his father went through.

Nonetheless, Carnegie is a masterful study in the art of entrepreneurship. His rags-to-riches story fits the novels written during the late 1800s by Horatio Alger. Even the later story of the new U.S. Steel Corporation shows how the dynamic Scot was missed. Sure, the new leaders installed Charles Schwab, Carnegie's man, as president, but they soon fired him. And the market share held by U.S. Steel steadily dwindled from about 61 percent to 39 percent in the first two decades of the twentieth century.

There is something amusing about the progressives of the early twentieth century regularly denouncing U.S. Steel as a sinister behemoth, with the potential to crush any competitor. But without Carnegie, U.S. Steel couldn't even hold its own market share, least of all take more from others. Bigness did not equal greatness. But, as Samuel Bostaph shows in his excellent biography, a great entrepreneur does more than any politician to improve the quality of life for ordinary people.

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