



The Journal Of
Peace, Prosperity & Freedom

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The Journal Of *Peace, Prosperity & Freedom*

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About the Journal

The Journal of Peace, Prosperity and Freedom was founded in 2012 by Sukrit Sabhlok, a Master of Arts (Political Science) student at Monash University. The journal features an editorial board composed of respected scholars such as Stephan Kinsella of the Ludwig von Mises Institute and Dr. Ben O'Neill of the University of NSW (ADFA).

Our mission is to promote the development and extension of Austrian economics and libertarianism, with a focus on Australia. The journal encourages submissions that eschew technical jargon and are accessible to the layperson while simultaneously providing value to the specialist reader. All aspects of the social sciences — from economics, to political science, sociology and more — are welcome. All research articles and commentaries are subject to peer-review; book reviews are not.

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The Journal Of Peace, Prosperity & Freedom

SUKRIT SABHLOK

Editor's Note

Welcome to the second volume of *The Journal of Peace, Prosperity and Freedom*.

One of the feature articles in this issue is by Tim Andrews. Andrews looks at Australian and American constitutional law and focuses on the trend towards centralism that is evident in both countries. He sees little advantage in the highly nationalist and centralised status of Australian federalism at present. From an economic point of view, decentralisation allows for more dynamic societies, with each state competing with other states on various indicators, thereby driving improvements in living standards. Andrews also delves deeply into the prevailing jurisprudence on federalism, in the process mounting a powerful (albeit currently unpopular) critique of the ways in which the High Court of Australia has perverted constitutional interpretation and the intentions of the framers by centralising power.

Andrew Dahdal, meanwhile, examines a part of Australia's monetary system that has rarely been questioned – namely, fiat currency. It will be of interest to readers to know that section 115 bars state governments from making 'anything but gold and silver coin a legal tender in payment of debts'. The question then becomes: does the *federal* government possess a power to allow something other than gold and silver coin to be used in payment of debts? Dahdal examines the text and history behind the Constitution to demonstrate that 'the Australian Constitution does not support a system of fiat currency that can apply nationally across federal and State jurisdictions'. Dahdal's arguments are intriguing and deserve careful consideration by constitutional lawyers.

And then there are the contributions of Marcus Witcher, Brian Bedkoher and Vinay Kolhatkar on economic history, medical economics and media ethics respectively, all of whom question the dominant narrative or reinterpret historical events. Witcher's scholarship is insightful and offers a refreshing take on the history of English price rises and currency debasement. Bedkoher applies free-market principles to healthcare, arguing that many of the objections raised against individual choice and reduced government intervention in healthcare are spurious at best. And Kolhatkar, through a process of careful investigation, finds

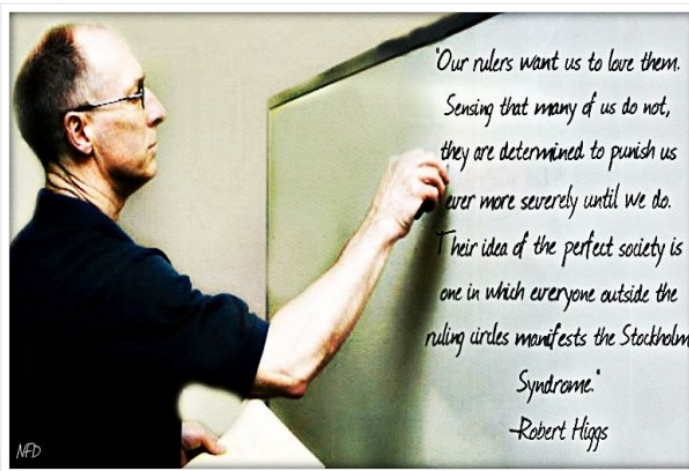
that a well told yarn can outweigh logical reasoning; it is therefore imperative the media perform its fourth estate function in order to keep government's fictional story-telling from being treated as fact.

In summary, there is bound to be some food for thought in this issue. Thanks must go to all the authors who submitted an article.

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The Journal Of Peace, Prosperity & Freedom

TIM ANDREWS

The High Court's Attack on Federalism

ABSTRACT: It is an indisputable fact that the Australian founding fathers designed a strongly federalist constitution, with the federal government holding few enumerated powers, and the bulk of political authority reserved for the states, and that this was overwhelmingly endorsed by the Australian people at referendum. The descent to centralism can be traced to 1913, with the expansion of the High Court from five to seven in a manner analogous to President Roosevelt's infamous 'court-packing' scandal. The salt in the wound came with the *Workchoices Case*, which gave the Commonwealth power over industrial relations through their power to regulate the trading activities of corporations. The High Court has departed from accepted principles of legal interpretation in its attempt to centralise government power in Canberra.

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*Facilis descensus Averno...*¹

The federal-state question is hip once again. Lying dormant for decades, relegated to gather dust in university history departments, latent questions of Australian federalism have once again emerged in political, academic and media discourse. Not only have media reports investigating the federal-state balance increased exponentially since the previous decade, Australian heads of government are openly calling for a structural overhaul of the current federalist model.

Triggered partially by the WorkChoices legislation² – one of the “most important cases with respect to the relationship between the Commonwealth

1 *Facilis descensus Averno, Sed revocare gradum, superasque evadere ad auras, Hoc opus, hic labor est.* (Easy is the descent to Avernus, but to retrace one's footsteps, and ascend again to the upper air – that is the labour, that is the toil). As quoted in Harry Gibbs, 'The Decline of Federalism' 18 *University of Queensland Law Journal* 1 at 7.

2 *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*.

and the States to come before the [High] Court in all of the years of its existence”³ — all areas of Federal-State relations have fallen under intense scrutiny. With the creation of an opposition Federal-State relations portfolio to facilitate “a radical revamp of commonwealth and state responsibilities”,⁴ combined with the Coalition abandoning its traditional defence of the States in a profound and unambiguous manner⁵ (former Ministers Costello, Abbott, Nelson and Bishop all argue for greater central control⁶), it seems inevitable that the paradigm of co-ordinate federalism in place for the majority of the 20th century will die.⁷

Calls are already being made for a Federal criminal code,⁸ a nationalised secondary education curriculum⁹, water, health care¹⁰ as well as many other previously unmentionable areas. Former Treasurer Peter Costello once argued that states could face a fresh assault on their power as “the public sees the commonwealth as a more competent administrator than the states”, and that “Canberra should have full responsibility for the national economy, including the major interstate transport routes and export ports”, which were “the lifeblood of our trading systems”.¹¹

It seems the 21st century will usher in an intensified struggle over federalism. The federalism debate is, perhaps, the most important political and legal debate taking place today — going to our very roots as a nation.¹² Will states become mere administrative units of a national policy to enforce equality, or will they become competitors in a diverse, decentralised political economy?¹³

Yet, as seems to be an all too common occurrence in mainstream political discourse, the present debate remains disconnected from the philosophical underpinnings of Australian federalism, and the rich jurisprudential history surrounding it. The distinction between decentralisation and constitutional

3 Callinan J as per *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* [2006] HCA 52 (14 November 2006) at 619.

4 M Franklin, ‘Rudd calls on states to corner PM’, *The Australian*, 6 December 2006.

5 L Clegg, ‘Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime’ (2006) 17 *PLR* 97 at 110.

6 M Franklin, *Op cit*.

7 See also L Tanner, *Open Australia*. Pluto Press. Melbourne pp 206-10; G Greenward, *The Future of Australian Federalism*, Melbourne University Press, Melbourne, 1946.

8 T Dick, ‘Uniform Criminal Code urged for states’, *Sydney Morning Herald*, 9 January 2007.

9 D Rood & J Topsfield, ‘Libs call for National Curriculum’, *The Age*. 6 October 2006.

10 J Dwyer, ‘Federating health care would mend our health system’, *OnlineOpinion*, 6 June 2004.

11 S Lewis, ‘Public Wants Us in Charge’, *The Australian*, 17 February 2007.

12 R Pilon, United States House of Representatives, Committee on Government Reform and Oversight, Subcommittee on Human Resources and Intergovernmental Relations, 20 July 1995 p. 1.

13 A Wildavsky, ‘A Double Security: Federalism as Competition’, *Cato Journal*, Vol. 10, No. 1, 1990 p. 56.

federalism (reserving permanently to the states a measure of sovereignty wholly absent in today's understanding of federalism) remains obscured to most.¹⁴ It is only through revising our understandings that the long ascent up from Hades can begin. Such an understanding cannot be had, however, without appreciating the distinction between normative political theories of federalism and the applicable constitutional issues, in particular, the relationship between the Australian Constitution and that of the United States of America.

I. FEDERALISM: THE NATURE OF THE BEAST

Originating primarily with the writings of Montesquieu¹⁵ and reaching its zenith in *The Federalist Papers*, political theories of federalism have generally accepted that a polity cannot be called federal unless the regional governments have powers which the central government is not able to render inoperative, and moreover that the regional governments have the ability to raise the finances necessary to enable their powers to be exercised¹⁶. Thus Sir Robert Garran defines federalism as "a form of government in which sovereign or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other"¹⁷.

The principles underpinning this division of powers have appealed to philosophers of the classical liberal tradition because any division of authority must, by necessity, tend to limit the potential range of political coercion¹⁸. Just as the doctrine of the separation of powers inhibits tyranny by preventing the merging of executive and judicial power, so the existence of states means no single government may exercise power nationwide and the central government will always be open to policy critique.¹⁹

By its nature, politics is coercive: all members of a political unit must be subjected to the same decisions, and the prospect of exit, which is so important in imposing discipline in market relationships, is absent from politics. However the constitution of a federalised structure is seen as a solution to this problem by guaranteeing a degree of inter-jurisdictional competition between states.²⁰ As such, federalism offers a means of introducing essential features of the market

14 PH Aranson, 'Federalism: The Reason of Rules', *Cato Journal*, Vol. 10, No. 1, p. 20.

15 Montesquieu, *The Spirit of the Laws*, 1750, vol I. book IX ch 1, 183-4. See also A de Tocqueville, *Democracy in America*, 1835 pt 1, ch VIII p 103-9.

16 H Gibbs, 'The Decline of Federalism', 18 *University of Queensland Law Journal* 1 at 1.

17 Wheare, *Federal Government* (4th ed) Oxford University Press. New York. 1964 p 2, 14.

18 JM Buchanan, 'Federalism and Individual Sovereignty', *Cato Journal*, Vol 15, Fall 1995, p. 259.

19 G Craven, 'Federalism and the States of Reality', *Policy*, Centre for Independent Studies, Sydney, 2005.

20 JM Buchanan, 'Federalism and Individual Sovereignty', *Cato Journal*, Vol 15, Fall 1995, p. 260.

into politics, and effectively places limits on the ability of the state governments to exploit citizens, quite independently of how political choices within these units are made. Localised politicians and coalitions would be unable to depart significantly from overall efficiency in their taxing, spending and regulatory politics.²¹

The argument for federalism is as much economic as moral. Substantial public policy research has demonstrated the proximity between ruler and ruled is a key factor in determining economic efficiency; as distance increases the capacity for making terrible mistakes increases significantly. Most empirical evidence points to the fact that smaller nations are thus richer than large ones. Apart from the US, the ten richest nations in the world are less than 10 million in population, the highly decentralised nature of the US making it the 'exception that proves the rule.'²²

Furthermore, by allowing for differences between states, federalism fosters not only competition, but innovation. When states are given greater freedom to compete, they invariably invent administrative solutions to enhance the business climate, with states creating a 'social laboratory' in which public policy innovations may be deployed and evaluated.²³ As such, under the 'Tiebout Hypothesis', by voting with their feet, "people will sort themselves out among jurisdictions that provide the mix of goods and services that they most prefer; improvements in governmental performance will be capitalised into real estate prices, thus giving citizens and public servants incentives to act in appropriate ways".²⁴

While there has been an argument against federalism derived from a form of egalitarianism, such an argument is weak at best, and unsupported by scientific or historical data.²⁵ If we think so well of competition that we enthrone it in democracy, science and economics, why should we not tackle the problem of federal structure in a similar fashion?²⁶

Despite a Marxian element in some of the arguments used by proponents of centralism (incorporating Marx's hostility to rigid constitutions, and his belief

21 JM Buchanan, *Op Cit*, p. 260. Federalism's importance has also been explained by empirical evidence that political attitudes do differ from state to state, with significantly varying conditions of climate, geography, society and economy making one-size-fits-all centralist models unsuited to countries such as Australia. See AJ Brown, 'After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st century' (2002) 13 *PLR* 171 at 174.

22 M Steyn, *The London Spectator*, 3 April 2005.

23 W Kasper, 'Making Federalism Flourish', Samuel Griffith Society Conference Proceedings, Vol 2, 2004.

24 Aranson, *Op Cit*. p. 21–22.

25 Egalitarianism opposes competition on the grounds that it is a source of inequality, because the existence of states free to disagree with one another and with the central government inevitably leads to differentiation.

26 A Wildavsky, 'A Double Security: Federalism as Competition', *Cato Journal*, Vol. 10, No. 1. 1990 at 42.

in large-scale central government control of the economy²⁷), proponents of centralism have historically tended to focus less on philosophical abstraction, and more on pragmatism, than their federalist counterparts. As such, with the possible exception of the work of British constitutional scholar Dicey,²⁸ whose opposition to Irish home rule resulted in strong centralist beliefs filtering down into early Australian legal circles,²⁹ centralist arguments have – after denying inherent differences between the states – focussed almost solely on the economic. Three core themes emerge from this literature. First, the alleged greater efficiency of centralised government.³⁰ Secondly, the effects of ‘waste, expense and duplication’ caused by dual governments, and thirdly, the alleged deficiencies of state administration. As wryly noted by Professor Craven, in the minds of centralists at a domestic level, the abolition of the states would result in:

Australia's affairs handled by a benign Commonwealth government, ruling under a Pax Canberrum through talented civil servants distributed throughout the former States. The complexities of State law would be unsnarled; State inefficiencies dissolved; ghastly State politicians exiled back to their barren wastes and cuisine-deficient hamlets; and the savage instincts of certain State populations firmly restrained. God would be, if not in His heaven, then hovering in the close vicinity of Capital Hill.³¹

In assessing the claims of ‘duplication and waste’ however, the federalist response is simple – the duplication occurs not due to the states, but because a financially well-endowed Commonwealth has:

...muscled in on their constitutional act. Blaming them for the resulting overlap is like criticising the householder for wrestling with the burglar over the video machine. If the Commonwealth wants dramatically to reduce jurisdictional overlap it has only to retreat to its own areas of constitutional competence, hand over the money, and the States will be happy to do the rest.³²

Similarly, the arguments regarding state misadministration were rebutted in the Australian context by constitutional scholar John Quick almost a century ago:

[I]f it be true... that the State Legislatures have omitted to exercise their powers in certain matters, and have neglected to carry out great or important reforms,

27 G De Q Walker, ‘The seven pillars of centralism: *Engineers’ Case* and Federalism’ (2002) 76 ALJ 678 at 684

28 AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1885.

29 De Q Walker. Op cit. p 685.

30 A Mason, ‘The Role of a Constitutional Court in a Federation’, (1986) 16 *Federal Law Review* 1 at 23.

31 G Craven, Op cit.

32 Ibid.

whose fault is it?...It is the fault of the electors, the people of the State who have the management of their own affairs, the choice of their own representatives, and the control of their constitutional government. Surely they can control their own local constitutional development without resorting to an outside power...to assist them in wresting liberal concessions within their domains?³³

One may well query whether Australia remains a federation not because its Constitution is federal in character, but because in practice the political influence of the States is such that the nation remains a federation for practical purposes³⁴. Arguably, a shift has occurred from constitutional federalism to wholly utilitarian contingent decentralisation, under which the authority of the states is no longer guaranteed as a matter of law but instead remains dependent upon the central government – which then decides as a matter of prudential or political judgement how much authority to devolve to its constituent units.³⁵

II. THE FOUNDING FATHERS OF FEDERALISM

In examining the historical evolution of models of federalism, the creation of the Constitution of the United States of America is an obvious starting point; after all, “modern Federalism was born in America”.³⁶ Irrespective of whether or not they *should* have done it, it is clear from the constitutional debates, and the intellectual climate of the time, that US Framers designed a constitutional decentralisation, not a contingent one, reflecting an understanding that the animating spirit of government action all too often ignores evidence in the pursuit of private interest.³⁷ As articulated by Madison:

[T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic...The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.³⁸

To reinforce this, the 10th Amendment was inserted, stating that “[t]he powers not delegated to [the federal government] by the Constitution, nor prohibited by

33 J Quick, House of Representatives Parliamentary Debates. 20 October 1910 at 4930.

34 H Gibbs, ‘The Decline of Federalism’, 18 U. *Qld L.J.* 1 at 1.

35 PH Aranson, ‘Federalism: The Reason of Rules’, *Cato Journal*. Vol. 10. No. 1 at 17-20.

36 RP Nathan, ‘Updating Theories of American Federalism’, American Political Science Association, Philadelphia, 2 September 2006.

37 PH Aranson, ‘Federalism: The Reason of Rules’, *Cato Journal*, Vol. 10, No. 1 at 24.

38 Madison, *The Federalist* XIV.

it to the States, are reserved to the States respectively, or to the people". In other words, if a power has not been delegated to the federal government, then it simply does not have it. This principle is part of a philosophy of government first set forth in the Declaration of Independence – that governments are instituted to secure our rights "deriving their just powers from the consent of the governed".³⁹ Indeed the Supreme Court has explicitly endorsed the view that the clause clarifies rather than expands Congress's executory powers.⁴⁰ For if the framers had meant for Congress to be able to legislate on virtually anything it desired, why would they have enumerated Congress' other powers, much less strenuously defended the doctrine of enumerated powers throughout *The Federalist Papers*?⁴¹ Under the doctrine of enumerated powers, power resides in the first instance in the people who then grant or delegate their power, reserve it, or prohibit its exercise, not immediately through periodic elections but rather institutionally – through the Constitution⁴².

In the early years of the fledgling American republic, the Supreme Court was primarily concerned with practical questions regarding the capacities of government, as it was essential to "provide against discord between national and state jurisdictions, to render them auxillary instead of hostile to each other; and so to connect both as to leave each sufficiently independent, and yet sufficiently combined."⁴³ As such, the early Court's line of decisions was principally important for its contributions to shoring up the new national government's authority, while protecting the claims of the states. Thus, even at the height of the Marshall Court's enthusiasm for broad constructions in a nationalist mode, they were nevertheless imbued with a strong undercurrent of what would later become termed 'dual federalism'.

Thus in *Cohens v Virginia*⁴⁴ a powerful nationalising decision which asserted the Supreme Court's power to review state supreme court decisions in criminal cases, Marshall himself conceded that "these states...are members of one great empire, for some purposes sovereign, and for some purposes subordinate".⁴⁵ Similarly, in *Gibbons v Ogden*,⁴⁶ which broadly asserted national power over commerce, Marshall made explicit reference to the state police powers as embracing

39 R Pilon, United States House of Representatives, Committee on Government Reform and Oversight, Subcommittee on Human Resources and Intergovernment Relations, 20 July 1995.

40 *Kinsella v US* 361 US 234.

41 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004.

42 Ibid.

43 Chief Justice Jay as quoted in K Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992 at 279.

44 *Cohens v. Virginia*, 19 U.S. 264 (1821).

45 *Cohens v Virginia* 19 U.S. 264 (1821) at 429.

46 *Gibbons v Ogden* 22 US 1 (1884).

elements of authority “not surrendered to the general government”⁴⁷, a concept he broadened in *Willson v Blackbird Creek Marsh Co*⁴⁸ to provide the basic doctrine of the dormant commerce power. Similarly in *Weston v Charleston*,⁴⁹ the Court established the doctrine of the immunity of state agencies against federal taxing power.

In the latter part of the antebellum era, from 1836 until the Civil War, the Court led by Chief Justice Roger B Taney moved strongly to shore up the doctrine of ‘dual federalism’ based on the notion of the state and national governments as coequals, each operating in its own sphere, autonomous within that sphere.⁵⁰ The first move in this direction came in *Charles River Bridge v Warren Bridge*,⁵¹ when the Court’s new majority declared that state governments enjoyed wide discretionary authority to advance and protect the rights of the public as against the claims of corporations, and the Court further narrowed the effectiveness of the Contract Clause limitation on state action by ruling in *West River Bridge v Dix*⁵² that when states exercised the eminent domain power to take property, challenges to the propriety of such takings or to compensation to the former owners of property taken were the exclusive concern of the state’s own agencies.⁵³ In its famous dictum in *Texas v White*,⁵⁴ the court held that that “the Constitution, in all its provisions, looks to an indestructible union, composed of *indestructible* states (emphasis added)”.⁵⁵

There was admittedly a brief revival of centralisation in the Supreme Court’s jurisprudence in the years following the Civil War. The Court found that “[w]ithin the scope of its powers, the national government operates on every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines”,⁵⁶ and that even in the absence of national legislation, state action that burdened interstate commerce would not be tolerated,⁵⁷ serving as a trigger for the *Interstate Commerce Act*, and generally building on earlier doctrine of a federal commercial common law to develop a more expansive notion of a ‘general jurisprudence’ that could be invoked to overturn state court decisions that upheld bond repudiation. Nevertheless, there was no retreat by the

47 Marshall CJ as per *Gibbons v Ogden* Op. Cit. at 203.

48 *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

49 *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829).

50 K Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992, p. 282.

51 *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

52 *West River Bridge Co. v. Dix* 47 U.S. (6 How.) 507 (1848).

53 K Hall (ed), Op Cit. p 282.

54 *Texas v. White* 74 U.S. 700 (1869).

55 *Texas v. White* 74 U.S. 700 (1869) at 725.

56 *Penacola Telegraph Co v Western Union* (1877).

57 *Wabash, St. Louis and Pacific Railway v Illinois* (1886).

Court from general theories of dual federalism, and the Court upheld broad discretionary authority for states to develop their natural resources through various uses of the eminent domain power, the ordering of their water law on highly diverse lines, and even the adoption of a variety of regulatory measures such as public health enforcement. In addition, it declined to extend activist federal judicial censorship over the states' efforts to cope with some of the challenges of economic development and attainment of new goals in areas of welfare, or to extend federal procedural guarantees in the criminal justice area.⁵⁸

Furthermore, the Court began to give close scrutiny to national legislation that it regarded as exceeding constitutional authority. In 1879 it struck down an act of Congress protecting trademarks, and in 1883 it rendered the *Civil Rights Acts* virtually unenforceable, as well effectively eviscerating the *Sherman Antitrust Act* by ruling that control of manufacturing was not authorised by the Commerce Clause powers. Moreover, the Court found unconstitutional⁵⁹ a federal income tax.⁶⁰

It is impossible to view the creation of the Australian Constitution in anything but the light of the aforementioned constitutional climate. The single most important precedent for the federation fathers was the US. Like Canada, Australia was a federation of former British colonies, but the US federal system struck a balance between the State and federal authorities which, if adopted in Australia, still protected many of the colonies parochial interests.⁶¹ The idea that Australia could become a single unified nation with colonies reduced to the level of large municipalities was wholly unacceptable to the colonial delegates. The founders considered Canada's constitutional structure too centralist,⁶² so the more decentralised distribution of powers used in the Constitution of the US was deliberately chosen,⁶³ with federalism one of the major features of the American case.⁶⁴ Hence the importance of the US experience – in particular the attention given to James Bryce's classic *The American Commonwealth*⁶⁵ – cannot be overstated.

A quantitative assessment of citations in the Convention debates, the colonial parliamentary debates, and in Australian books, articles and speeches outside these formal venues confirms the importance of US materials, especially the writings of notables such as James Wilson, John Hay, Alexander Hamilton and James Madison, with *The Federalist Papers* being of decisive importance (along

58 K Hall (ed), *Op Cit.* p 283.

59 *Pollock v Farmer Loan & Trust Co* (1895).

60 K Hall (ed), *Op Cit.* p 283.

61 M Harvey, 'James Bryce, *The American Commonwealth* and the Australian Constitution', (2002) 76 *ALJ* 362.

62 JA La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, at 17, 27-8.

63 See *Deakin v. Webb*, (1904) 1 CLR 585 at 606.

64 Kirby J as per *Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 49.

65 J Bryce, *The American Commonwealth*, London, 1988.

with the scholarship of later authors such as de Tocqueville and Marshall).⁶⁶ Whether due to the self-interest of colonial politicians concerned to maintain their power, or for more noble philosophical questions, there can be no doubt that the framers of the Australian Constitution intended that it should establish a federal government in the true sense; this conclusion is inescapable, whether one has regard to the Constitution itself, or the debates at the conventions, which generally proceeded on the assumption that State functions would include “almost all matters which have a direct bearing on the social and material welfare of the people”.⁶⁷ According to Samuel Griffith, the Australian colonies had been “accustomed for so long to self-government” that they had “become practically almost sovereign states”,⁶⁸ and that in this context “the creation of a unitary nation-state of Australia was both impossible and unthinkable”.⁶⁹

The Australian Constitution, subject to the overarching role of the Imperial Parliament, was to follow a ‘very similar course’ to that of the United States Constitution, partly because of the “practical, institutional conditions under which the Australian Constitution came into being” were analogous to that of the US, but also because the “theoretical reflection on the American system” suggested that such process and outcomes were essential to the idea of a ‘true federation’.⁷⁰

However, differences nevertheless remained, and the uniquely Australian combination of federalism with responsible government is its principal unique contribution to world constitutionalism.⁷¹ Federalism was “the foundational institution of the Australian Constitution and the nation it created”,⁷² with its constitutions, legislative powers, and laws protected. Indeed, while federalism is one of the four fundamental political principles upon which the Commonwealth is founded – the others being representative government, responsible government and the separation of powers – the latter two are implied rather than expressed, and representative government is common to all modern democracies⁷³. Federalism was not only of vital importance to the Australian Constitution, but in the Commonwealth context it was *unique*.

66 N Aroney, *Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901*, 266 *Federal Law Review* Vol 30, p 269.

67 L Zines, ‘The Federal Balance and the Position of the States’, G Craven (ed) *The convention Debates 1891-1898 Commentaries, Indices and Guide*, Sydney, Legal Books Pty Ltd, 1986 at 77.

68 S Griffiths, Official Record of the Debates of the Australian Federation Conference, Melbourne, 10 February 1980 at 10.

69 N Aroney, Op Cit. p 267.

70 Aroney, Op Cit. p 294.

71 L Zines, Op Cit. p 77.

72 B Galligan, ‘Parliament’s development of federalism’ in R Bennett, *Parliament: The Vision in Hindsight*, Federation Press, Sydney 2001 at 5.

73 G Winterton, ‘The High Court and Federalism: A Centenary Evaluation’, in P Cane, *Centenary Essays for the High Court of Australia*, Butterworths, Chatswood. 2001.

The first two decades of Australian constitutional jurisprudence, dominated by Sir Samuel Griffith, discerned in the Constitution a governmental structure whereby both the Commonwealth and the states were sovereign within their respective spheres, which, as independent political societies, were thus subject to no other power, and were given immunity from any interference from another government in the exercise of its power.⁷⁴ Therefore, the separate states continued “as autonomous bodies, “surrendering only so much of their power as is necessary to the establishment of a general government to do for them collectively what they cannot do for themselves”.⁷⁵

Indeed, noting that before federation the colonies had almost unlimited powers, the court consistently stated that “in considering the respective powers of the Commonwealth and the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign state”.⁷⁶ Two guiding concepts had already emerged from the court's perspective on the Constitution as a whole: that of the reciprocal immunity of instrumentalities doctrine, under which the Commonwealth could not subject the States to Commonwealth law, nor the States subject the Commonwealth to State law,⁷⁷ and of the doctrine of implied prohibitions or State ‘reserved powers’.

A. *Immunity of Instrumentalities*

In the seminal US constitutional case of *McCulloch v Maryland*⁷⁸, the state of Maryland attempted to impede operation of a branch of the Second Bank of the US by imposing a tax on all notes of banks not chartered in Maryland. The Court decided that the Constitution grants to Congress implied powers for implementing the Constitution's express powers in order to create a functional national government, and state action may not impede valid constitutional exercises of power by the federal government. As such, this judgement is considered the foundation stone on which the doctrine of immunity of instrumentalities rests. In striking down the “destructive and discriminatory” tax on the operations of a federal bank, Marshall CJ set down the principle that the states did not have a power to tax any instrument employed by Congress to execute its powers⁷⁹ because “the power to tax involves the power to destroy”, and the states

74 C Parkinson, ‘The Early High Court and the Doctrine of the Immunity of Instrumentalities’ (2002) 13 *Public Law Review* 26 at 27.

75 S Griffith, ‘Notes on Australian Federation: Its Nature and Probable Effects’ (1896) p 6-7.

76 *D’Emden v. Pedder* (1904) 1 CLR 91 at 109.

77 *Texas v White* 74 US 70 (1968) with its ringing declaration that “the constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States”.

78 *McCulloch v Maryland* 4 Wheat 316 (1819) at 429.

79 Marshall CJ as per *McCulloch v Maryland* 4 Wheat 316 (1819) at 429.

should not be in possession of a power to destroy the federal government.⁸⁰ Although no authority was cited for this judgment, it appears from other decisions Marshall delivered that he developed this principle from his understanding of the relationship between sovereign states in international law.⁸¹

In the 1842 case of *Dobbins v Commissioners of Erie County*,⁸² the doctrine was extended to invalidate a general non-discriminatory state tax on “all offices and posts of profit” in its application to a federal officer because it interfered with the instrument in which the US exercised its powers. With the 1870 case of *Collector v Day*⁸³ that “Pandora’s box” was opened, with the Court making the doctrine reciprocal for states, striking down a general federal income tax on the salary of a state judge on the ground that in its own sphere each government is sovereign.⁸⁴ It is clear that throughout the entire 19th century, the doctrine was viewed as “an axiom of federal government”.⁸⁵

Sir Robert Garran gave an opinion to Sir Edmund Barton⁸⁶ that comparable provisions in the Australian and US Constitution should be similarly interpreted, emphasising the Australian Constitution should be interpreted using US precedent on the doctrine of the immunity of instrumentalities.⁸⁷ Following this line of reasoning in *D’emden v Peddler*,⁸⁸ the Court held that:

[I]n considering the respective powers of the Commonwealth and of the States, it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied... it must, therefore, be taken to be of the essence of the Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself.⁸⁹

Despite the arguments of the Attorney-General for Tasmania, who whilst not questioning the validity of the McCulloch doctrine argued its inapplicability to

⁸⁰ Ibid at 430.

⁸¹ See *Antelope Case* 10 Wheaton 66 at 112 (1825).

⁸² *Dobbins v Commissioners of Erie County* 15 Peters 435 (1842).

⁸³ *Collector v Day* 11 Wallis 113 (1870).

⁸⁴ C Parkinson, ‘The Early High Court and the Doctrine of the Immunity of Instrumentalities’ (2002) 13 *PLR* 26 at 28.

⁸⁵ Ibid.

⁸⁶ Opinion by Robert Garran, 13 June 1902, Australian Archives, CRS. A 432 29 2751, File No 1.

⁸⁷ C Parkinson, Op Cit. at 31.

⁸⁸ *D’emden v Peddler* (1904) 1 CLR 91.

⁸⁹ Griffith CJ as per *D’emden v Peddler* (1904) 1 CLR at 110.

Australia because ss 106-109 of the Australian Constitution were different from the Tenth Amendment to the US Constitution, Griffith CJ was unable to find “any such difference”⁹⁰ and held that that:

[A]s the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.⁹¹

It was not an unreasonable inference that the framers intended provisions in the Constitution “indistinguishable in substance, though varied in form, from provisions of the Constitution of the US” to “receive like interpretation”,⁹² an assertion based on the fact that the delegates of the Federal Convention were familiar with both the Canadian and US Constitutions, and they deliberately chose the US model.⁹³

In the years following *D’Emden*, the Australian High Court repeatedly indicated it would apply the decision rigorously in future cases,⁹⁴ and that whilst the High Court had not indicated any preference for American decisions or any disregard for British decisions, the “interpretation of the American Constitution had been long since settled by judicial decisions that it is reasonable inference to draw that the framers intended similar language in the Australian Constitution to be similarly interpreted”,⁹⁵ with it being of no relevance that the source of the American Constitution is the people, while the Australian Constitution is a grant of the Imperial Parliament.⁹⁶ Furthermore, the court turned to the US case of *Collector v Day*⁹⁷ and held the doctrine of immunity was reciprocal, and extended the provision to include activities outside the traditional branches of government.⁹⁸

Despite this, in a move that “left legal commentators in both Australia and England bemused as to its reasoning”,⁹⁹ there was a rejection of the doctrine of instrumentalities in Australia by the Privy Council (in proceedings probably illegal

⁹⁰ Ibid at 112.

⁹¹ Ibid at 116.

⁹² Ibid at 113.

⁹³ C Parkinson, Op Cit. at 32.

⁹⁴ *Sydney Municipal Council v The Commonwealth* (1904) 1 CLR 208.

⁹⁵ *Sir William Lyne v Thomas Prout Webb (Commissioner of Taxes)* (1904) 1 CLR 585 at 605.

⁹⁶ C Parkinson, Op Cit. at 33.

⁹⁷ *Collector v Day* 11 Wall 113 (1870).

⁹⁸ *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association (Railway Servants Case)* (1906) 4 CLR 488.

⁹⁹ C Parkinson, Op Cit. at 40.

under the common law rules of champerty¹⁰⁰), where it was ruled that Royal Prerogative made the doctrine an unnecessary implication.¹⁰¹ The Privy Council left unaddressed the arguments of the High Court in *D'Emden*, nor did it consider the issue of inconsistency and ss 106-109. It was almost universally conceded that Halsbury, although a greatly respected Judge, in making the ruling for the Council was unable to interpret a federal constitution and was acting more to subordinate the High Court to the Privy Council. Griffith CJ commented how Halsbury knew about as much about the Constitution “as he did about Calvinism when the *Free Church case* was decided”,¹⁰² and Barton wrote that he had a vendetta against Australia and that the decision was “of itself an insult to every Australian... fatuous and beneath consideration” and that the “old pig wants to hurt this new federation and does not care how he does it”.¹⁰³

B. Reserve State Powers

The principle underpinning the reserved state power doctrine, whereby the s 51 grants of Commonwealth legislative power were read down in light of power supposedly reserved to the States by s 107, first emerged in *Peterswald v Bartley*.¹⁰⁴ In this case, the High Court expounded that that regard must be had to the Constitution's general provisions, as well as its particular sections. In *R v Barger*¹⁰⁵ the court took the idea further, declaring that the Constitution's scheme was to confer definite powers on the Commonwealth “and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth”.

Specific reliance was placed on s 107 and on the effect of the almost identical US 10th Amendment.¹⁰⁶ The High Court's duty was to interpret the Constitution as a whole,¹⁰⁷ so as to give effect – as far as possible – to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the con-

100 C Parkinson, Op Cit. at 40.

101 *Webb v Outrim* [1907] AC 81.

102 Sir Samuel Griffith to Alfred Deakin, 29 Dec 1906 Deakin Papers, National Library of Australia MS 1540/15/34 15-6.

103 Letter to Sir Thomas Bavin, Bavin Papers, NLA. MS 560/1/40.

104 *Peterswald v Bartley* (1904) 1 CLR 497.

105 *R v Barger* (1908) 6 CLR 41 at 67.

106 G De Q Walker, ‘The seven pillars of centralism: Engineers’ Case and federalism’ (2002) 76 *ALJ* 678 at 680.

107 See Griffith CJ in *Peterswald v. Bartley* (1904) 1 CLR 497 at 507: “in construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections and to ascertain from its whole purview whether the power [in question] was intended to be withdrawn from the States, and conferred upon the Commonwealth”.

flict is to be preferred.¹⁰⁸ While the immunity of instrumentalities doctrine was based on implications from the Constitution rather than express provisions, this was much less so of reserved powers, which was based mainly on s 107. The reserved powers approach was not primarily an exercise in finding implications, but a normal piece of judicial construction based on the standard principle that written instruments are to be construed as a whole, the general provisions along with the specific.¹⁰⁹ This approach has been called unsupportable because s 107 does not, unlike the 10th amendment, use the word 'reserved'. However this criticism seems to be little more than an insubstantial matter of labelling, and if anything s 107 is more forcefully expressed, as it saves "every" power and excepts only those powers "exclusively" vested in the Commonwealth. These words of emphasis do not appear in the American model,¹¹⁰ as pointed out by Griffith CJ in *D'Emden v Peddler*.

III. THE DESCENT TO AVEMUS

The descent to centralism in Australian constitutional law can be traced back to 1913, with the expansion of the High Court from five to seven in a manner analogous to Roosevelt's infamous 'court-packing' scandal. Following the defeat of referendums to increase Commonwealth power over industrial relations in 1911 and 1913, federalism came under considerable attack. Attorney-General Billy Hughes, under Prime Minister Andrew Fisher, took the opportunity to try to 'stack' the court.¹¹¹ The initial appointment of Albert Piddington was met with controversy due to perceived bias; before being appointed Piddington had assured Hughes of his "sympathy" in favour of Commonwealth powers¹¹² and public opposition led to Piddington's resignation from the bench not having tried a single case. The subsequent appointments of justices Rich and Starke achieved Hughes' object of influencing the court's composition – with the death of O'Connor and an expanded High Court, Griffith and Barton found themselves in a minority. By 1920, both Griffith and Barton had left the bench, and, with the appointment of Knox as Chief Justice by Hughes, the scene for a constitutional showdown was set.

In the *Engineer's Case*, the entire enterprise of Australian federalism was set on a diverging track that carried it to destinations far removed from those intended by the generation that had brought the federation into being.¹¹³ From a

¹⁰⁸ *R v Barger*; *Commonwealth v McKay* (1908) 6 CLR 41, 72.

¹⁰⁹ *Ibid* at 681.

¹¹⁰ *Ibid*.

¹¹¹ *G Fricke, Judges of the High Court, Century Hutchinson Australia, Melbourne, 1986, p 82.*

¹¹² *Ibid* p 80.

¹¹³ *G De Q Walker, Op Cit, at 678.*

jurisprudential standpoint, the *Engineers Case* profoundly affected constitutional doctrine in three respects: in “exploding” the immunity of instrumentalities doctrine and the ‘heresy’¹¹⁴ of reserved state powers, and finally as to the methodology of constitutional interpretation. The case has been regarded as radically changing the approach to interpretation to that of ‘literalism’¹¹⁵ which involves construing the Constitution as if it were nothing more than a British statute, to be interpreted by reference to its explicit terms and without reference to history, to implications from federalism, or even those terms’ own context in the Constitution,¹¹⁶ and as such, signalled the start of a long-term trend of High Court decisions centralising political power in the Commonwealth, culminating in the 2006 *WorkChoices* decision. Was the rejection of previous doctrine justified, and if so, does that rejection necessarily exclude all federal considerations in interpreting Commonwealth legislative power?¹¹⁷

The rejection of the reserved powers doctrine has been justified on three grounds. Firstly, that the subject of s 107 is state legislative power and states nothing expressly regarding Commonwealth power. Secondly, because employing the States’ supposedly reserved powers to limit Commonwealth power and thereby determine what is left exclusively to the States by s 107 is “a circular process whereby the conclusion is contained in the premise”, and thirdly, because there is no objective method of determining what residue was supposedly guaranteed to the states,¹¹⁸ and that it is “impossible to determine from the Constitution or from the nature of the Commonwealth what powers should be exclusive to the states”.¹¹⁹ It remains difficult, to sever this debate from the method of constitutional interpretation used, as relying solely on the express terms of the Constitution’s grant of Commonwealth legislative powers in ss 51, 52 and 122 and giving them a broad liberal interpretation, while ignoring any impact such interpretation may have on state residuary powers, is a core component of the literalist methodology.¹²⁰

The aforementioned approach has come under significant criticism for its lack of any articulated theoretical justification, and for its ahistorical outlook, which has been used to reverse the Constitution’s intended operation and is at odds with the modern purposive approach to legal interpretation.¹²¹ It has been argued that through the practice of selecting from a range of possible meanings

114 *Attorney-General Victoria v Commonwealth* (1962) 107 CLR 529 at 582 per Windeyer J.

115 G Winterton, ‘The High Court and Federalism: A Centenary Evaluation’, in P Cane, *Centenary Essays for the High Court of Australia*, Butterworths, Chatswood, 2001, p 202.

116 G De Q Walker, *Op Cit.* at 682.

117 G Winterton, *Op Cit.* p 205.

118 G Winterton, *Op Cit.* p 205-6.

119 Zines in ‘*Engineers and the Federal Balance*’ in Coper and Williams (eds) *How Many Cheers for Engineers?*, Federation Press, Sydney, 1997, 81 at 87.

120 G Winterton, *Op Cit.* p 204.

121 Craven (1997) ‘The High Court and the States’ (1995) 6 *UTAC* at 86-91.

of a grant of Commonwealth power the widest one that the words are capable of bearing, it has been used for the purpose of defeating that intent to which the words are supposedly the safest guide. If history is a guide, this commitment to literalism is often contingent on the production of the desired result – namely the expansion of the powers of the Commonwealth.¹²² The ‘ordinary sense’ of a word will be adopted if it will have this result,¹²³ or an interpretation at odds with the ‘ordinary meaning’ may also be adopted.¹²⁴ Sometimes the court will refer to consider the “high object” of a power,¹²⁵ or the result of empirical study¹²⁶ or alleged practical or functional considerations where they favour the Commonwealth.¹²⁷ Thus, “a literal, ordinary, arcane, technical or otherwise convenient meaning can be used as desired, but, as we have seen, it must be the widest (that is most centralist) meaning that the words can possibly bear”,¹²⁸

At a more fundamental level, a purely literalist approach seems at odds with the basic rule of legal interpretation that requires a document be read as a whole,¹²⁹ and that “the starting point to the understanding of any document is that it must be read in its entirety”, with Courts consistently holding that “every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument”.¹³⁰ In violation of this basic rule, the effect of *Engineers* was to discourage reference to context. Even though the court’s reasons themselves did countenance reference to context,¹³¹ the court took no account of the fact that a broad reading of a power will make another enumerated power redundant or meaningless, and doing so must clearly defeat the intention of the framers.¹³² Although it has been argued that *Engineers* in its effect has been more symbolic than substantive, in that it has been treated as establishing more than it actually did because the actual commentary on constitutional interpretation is relatively modest¹³³, it must be said that, to the contrary, while the Court did appear to acknowledge that when the text is ambiguous recourse must be had to

122 M Cooray, ‘The High Court - The Centralist Tendency’ (1992) 1 *UTAC* 105.

123 *Re Lee; ex parte Harper* (1986) 160 CLR 430, 448.

124 *R. v. Brislan; ex parte Williams* (1935) 54 CLR 362; *Jones v. Commonwealth (No.2)* (1965) 112 CLR 206, 218, 225-27; *Herald and Weekly Times Ltd v. Commonwealth* (1966) 115 CLR 418, 433-34, 439-400.

125 *R. v. Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 314.

126 *Australian Coarse Grains Pool Pty Ltd v. Barley Marketing Board (Qld)* (1985) 157 CLR 605, 627-28.

127 *Tasmanian Dams*.

128 De Q Walker, *Op Cit.* at 689.

129 Sir Harry Gibbs, ‘The Threat to Federalism’ (1993) 2 *UTAC* 183 at 185.

130 DC Pearce, *Statutory Interpretation in Australia*, 2nd ed., Butterworths, Sydney, 1981 p 31.

131 De Q Walker, *Op Cit.* at 689.

132 LR Zines, *The High Court and the Constitution*, 3rd edn, Butterworths, Sydney, 1992, p 22.

133 G Winterton, *Op Cit.* p 202.

the context and scheme of the Constitution, in reaching its decision it gave no weight to the fact that the Constitution was of a federation, and not of a unitary state.¹³⁴ Thus the stress on the express words of the Constitution, discouraging reference to context, also deterred the drawing of implications from the federal nature of the Constitution and as such, the rejection of submissions based on federal balance in the later *Tasmanian Dams*¹³⁵ and the *Incorporations Case*¹³⁶ can be seen as a direct result of this doctrine. Ironically, the doctrine of immunity of instrumentalities has since been resuscitated in Australia by Chief Justice Dixon, who developed the “most coherent theory of intergovernmental immunity” that led to the exposition of this “new doctrine”. His theory has been described as “the most faithful and effective recapitulation of Marshall’s spheres of sovereignty thesis”, and his dissent in *Re Foreman & Sons; Uther v FCT*, later adopted by the court in *Commonwealth v Cigamatic Pty Ltd* is “classical Marshall”.¹³⁷

Shortly after *Engineers*, in *R. v. Licensing Court of Brisbane; ex parte Daniell*,¹³⁸ a further blow against federalism was struck, with the Court holding that since the Commonwealth law evinced a legislative intention to “cover the whole field” of the subject matter, the state law would in that area be rendered inoperative, overturning the previous approach that a federal Act made a state law inoperative to the extent that it was impossible for the citizen to obey both. This ruling also goes against Canadian precedent where the paramountcy rule has been shaped so as to save provincial laws wherever possible, not only rejecting the ‘covering the field’ doctrine, but adopting a ‘direct clash’ inconsistency rule that is far narrower than the Australian counterpart.¹³⁹ In Australia, the door was opened for the broad-brush invalidation of State law even where the Commonwealth law is silent, and enabled the Commonwealth to indirectly prevent the states from legislating.¹⁴⁰ Note must also be made of the later doctrine in *Murphyores Inc v The Commonwealth*,¹⁴¹ where it was held that the Commonwealth may attempt, but fail, to enact legislation under one field, yet score under another, an “unconvincing” doctrine that asks the Court to “do what the legislature itself was unwilling or unable to do: to strip-mine the Constitution to try to discover in it, or extend for the Commonwealth, some supportive head of power”.¹⁴²

134 H Gibbs, ‘The Decline of Federalism’ 18 U. *Qld L.J.* 1 at 2.

135 *Commonwealth v Tasmania* 158 CLR 1.

136 *New South Wales v The Commonwealth* 169 CLR 482.

137 C Parkinson, *Op Cit.* at 50.

138 *R. v. Licensing Court of Brisbane; ex parte Daniell* (1920) 28 CLR 23.

139 CD Gilbert, *Australian and Canadian Federalism 1867-1984: A Study in Judicial Techniques*, Melbourne University Press, 1986 at 153.

140 De Q Walker, *Op Cit.* p 694.

141 *Murphyores Inc v The Commonwealth* (1976) 136 CLR 1.

142 Callinan J as per *NSW & Ors v Commonwealth* *Op Cit* at 676.

C. *A Stitch in Time...*

Simultaneous to the Australian debate about the federal-state balance, similar deliberation was taking place in the United States. In the 1918 *Hammer v Dagenhart*¹⁴³ decision, the Supreme Court led by the “Four Horsemen”¹⁴⁴ overturned an act of Congress that would have banned the products of child labour from interstate commerce, crystallising the ‘dual federalism’ doctrine that insisted enumerated powers be read literally and be measured against the guarantees in the 10th amendment. The majority held that “the powers not expressly delegated to the National Government are reserved...and the power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government”.¹⁴⁵ In *US v Butler*¹⁴⁶ the Court overturned the New Deal’s agricultural program on 10th Amendment and dual federalism grounds, reasserting the sacredness of “reserved rights of the states” and holding that commerce did not include agriculture, mining and manufacturing, and hence could not be reached by congressional regulations.¹⁴⁷ And in *Carter v Coal*¹⁴⁸ the Court voided legislation regulating the coal industry. Finally, in a decision striking down one of the keystones of the early New Deal, the *National Industrial Recovery Act*, the court “declaimed with horror against the heresy that the commerce clause might be construed as reaching all enterprises and transactions which could be said to have an indirect effect upon interstate commerce”¹⁴⁹ as such a doctrine would permit federal power to “embrace practically all the activities of the people” and in such event “the authority of the state over its domestic concerns would exist only by sufferance of the federal government”.¹⁵⁰

In response to the striking down of key New Deal legislation, in possibly the most scandalous episode in US judicial history, President Franklin D. Roosevelt proposed the *Judiciary Reorganization Bill of 1937*, a proposal to appoint an extra Supreme Court justice for every sitting Justice over the age of 70 and six months, allowing Roosevelt to immediately appoint six more Supreme Court justices and so making the Court cease to lay what he termed its “dead hand” on a “desperately needed program”.¹⁵¹ With the previous cases decided by a 5-4 margin, the

143 *Hammer v. Dagenhart* 247 U.S. 251 (1918).

144 The nickname given to the four conservative justices - Justices James Clark McReynolds, George Sutherland, Willis Van Devanter and Pierce Butler.

145 K Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992, p 284.

146 *United States v. Butler* 297 U.S. 1 (1936).

147 *Ibid* p 284.

148 *Carter v Carter Coal* 298 U.S. 238 (1936).

149 *Schechter Poultry v US* (1935).

150 *Ibid* p 284.

151 K Hall (ed), *Op Cit.* p 284.

removal of appointees of Presidents Harding and Coolidge would have ensured the success of Roosevelt's legislation. Two months following the announcement of this plan, in "the switch in time that saved nine", Justice Roberts switched his vote and upheld a Washington State minimum wage law.¹⁵² This, together with the resignation of Justice Van Devanter – triggered by Congress voting full pay for justices over 70 who retired – and his replacement with Justice Hugo Black, what has been dubbed a 'constitutional revolution' in doctrine began, largely completed by 1941.¹⁵³ The commerce clause as a limitation on congressional regulatory power was entirely discarded and made as "broad as the economic needs of the nation required".¹⁵⁴ Similarly, the 10th amendment was now renounced as 'but a truism' and so of no limiting effect in *Darby*.¹⁵⁵ Sounding the 'death-knell' for dual federalism.¹⁵⁶ Taken together these initiatives amounted to a massive centralisation of agenda setting, financing and administrative decision making, and, in large measure, government in the US had become unitary rather than truly federal in the sense that there was any perceptible constitutional limit on nationalisation of authority. The Court's decisions as to congressional authority, taken together with a new commerce clause doctrine, amounted to a broad – virtually plenary – federal police power, and although the states survived as constitutional and political entities, the extent and importance of their autonomous powers had been dramatically attenuated.¹⁵⁷

There can be little doubt that the rise of the American modern regulatory and redistributive state since 1937 – the state the Framers sought explicitly to prohibit – has come about through just two clauses in the Constitution: the Commerce Clause and the General Welfare Clause respectively. Deeper understanding of these clauses is essential to any coherent analysis of the history of federal-state relations.¹⁵⁸

The Commerce Clause, which gives Congress the power to regulate commerce among the states, arose out of concern that the free flow of commerce among the states might break down if states had the power to erect protectionist measures,¹⁵⁹ and was adopted only after the Convention delegates rejected more general grants of legislative power as overly vague.¹⁶⁰ Yet underlying the constitutional interpretation of the commerce clause for much of the 20th century is the

152 *West Coast Hotel Co. v. Parrish* 300 U.S. 379.

153 K Hall (ed) *Op Cit.* p 284.

154 *Light v SEC* 1946 at 104.

155 Stone J as per *US v Darby* 312 U.S. 100 (1941) at 124.

156 D Dickson (ed) 'The Supreme Court in Conference (1940-1985)', *The Private Discussions Behind Nearly 300 Supreme Court Decisions*, Oxford University Press, New York, 2001, p 20.

157 K Hall (ed) *Op Cit.* p 285.

158 R Pilon, *Op Cit.* p 1.

159 *Ibid.*

160 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 p 274.

notion that the Court could regulate wholly intrastate non-commercial activity, if such activity viewed in the aggregate would have an effect on commerce, even if trivial.¹⁶¹ This meant the obliteration of the commerce/manufacture distinction, as well as the distinction between interstate and intrastate commerce. As a result, power was given to Congress to regulate virtually every aspect of enterprise and even enterprise confined wholly within a particular state, with the Commerce Clause becoming the vehicle for federal control of all aspects of private economic life, including matters of industrial organisation, labour relations, worker and product safety, environmental quality, race relations and matters involving gender.¹⁶² Such a construction was defended, in an eerie parallel to the *WorkChoices* debate, as an unavoidable implication of an increasingly interconnected national economy that was unforeseen by the founders. Such an argument, however, is dubious at best, with evidence that an interconnected economy was far from unforeseen by the founders. Madison explicitly recognised that “in the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing” and warning that “a power over any one thing, if not limited, may amount to a power over every other thing”.¹⁶³

There can be little doubt that some degree of ambiguity over the precise definition of the commerce clause exists in the Constitution. Commerce might be limited to trade or exchange of goods, which would exclude agricultural, manufacturing and other methods of production. Conversely, it might expansively be interpreted to refer to ‘any gainful activity’. To regulate might be limited to ‘make regular’ which would exclude any prohibition on trade as an end in itself, or it might expansively be interpreted to mean ‘to govern’ which would include prohibitions as well as pure regulations. “Among the several States” might be limited to commerce that takes place between the states, or between people of different states, as opposed to commerce that occurs between persons of the same state, or might expansively be interpreted to refer to commerce “among the people of the States”, whether such commerce occurs between people in the same state or in different states.¹⁶⁴ In a debate paralleling the Australian experience with ‘literalism’, significant scholarly attention has been devoted to the use of ‘originalism’, or seeking the ‘original meaning’ of the text. Originalism has been criticised on the grounds that it is impossible to ascertain and then aggregate the “intention

161 See *Wickard v Filburn* 317 U.S. 111 (1942) where it was held that the act of growing wheat on one’s own land for one’s own consumption affected interstate commerce, and therefore came under the commerce clause and was subject to federal regulation.

162 PH Aranson, Op Cit. at 27.

163 Madison as quoted in R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 at 315.

164 R Barnett, ‘The Original Meaning of the Commerce Clause’ 68 *U.Chi L. Rev* (2001) 101, 112.

votes” of a multitude of framers, much less to carry them forward to apply to a current controversy,¹⁶⁵ and that “the modern resort to the intent of the framers’ expectation gains no support from the assertion that such was the framers’ expectation, for the framers themselves did not believe such an interpretive strategy to be appropriate”.¹⁶⁶ But originalism, contrary to some claims, does not seek the intentions or will of the lawmakers or ratifiers, but rather seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.¹⁶⁷

An examination of every appearance of the word ‘commerce’ in the records of the Constitutional Convention, the ratification debates, and the Federalist Papers yields no evidence of the presently popular ‘broad’ definition. The founders certainly distinguished between commerce and activities that affect or are benefited by commerce. Jefferson himself stated that “For the power given to Congress by the Const does not extend to the internal regulation of the commerce of a State, that is to say the commerce between citizen and citizen, which remain exclusively with its own legislature”.¹⁶⁸

Similarly the general purpose clause, which gives Congress the power to collect taxes, duties, imposts and excises,¹⁶⁹ was initially viewed narrowly, with taxation having to be tied to one of the specifically enumerated powers such as regulating commerce or providing for the military.¹⁷⁰ This view has been rejected, and replaced by one whereby the clause gives Congress a plenary power to impose taxes and to spend money for the ‘general welfare’, and is an independent power that gives Congress power it might not have anywhere else, including the power to force the states to abide by national standards by threatening to withhold federal funds¹⁷¹ - similar to the Australian situation after the *Uniform Tax Cases*.

D. Vertical Fiscal Imbalance and the End of State Financial Sovereignty

Despite lively debate, the Depression-era US cases had little effect on Australian constitutional thought and the federal-state balance remained unchanged until WWII and the introduction of the ‘uniform tax’, which involved four

165 Brest, ‘The misconceived quest for original understanding’ *Boston Uni Law Review* (1980) 204, 221.

166 HJ Powell, in ‘The Original Understanding or Original Intent’ *Harvard Law Review* 98 (1980) at 204.

167 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 p 91.

168 Ibid at 316.

169 Article I, Section 8, Clause 1.

170 *Bailey v. Drexel Furniture Co.* 259 U.S. 20 (1922).

171 *South Dakota v. Dole* 483 U.S. 203 (1987).

Commonwealth statutes which together were designed to drive the States out of the income tax field by means of a combination of inducements, penalties and coercion.¹⁷² In a decision representing a complete triumph of form over substance, the core feature of the *First Uniform Tax Case*¹⁷³ was the decision to treat the States' ouster from the field as voluntary; they were not legally forbidden to levy income tax, but merely succumbed to the Commonwealth's temptation in two forms of the s 96 grant.¹⁷⁴ This ran contrary to US precedent that could have been cited in support of a substantive approach which viewed such legislation as non-voluntary.¹⁷⁵

The effect of the *First Uniform Tax Case* cannot be underestimated. It has been seen as marking a "turning point in Australian constitutionalism"¹⁷⁶ and in federal financial relations,¹⁷⁷ which overshadowed *Engineers* in its practical consequences,¹⁷⁸ with Sir Robert Gordon Menzies stating it marked "the end of the Federal Era" in Australia,¹⁷⁹ and Justice Dawson calling it the "most important single step in the increase in the effective powers of the Commonwealth at the expense of the powers of the state". The case not only heralded a great deterioration in the States' financial independence by depriving them of their independent source of income tax, but effectively enshrined Australia's long-term gross vertical fiscal imbalance.¹⁸⁰

Despite the arguments of the Court that "temptation is not coercion",¹⁸¹ since the states were not legally forbidden to levy income tax, such a decision in disregarding clear ulterior motives, would surely be at odds with general legal principle, especially today where substance rather than form is the overwhelming focus of legal analysis,¹⁸² as seen in all other jurisdictions.¹⁸³ In disregarding purpose and motive in its treatment of legislative schemes, no notice was taken of how the separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine. As a result, the States raise for themselves less than half of the revenue they need for their own purposes, and rely on grants for about 55%, whereas the

172 De Q Walker, Op Cit. p 695.

173 *South Australia v Commonwealth* (1942) 65 CLR 373.

174 G Winterton, Op Cit. p 211.

175 *US v Butler* (1936) 297 US 1.

176 C Saunders, *The Uniform Income Tax Cases*, p 62.

177 J Gillespie, 'Court's conception of Federalism', in *Oxford Companion*.

178 Ibid at p 274.

179 Quoted in Saunders p 78.

180 Winterton, Op Cit. p 211.

181 Latham CJ as per *South Australia v Commonwealth* (1942) 65 CLR 373 at 417.

182 De Q Walker, Op Cit. p 695.

183 See *Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v. Commonwealth* (1993) 176 CLR 555.

Commonwealth raises more than 75% of all taxes levied in Australia, although its expenditure only represents about 50%.¹⁸⁴ The fact that the Commonwealth raises many millions of dollars more than it needs for its own purposes, and that the States raise much less, not only imposes a strain on the working of the federal system and puts the financial relationship out of balance, but more crucially, results in a reduction of accountability, because the Commonwealth raises money although it is not responsible for the way in which it is spent, while the States spend money although they are not responsible for the manner in which it is raised.¹⁸⁵

E. The External Affairs Blank Cheque

The ‘third wave’ of centralism, roughly categorised as ‘cosmopolitanism’ or ‘globalism’, began to dominate Australian constitutional thought since the late 1960’s but came to prominence in the 1980’s. This school revolved around the use of UN conventions to transfer power from the States to the Commonwealth. Though it has been common to view *Tasmanian Dams*¹⁸⁶ as entrenching the use of the external affairs power, no serious critique can be made without first analysing *Koowarta v Bjelke-Peterson*,¹⁸⁷ where it was held that *The Racial Discrimination Act*¹⁸⁸ was a valid exercise of the ‘external affairs’ power. Enacted to give effect to the United Nations Convention on the Elimination of All Forms of Racial Discrimination, the Act was a significant departure from previous external affairs jurisprudence,¹⁸⁹ as its effects applied entirely within Australia, and did not involve either foreigners or foreign powers.

In a powerful dissent, Gibbs CJ and Aitkin and Wilson JJ reaffirmed the Dixon ratio of *R v Burgess*, which focussed on whether a treaty was “indisputably international”. More critically however, the dissent represented one of the last serious efforts to resuscitate the federal balance doctrine, with an argument being made that:

In determining the meaning and scope of a power conferred by s 51, it is necessary to have regard to the federal nature of the Constitution. Accordingly, no single power should be construed in such a way as to give to the Commonwealth parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that constitution.¹⁹⁰

¹⁸⁴ H Gibbs, ‘The Decline of Federalism’, 18 *U. Qld L.J.* 1 at 6.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁸⁷ *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

¹⁸⁸ *Racial Discrimination Act (Commonwealth)* 1975.

¹⁸⁹ The use of the power to implement treaties was affirmed in *R v Burgess; ex parte Henry* and also *New South Wales v Commonwealth* (1975) 135 CLR 337.

¹⁹⁰ Gibbs CJ as per *Koowarta v Bjelke-Peterson* Op Cit at 199.

Reading s 51 powers in their federal context merely assumes that the states retain sufficient legislative powers that the system can realistically be described as 'federal'.¹⁹¹ Although such an approach has been criticised because it does not overcome the fundamental proposition that a treaty with another nation is inherently international in character and thus an 'external affair',¹⁹² a view adopted by Mason, Brennan and Murphy JJ, such a view would, respectfully, seem naïve and simplistic at best. The Australian Constitution *mandates* a federal balance and this cannot be ignored when construing the Constitution – that the federal balance exists, that it must continue to exist, that the States must continue to exist and exercise political power and function independently both in form and substance, until the people otherwise decide in a referendum under s 128 of the Constitution, are matters that necessarily inform and influence the proper construction on the Constitution.¹⁹³ In *Koowarta*, the deciding opinion was that of Stephen J, who despite taking a narrower construction regarding whether a treaty is of 'international concern' ultimately agreed with Mason, Brennan and Murphy JJ and the Act was deemed valid.

Not a year after the decision in *Koowarta* was handed down the use of the external affairs power to allow the Federal Government to regulate purely internal matters was confirmed in *Commonwealth v Tasmania*.¹⁹⁴ Essentially, the *World Heritage Properties Conservation Act 1983*, based upon the United Nations Convention Concerning the Protection of the World Cultural and Natural Heritage, in conjunction with the *National Parks and Wildlife Conservation Act 1975*, enabled the Federal Government to prohibit the construction of the Franklin Dam.

Prior to *Tasmanian Dams*, it was still possible to distil within the court a general majority consensus for a narrow view of s 51(xx), and although cases such as *Concrete Pipes* and *Actors Equity* unambiguously broadened the scope, it was still possible to glean from both cases underlying support for the proposition that a valid law about trading and financial corporations must be a law about the trading or financial activities of those corporations,¹⁹⁵ and similarly in *Koowarta*, the lack of a clear majority distinguished it significantly from *Tasmanian Dams*. The finding that the Commonwealth can legislatively implement a genuine treaty on any subject represented a considerable increase in Commonwealth legislative power.¹⁹⁶ Whilst defenders of *Tasmanian Dams* contend that the treaty must nevertheless be "of international concern", that legislation implementing a treaty "must be reasonably capable of being considered appropriate

191 G Winterton, Op Cit. p 209.

192 Ibid p 212.

193 Callinan J as per *WorkChoices* at 797.

194 *Commonwealth v Tasmania* (1983) 158 CLR 1.

195 I Clegg, 'Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime' (2006) 17 *PLR* 97 at 105.

196 Winterton Op Cit at 212.

and adapted to that end” and the Commonwealth Parliament cannot simply treat the subject of the treaty as a new head of power,¹⁹⁷ these qualifications do little, if anything, to narrow the width of power granted. There is no limit to the matters that may be dealt with through treaty by the Executive, resulting in a situation where the legislative power of the Commonwealth can be expanded by Executive action, and the expansion can be wide enough to extend over almost all, if not all, of the matters within State legislative power, making the Constitutional grant of power to the Commonwealth quite irrelevant, and, arguably, making a mockery of the doctrine that the Commonwealth cannot legislate in a way that is inconsistent with the continued existence of a State, as it nevertheless has power to legislate in a way that will enable it if it wishes to render most or all State powers ineffective.¹⁹⁸

Consideration must also be given to the argument that, as set out by Mason J,

...it is possible that the framers of the Constitution thought or assumed that the external affairs power would have a less extensive operation than this development has brought about and that Commonwealth legislation by way of implementation of treaty obligations would be infrequent and limited in scope. ...But it is not, and could not be, suggested that by reason of this circumstance the power should now be given an operation which conforms to expectations held in 1900. For one thing, it is impossible to ascertain what these expectations may have been. ...Mere expectations held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution.¹⁹⁹

Such an argument seems weak at best, and there is little evidence to attribute to the founders the limited vision and foresight alleged by Mason J. To the contrary, significant evidence exists that they were greatly concerned with international affairs, in particular regional affairs, and discourse about international affairs. Agreements and treaties throughout the 19th century were intense and prolonged, and, as noted by Callinan J:

[T]he century before federation was a century of many wars between both large and small belligerents. In 1900 Australia aspired to be a nation of significance. The founders did not intend it to be tied to the apron strings of Britain forever, otherwise there would have been no need for an external affairs power.²⁰⁰

197 Ibid.

198 H Gibbs, *Op Cit.* p 4.

199 Mason J, *Commonwealth v Tasmania* *Op Cit* at 126.

200 Callinan J as per *WorkChoices* at 867.

IV. A FEDERALIST REVOLUTION?

Simultaneously, across the Pacific, the Burger Court began a significant retreat from some of the most assertive nationalist doctrines. As early as 1971, Justice Black wrote for a majority in *Younger v Harris* that when a state dependent applied for relief on civil rights grounds from a federal court, there must be “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments”.²⁰¹ Furthermore, *National League of Cities v. Usery*²⁰² invalidated an act that applied wage and hour limitations to state and local government employees, the court for the first time in 40 years overturning an act of Congress regulating economic relationships (although the shift of one justice’s vote led to an abandonment of the Usery doctrine in *Garcia v San Antonio Transit Authority*, where Justice Harry Blackman wrote for the court that “political safeguards” such as representation of states on an equal basis in the Senate were protection enough²⁰³). In the ensuing two decades, an “increasingly conservative court has frequently invoked this language with reverence to reduce the level and intensity of federal courts’ interference with state judicial functions”.²⁰⁴

It was not until the Rehnquist Court that a ‘revolution’ occurred in federalism doctrine,²⁰⁵ focussing on identifying areas where regulation by the states, rather than by the national government, is so important that the national government has to stay out – the so-called “enclave theory”. The philosophy was based upon the Constitution’s overall structure rather than on the words of particular provisions, as well as the fact that the Constitution is pervaded by the assumption that states exist and have an important role, a notion rejected by the New Deal constitutional transformation which treated states as administrative units that Congress could use and bypass whenever it chose.²⁰⁶ Beginning with Rehnquist’s sole dissent against one of Nixon’s anti-inflation measures and picking up pace in *Garcia*,²⁰⁷ by *United States v Lopez*,²⁰⁸ for the first time since the New Deal, a statute was found unconstitutional on the grounds that it exceeded the jurisdiction of the Commerce Clause.

201 Black J as per *Younger v Harris* 401 U.S. 37 (1971).

202 *National League of Cities v. Usery* 426 U.S. 833 (1976).

203 Blackman J as per *Garcia v San Antonio Transit Authority* 469 U.S. 528 (1985) at 565.

204 K Hall, Op Cit. p 296.

205 M Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, WW Norton & Company, New York, 2005. p 249.

206 Ibid p 255.

207 With Justice O’Connor stating that “The Court today surveys the battle scene of federalism and sounds a retreat ... I would prefer to hold the field, and, at the very least, render a little aid to the wounded” (*Garcia v San Antonio Transit Authority*).

208 *United States v Lopez* 514 U.S. 549 (1995).

In *US v Lopez*, Alfonso Lopez Jr. carried a handgun and cartridges into his high school, in violation of the *Gun-Free School Zones Act of 1990*. Lopez argued that the federal government had no authority to regulate firearms in school zones, despite the government's position that possession of a firearm may lead to violent crime which would affect general economic conditions by limiting travel in the area and prevent people from learning effectively due to the constant fear of violence, leading to a weaker economy. In a 5-4 decision, Rehnquist writing for the Court said that Congress held powers limited to regulating the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce. He rejected the arguments of the government, stating that:

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States... to do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.²⁰⁹

Similarly, in a concurring judgment of O'Connor and Kennedy, eerily similar to that of Gibbs CJ in *Koowarta*:

This case requires us...to appreciate the significance of federalism in the whole structure of the Constitution...the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far and...The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required.²¹⁰

Perhaps the most revolutionary judgment, however, was that of Thomas J, who going back to the Constitution's language demonstrated that "at the time the original Constitution was ratified, commerce consisted of selling buying and bartering as well as transportation for these purposes"²¹¹ and that the etymology of the word literally means 'with merchandise', and was used "in contradistinction to productive activities such as manufacturing and agriculture". Thomas J also points out that that it was hard to replace the term commerce in the commerce

209 Rehnquist CJ as per *United States v Lopez* 514 U.S. 549 (1995).

210 Kennedy & O'Connor JJ as per *United States v Lopez* Op Cit.

211 Thomas J as per *United States v Lopez* Op Cit at 585.

clause with the words 'agriculture and manufacturing'²¹², warning that "our case law has drifted far from the original understanding of the Commerce Clause." and urging the court to "temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause".²¹³

The pro-federalism trend continued in *US v Morrison*,²¹⁴ which, in examining the Commerce Clause powers, held that the *Violence Against Women Act of 1994*, which provided a federal civil remedy to victims of gender-based violence even when no criminal charges were filed, was unconstitutional:

[W]ere the Federal Government to take over the regulation of entire areas of traditional state concern, the boundaries between the spheres of federal and state authority would blur, and it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign...if Congress may regulate gender-motivated violence, it would be able to regulate murder.²¹⁵

V. THE LAST STAND

An opportunity for a similar revolution occurred in Australia in 2006, with the passage of the *Workplace Relations Amendment (Work Choices) Act 2005*, described by the Prime Minister as containing the most sweeping industrial reforms since 1904. Since the late 1970's and early 1980's, labour law academics had begun to champion a single national system of industrial relations based on alternative heads of power. In line with this, *WorkChoices* was a complete dismantling of Australia's six separate industrial relations regimes and their replacement with one national regime covering all employees of 'constitutional' corporations, as well as covering all employers and employees in the Territories, the Commonwealth, Victoria, as well as waterside, maritime and flight crew, and converting existing State industrial instruments. The policy achieved this through a broad view of both the corporations power in the Constitution, and of what constitutes a 'constitutional corporation'. Furthermore, it can be seen from the objects of the Act that the whole purpose is not just to affect, but to govern completely, all aspects of the relationship between employers and employees, without any attempt to connect these objects with an implementation of the corporations power.²¹⁶

²¹² M Tushnet, Op Cit. p 288.

²¹³ Thomas J as per *United States v Lopez* Op Cit at 584.

²¹⁴ *United States v. Morrison* (2000) 529 US 598.

²¹⁵ Rehnquist, CJ as per *United States v. Morrison* Op Cit.

²¹⁶ Callinan J as per *New South Wales & Ors v Commonwealth* [2006] HCA 52 at 675.

With some commentators treating decisions such as *Davis, Dighan* and the *Incorporations Case*, as well as *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority*²¹⁷ as evidence of a revival of states-rights (despite none of these cases affecting any significant retrieval of power from Canberra), hope for change was high, the challenge billed as the most important constitutional case in a generation. If ever there was an opportunity for the High Court to make a retreat – to reign in *Engineers* – this was it.²¹⁸ Hope was further heightened with the joint dissent of Callinan and Heydon JJ in *XYV z Commonwealth*.²¹⁹ Drawing upon the judgments of *R v Burgess; Ex parte Henry*, an almost originalist position was argued, stating that the Convention debates were relevant where “the extent that their linguistic usages are the primary sources from which a conclusion about the meaning of the words in question can be drawn”, and that “it might be asked whether it is not legitimate to seek to measure the ambit of the power by reference to the meaning which, in 1900, that expression bore or might reasonably have been envisaged as bearing in the future”.

In order to fully appreciate the constitutional impact of *WorkChoices*, a few historic notes must be made, and this requires brief consideration of where the regulation of Australia's IR began: s 51(xxxv) the conciliation and arbitration power.²²⁰ This provision received disproportionate attention in the Convention debates with future Prime Minister George Reid remarking that “no part of the Bill has received more careful consideration than this particular clause”. The transcripts of the debates reveal that there was as much controversy surrounding the regulation of industrial relations then as there is now, and there was extended argument about whether the Commonwealth parliament should have the power, or indeed any similar power, and that the proposal succeeded very narrowly²²¹ because a number of opponents were persuaded that the power was very confined and would be used only in limited circumstances,²²² leaving “no doubt that the architects of the Constitution assumed that the States would be responsible for the regulation of IR, the intention was that the Commonwealth should only be permitted to make laws supporting the resolution of a small number of interstate industrial disputes”.²²³ Despite the desire of delegates such as Higgins who

217 *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

218 L Clegg, ‘Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime’ (2006) 17 *PLR* 97 p 109.

219 *XYZ v The Commonwealth* [2006] HCA 25 (13 June 2006).

220 L Clegg, ‘Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime’ (2006) 17 *PLR* 97 at 98.

221 In Melbourne it was upheld by 22-19, having been defeated at the Adelaide Session 22-12.

222 Records of the Australasian Federal Convention of the 1890's, Australian Senate, Melbourne Session, March 1989 at 11.

223 L Clegg, *Op Cit.* p 98.

“felt that labour legislation should be exclusively vested in the Commonwealth Parliament... There was a general belief in the Convention that factory legislation should be left to the States Parliaments”.²²⁴ Thus the drafters chose to define Commonwealth legislative power in the area of IR by reference to two limitations: firstly, a restricted class of disputes was chosen - industrial disputes extending beyond the limits of any one state, reflecting a concern for the federal balance. Secondly, the ends and means of the legislation were limited: conciliation and arbitration were to be the means, and the prevention and settlement of such disputes were to be the ends.²²⁵

Unlike most other s 51 powers, the arbitration power, like defence, is of a purposive nature, resulting in more limitations than other plenary powers.²²⁶ In the first half of the last century, there were a total of six failed referenda attempting to amend the arbitration power to give more power to the Commonwealth; the first as early as 1911 and the last in 1946. The fierce opposition to these proposals, as articulated through parliamentary debate, was grounded on the premise that:

These amendments, if carried, will mark the beginning of the end of the Commonwealth of Australia as a union of States. They will mark the beginning of the destruction and the degradation of the Australian States as political units and partners in a scheme for the government of the Australian people...there can be no doubt that if they are enacted upon the Constitution they will deal a staggering blow to the State Legislatures and Governments.²²⁷

The 1911 referendum received 38.42% of the vote, with only Western Australia voting in favour. Similar amendments to those in 1911 were proposed in 1912, however this was even more prescriptive, and, as noted by Kirby J:

[T]he rejection by the electors of the Commonwealth of a proposed amendment to the federal constitution... suggests a reason for special caution when this Court is invited, effectively, to impose on the Constitution of the State a requirement which the electors, given the chance, declined to adopt.²²⁸

Of particular relevance to the *WorkChoices* debate, however, was that the referenda demonstrated “the repetitiveness and ingenuity of the attempts made by the

224 Australia, HOR, Debates, Hansard 12 Aug 1903 at 3467.

225 N Williams and A Gotting, ‘The interrelationship between the Industrial Power and Other Heads of Power in Australian Industrial Law’ (2001) 20(3) *Australian Bar Review* 264.

226 Note the original limited operation which was overruled in *Coldham*, when the court decided that all types of employees, including white collar employees, could be involved in an industrial dispute.

227 J Quick, Hansard, Parliament of Australia, 21 May 1926 at 4924-4925.

228 Kirby J as per *Durnham Holdings Pty Ltd v NSW* (2001) 205 CLR 299 at 428.

Commonwealth to gain the power which in this case it now says it has always had". As articulated in the dissent of Callinan J:

The court should not disregard that history. The people have too often rejected an extension of power to do what the Act seeks to do. To ignore the history would be, not only to treat s 128 of the Constitution as irrelevant, but also for the court to subvert democratic federalism for which the structure and text of the Constitution provide.²²⁹

Similarly, as noted by Kirby J:

[I]f s 51(xx) of the Constitution now provides a legitimate source for a comprehensive federal law with respect to industrial disputes, by inference it always did. All those hard-fought decisions of this Court and the earnest presentation of cases, the advocacy and the judicial analysis and elaboration within them concerning the ambit of s 51(xxxv) of the Constitution, were (virtually without exception) a complete waste of this Court's time and energies.²³⁰

Indeed, the question must be asked:

Why were repeated attempts taken by well-advised federal governments, none of them successful, to amend the Constitution to enhance the federal legislative power with respect to terms and conditions of employment in industry, if, waiting in the wings for easy deployment, was the corporations paragraph, there to solve virtually all of the deficiencies of power and to fulfil all of the Commonwealth's law-making dreams of industrial regulation? The answer to these questions is not that the earlier Justices, or other lawyers of the Commonwealth and the well-resourced parties, lacked the intelligence, insight and imagination of those of the present generation.²³¹

With the appointment of 'capital-C' conservatives to the High Court of Australia, there were high hopes for a federalism revolution similar to the US. Ultimately, however, in *New South Wales & Ors v Commonwealth*²³², by a 5-2 decision, these hopes were dashed, the court holding that "a law which regulates the relationship between a constitutional corporation and its employees or affects constitutional corporations in the manner upheld in *Fontana Films* is a law with respect to a corporation under the corporations power".²³³ The *WorkChoices* decision represented a complete break from historical and constitutional precedent.

229 Callinan J as per *New South Wales & Ors v Commonwealth* Op Cit at 733.

230 Kirby J as per *New South Wales & Ors v Commonwealth* [2006] HCA 52 at 474.

231 Kirby J Op. Cit. at 478.

232 *New South Wales & Ors v Commonwealth*.

233 Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, *New South Wales & Ors* Op Cit at 198.

VI. RESTORING THE FEDERAL BALANCE

There is no more basic rule of legal interpretation than the one requiring that a document be read as a whole.²³⁴ It is the legal version of the axiom common to all rational discourse that one must not take statements out of context.²³⁵ When it comes to constitutional law, however, the opposite has reigned supreme. Through the High Court's interpretation of the external affairs powers in *Tasmanian Dams*, the external affairs power is now subject to no significant limits, leading Gibbs to observe that it is as if s 51 (xxix) had been amended to delete the words "external affairs" and substitute "anything".²³⁶ Much the same was *Lopez*, where the US federal Attorney General was "unable to think of a single Act" that could possibly be unauthorised under the Clinton Administration's view of the Commerce Clause. Yet, as stated by Latham CJ in the *State Banking Case*:

[N]o single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution.²³⁷

To recognise this, and to construe the Constitution in light of its federal nature is distinct from reviving the doctrine of reserved powers, and would simply mean that grants of Commonwealth power be read in conjunction with all other power-recognising or power-conferring sections such as s 106 and s 107,²³⁸ for it is an impossibility to say that the Commonwealth has power over everything, whilst still maintaining a nation is a federal one.²³⁹ As wryly noted by Professor De Q. Walker:

The High Court's disregard of the Constitution's overall federalist structure and content resembles diagrammatically a kind of Schlieffen Plan. One arm of the thrust is the maximalist interpretation of Commonwealth powers without regard to their context. The other is the use of s 109 to annihilate whole areas

234 Sir Harry Gibbs, 'The Threat to Federalism' (1993) 2 *UTAC* 183, 185.

235 De Q Walker, *Op Cit.* p 689.

236 Sir Harry Gibbs, Address Launching Volume 1 of *Upholding the Australian Constitution* (1993) 3 *UTAC* 137.

237 Latham CJ as per *Bank of New South Wales v. Commonwealth (Bank Case)* (1948) 76 CLR 1 at 184–185.

238 De Q Walker, *Op Cit* at 691.

239 L Zines, *Op Cit.* p 90–91.

of State legislative power. Together they complete an impressive double envelopment strategy.²⁴⁰

The idea of a purely ‘political’ rather than constitutional federalism contradicts every known fact about the framing and adoption of the Constitution. A right that cannot be enforced in a court is a right that does not exist.²⁴¹ All power calls for its use, and absolute power calls absolutely: allowing the central government to be judge in its own cause will not result in a negotiated pattern of political give and take, because the Commonwealth now holds all the cards:

Instead it will lead to the indefinite expansion of Commonwealth regulation. There is no limit to the hunger of lobby groups for more wealth transfers, of parliamentarians for new portfolios, or of bureaucrats for larger departments. Public choice research shows that bureaucracies are an independent factor in the growth in the size of government, a factor that increases in power according to size.²⁴²

The Constitution, like any institution, is first and foremost its history – “it is the memories and the experience of all those who have ever lived by it, and of all those who continue to live by it. It is the written commentaries upon it, the judicial pronouncements, the learned discussions, the controversies, the public inquiries, the parliamentary debates, and the referenda polemics”.²⁴³ To disregard entirely the fundamental ‘policy’ of the Constitution, federalism and the careful division of power that it involves, is to disregard the object which the framers intended, the people who voted in favour of federation adopted and the Imperial parliament enacted. It represents a departure from not only common sense, but current purposive techniques of statutory interpretation, especially when the text – as is the case with constitutions in general – is expressed in some instances in other than absolute language.²⁴⁴ Yet this is precisely what has occurred in both Australia and the US. Since the adoption of the US Constitution, courts have eliminated clause after clause that interfered with the exercise of government power, starting with the necessary and proper clause, continuing through Reconstruction with the destruction of the Privileges or Immunities Clause, and culminating in the post New-Deal Court that gutted the Commerce Clause and the scheme of enumerated powers affirmed in the 10th amendment.

²⁴⁰ Walker, *Op Cit.* p 691.

²⁴¹ Walker, *Op Cit.* p 701.

²⁴² *Ibid* p. 702.

²⁴³ R Davis, ‘The Constitutional Commission or the Inescapable Politics of Constitutional Change’.

²⁴⁴ See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-5 per Gibbs CJ, 310-311 per Stephen J, 320 per Mason and Wilson JJ, 223 per Aitken J. Also *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at 374-375 per Brennan CJ.

Consequently the Constitution that was actually enacted and formally amended “creates islands of government powers in a sea of liberty” but “[t]he judicially redacted constitution creates islands of liberty rights in a sea of government power”.²⁴⁵ Indeed, even if the broadest possible original meaning of the power to regulate commerce is adopted (i.e. that Congress is empowered to make regular or prohibit any gainful activity that occurs anywhere in the US), it is difficult to see how Congress may still regulate non-commercial or non-gainful activities, raising questions about federal laws prohibiting the possession and use of alcohol, tobacco, firearms, drugs, sexual literature or any other items are improper and unconstitutional,²⁴⁶ or federal criminalisation of acts that are already criminalised by the states, usurping state authority and circumventing (opinion of the Supreme Court notwithstanding) the prohibition of double jeopardy in the 5th Amendment as well as that of the 10th Amendment.²⁴⁷

Overall, the question of which is the more federal country, Australia or the US, is a vexed one. On one hand, the political independence of the states, the lack of a uniform common law and a significantly reduced vertical fiscal imbalance would point to the US as the most federal country. On the other, federal bureaucracies/regulatory agencies and in particular the Federal Bureau of Investigations exert far greater influence than their Australian counterparts. In Australia, no federal penitentiaries exist domestically. Yet, at the core of it, neither Australia nor the United States is a federation in any true sense of the word. Despite the ‘federalism revolution’ tinkering at the edges, constitutional federalism in the US was destroyed by the New Deal Court. In Australia, the death was more protracted, the final gasps of breath extinguished by *Tasmanian Dams*. Federalism exists in name only, political and at the whim of the central government.

A revitalisation of constitutional federalism within Australia does not require the radicalism of a complete overruling of *Engineers*, nor a return to the doctrines of immunity of instrumentalities or reserved state powers. Rather, a revival of the federal balance doctrine can be achieved by purposive interpretation with the founders intentions and understandings, to the extent that these intentions are generally consensual – with the evidence to be found in debates, referenda results and what was said by relevant informed, legally qualified and knowledgeable persons. Such a revival was briefly evidenced in the Gibbs Court:

[T]here should be two levels of government, each of which is limited to its own sphere, but neither of which is subordinate to the other. There must be a division of powers, effected by a written Constitution which binds both levels of government, so that neither has absolute sovereignty. Each level of

²⁴⁵ R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 p 1.

²⁴⁶ *Ibid* at 313-314.

²⁴⁷ *Cato Handbook for Congress*, The Cato Institute, Washington DC, 2000, p 18.

government should be independent and supreme within the area of its powers, and each should have under its control the financial resources necessary to enable it to perform its functions.²⁴⁸

The views of Sir Harry Gibbs are a welcome return to co-ordinate federalism, and his vision can be summed up as follows: “nothing should be done by the Commonwealth that could be done equally well by the individual States themselves”.²⁴⁹ The resurrection of these views by the Gibbs Court could be seen in *Gazzo*, where it was ruled that s 51 “is concerned with matters incidental to the execution of a power, not with matters incidental to its subject matter. It cannot be used to expand the subject-matter of any of the enumerated legislative powers”,²⁵⁰ and also in *Coldham*²⁵¹ by Gibbs CJ. Such an approach recognises that “[t]he limited grant of powers to the Commonwealth can not be exercised for ends inconsistent with the separate existence and self-government of the States, nor for ends inconsistent with its limited grants”²⁵² and that:

[T]he maintenance of the States and their powers... is as much the object of the Constitution, as the maintenance of the Commonwealth and its powers... It is inconsistent with the Federal system set up by the Constitution that the Commonwealth should enact legislation compelling the states, as such, to take or refrain from taking any action...in a manner prescribed by the Commonwealth.²⁵³

The above is *not* contrary to *Engineers*, or analogous to the reserved state powers doctrine (a doctrine *rejected* by Gibbs CJ) but rather a view that draws implications from federalism to prevent the Commonwealth legislating to impose special burdens or disabilities on State governments. In the *Melbourne Corporation case*,²⁵⁴ it was held that any statute that denies the existence or ability of a State to govern itself or the federal structure of the Commonwealth is invalid, a test which was broadly upheld in *Austin v Commonwealth* in 2003.²⁵⁵ Its lingering effects are seen in the *WorkChoices Case* in the judgement of Kirby J, who referred to “the federal structure and character”²⁵⁶ of the Constitution, further stating that:

248 Sir Harry Gibbs, ‘The Threat to Federalism’ in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993) 183-184.

249 Sir Harry Gibbs, ‘Rewriting the Constitution’ *UTAC* Volume 1 (1992) xiv.

250 Aickin J per *Gazzo v. Comptroller of Stamps* (Vic) 56 ALJR 143, at 158.

251 *R. v. Coldham; ex parte Australian Social Welfare Union*.

252 Starke J as per *South Australia v The Commonwealth* (1942) 65 CLR 373.

253 Starke J as per *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488 at 515.

254 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

255 *Austin v Commonwealth* (2003) 215 CLR 185.

256 Kirby J as per *NSW & Ors. v Commonwealth Op. Cit.* at 572.

[T]o take the language of the corporations power in par (xx) of s 51 in isolation and to ignore the other paragraphs of that section, would involve a serious mistake. It is not a mistake that our predecessors in this Court made. They read pars (xx) and (xxxv) together as part of the one section of the Constitution containing a grant of many powers. Clearly, it was not intended that s 51(xxxv) should be otiose, irrelevant or entirely optional to the Commonwealth in its application. Nor was it intended that the important restrictions imposed on the federal exercise of legislative powers in par (xxxv), with respect to laws on industrial disputes, should be set at nought by invoking another head of power, such as that contained in par (xx).²⁵⁷

It would seem that the current High Court holds the jurisprudential view that context is of no importance whatsoever. What remains at present therefore, is that states are still protected to a small degree by the fact that any action on the part of the Commonwealth which would prevent a State from continuing to exist and function is necessarily invalid because it is inconsistent with the express provisions of the Constitution. However, such protection is futile if it protects the existence of the States and at the same time places no limit on the extent to which the Commonwealth can deprive the States of their functions.²⁵⁸ It is only if the powers conferred by s 51 are conferred 'subject to this constitution',²⁵⁹ that is if they are viewed in context, that the states can survive as constitutional entities. A federal system premised on the existence of the states as meaningful independent entities with a constitutional right to survive necessarily implies certain substantive and structural limits on the powers of the central government. If these limits are to have any real meaning, the legislature must be prevented not only from formally destroying states, but also from acting in ways that would leave a state formally intact but functionally a gutted shell.²⁶⁰

To state that modern times require a living, evolving constitution, not only makes a mockery of s 128, but ignores the fact that "The framers of the Constitution and the people who endorsed it by popular vote could not have been unaware of the problems, and the frustrations, to which the division of powers in a federation may give rise. Nor would they have been ignorant of the aversion that those who exercise power generally have to any sharing of it".²⁶¹ While it has been argued that the blame for the descent to centralism should be placed not on the High Court, but rather on the framers choice of words in the constitution, such an argument is disingenuous at best. As noted by Chief Justice Gibbs, lamenting the lack of fulfilment of the founders vision: "By a process of

257 Kirby J as per *NSW & Ors v Commonwealth* Op. Cit. at 511.

258 H Gibbs, Op Cit. p 186.

259 Rich J as per *Melbourne Corporation* Op. Cit. at 66.

260 L Tribe, *American Constitutional Law*, 3rd Ed, Foundation Press, NY, 2000, Vol 1 p 865.

261 Callinan J as per *NSW & Ors v Commonwealth* Op Cit at 772.

expansive interpretation some of the powers given to the Commonwealth by the Constitution [have] already...been widened in a way which no one in 1901 would have thought possible”.²⁶²

The further the interpretation of the Constitution moves from the vision of the founders, the harder it may be to return it to a jurisprudence that has regard to its federal character, with the focus of federalism in the future less on constitutional federalism, but rather political federalism alone. The question is no longer whether the Commonwealth has the power, but merely if it should exercise it.²⁶³ Hope remains however, in that there remains no real possibility of the states being formally abolished within the foreseeable future. 82% of Australians consistently state they are either satisfied or very satisfied with the way the federation currently works.²⁶⁴ The best hope for the survival of federalism lies in the recognition by politicians of all parties and by the public of the value of maintaining a real federal system in Australia.²⁶⁵ It seems that this recognition is finally, albeit belatedly, being achieved. The establishment of the Council for the Australian Federation in 2006 — comprised of only the states and territories — as a lobby group designed to prevent further loss of state power may well demonstrate that after decades of centralism, voters and the states have said “enough is enough”,²⁶⁶ and that the ascent from *Avemus* can finally begin.

262 Transcript of Proceedings, ‘Welcome to the Chief Justice’, Sir Harry Gibbs and Mr Justice Brennan, Perth, High Court of Australia, 21 September 1981.

263 J Leaser, ‘Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution’ 18 *UTAC* 4.

264 AJ Brown, ‘After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st century’ (2002) 13 *PLR* 171 at 174.

265 Gibbs, *Op Cit.* p 8.

266 P Williams, *Op Cit.*

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The Constitutionality of Fiat Paper Money in Australia: Fidelity or Convenience?

ABSTRACT: This article finds that the existence of a system of federal government issued paper money in Australia owes more to political rather than constitutional design. Support for this perspective can be found in the text of the Australian Constitution and the monetary history of colonial Australia. The political motivations that drove the establishment of the fiat paper money system in Australia can also be understood through an examination of the historical roots of paper money within the context of the English constitutional tradition and by drawing on the American experience. In the US the prevailing view is that a faithful interpretation of the Constitution in line with the intentions of its framers (be they the drafters, ratifiers in State congresses or public opinion at the time) would require that fiat paper money be deemed unconstitutional. Despite this acknowledgement of the intended original scope of the US Constitution, economic considerations and a pragmatic resignation to the financial State-capitalist status quo means that the paper money question is largely ignored rather than engaged. At a bare minimum, the US position recognises the incongruence between the original intent embodied in the Constitution and prevailing conditions. In Australia, however, not only has the issue of the constitutionality of the paper money system never been openly discussed amongst scholars and the legal establishment, but the High Court seems to be actively avoiding the question.

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INTRODUCTION

A fiat currency is a monetary system where the medium of exchange is untethered from any underlying measure of wealth or commodity. In a state of nature, sophisticated explanations would be needed in order to explain why anyone would accept a fiat currency and ascribe value to otherwise worthless paper.

Indeed why anyone would accept any form of currency that is not constituted by objects that have an immediate utility or qualities that sustain life is a phenomenon that begs explanation. A sociologist might posit that participants in the system accept the currency because of the tacit mutual reciprocity that each contracting party expects of the other.¹ An economist, by contrast, might point to the fungible nature of the currency and the efficiencies realised through being able to transact with a multi-denominational, fungible medium. Notions of co-operation, reciprocity or efficient commercial exchange are no longer required when State power is engaged. The explanation as to why people accept a fiat currency system when State power props up and enforces the system thus becomes abundantly simple — choosing to shun the system or otherwise avoid it will be met with State sanctioned force. When the State demands taxation in a particular currency, that currency effectively becomes the base medium in society.

Australia currently has a system of fiat currency based on monetary notes issued by the federal government through the Reserve Bank of Australia. Yet in 1901, when the colonies joined together in a federation, this arrangement was not created by the Constitution. Nor did the framers of the Australian Constitution intend that the document they were drafting support such an arrangement. Indeed it was not until a decade after the Australian colonies federated that the first elements of the fiat paper money system began to emerge.² Although it was the Labor³ party that instigated the first moves towards a central bank and paper money system in Australia, the political benefits this provided to the financial administration of the federal government meant that all sides of politics were ultimately co-opted.

The Australian Constitution has an implied monetary system embodied in several of its provisions that deal with currency matters. The strongest and clearest manifestation(s) of this underlying monetary system are s 115, s51(xii) and s51(xiii) of the Constitution. Section 115 in particular provides that a State government cannot mandate anything other than gold and silver coin as legal tender in the payment of debts. While critics might argue that the text of the Constitution is anachronistic and it is legitimate for the High Court to ignore the offending provisions or interpret them to meet the requirements of modern times and expectations⁴, it should be noted that the Australian Constitution has a built-in amendment procedure contained in s 128. If critics wish to see the Constitution updated to meet modern expectations, a referendum pursuant to s128 is the only constitutionally legitimate means of achieving such ends.

1 Bruce Carruthers and Laura Ariovich, *Money and Credit: A Sociological Approach* (2010) 51-82.

2 See *Australian Notes Act 1911* (Cth); *Commonwealth Bank Act 1911* (Cth); *Inscribed Stocks Act 1911* (Cth).

3 The Americanised spelling 'Labor' is used in the name of the Australian Labor Party.

4 See, for example, Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1.

In order to uphold the proposition that the Constitution neither creates nor supports a fiat paper money system, two important points need to be established. The first point is that, when plainly read and understood, the text and structure of the Australian Constitution in no way supports the existence of a federally issued fiat currency. Even beyond the plain meaning of the words, a historical contextualisation of the relevant constitutional provisions also tends towards a similarly negative conclusion. Secondly, in order to complete the argument that the Australian Constitution does not create or support a fiat monetary system, this claim must be squared with the prevailing reality that a fiat monetary system nevertheless prevails. As such, this article examines the motives as to why a fiat paper money system eventually emerged in contradiction to the provisions of the Constitution. What were the political forces and incentives driving the Labor movement to seek the centralisation of the monetary system in government hands? And why has such an obvious transgression against constitutional fidelity gone largely for over a century unnoticed by politicians, jurists and the Australian public alike.

By way of comparison, it is worth observing that in the United States of America the existence of a federally issued fiat paper money in the constitutional arrangements is almost an 'in-joke' amongst those who understand US constitutional history. Constitutional historians and scholars generally agree that the framers of the US Constitution (however conceived) intended to deny the federal government the power to issue paper money. With complete cognisance, the US Supreme Court has still managed to recognise the existence and constitutionality of federally issued fiat paper money.⁵ In a string of cases in the second half of the 19th century, the US Supreme Court not only allowed a fiat paper money system to prevail, but provided the intellectual and legal foundations for the system.⁶

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- 5 See Kenneth Dam, 'The Legal Tender Cases' (1981) *Supreme Court Review* 367, 389; See Gary Lawson, 'The Constitutional Case against Precedent' (1994) *Harvard Journal of Law and Public Policy* 23, 33; See also Jonathon Mitchell, 'Stare Decisis and Constitutional Text' (2011) 110 *Michigan Law Review* 1, 13; See also Nelson Lund, 'Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors' (2012) 19 *George Mason Law Review* 1029, 1030.
 - 6 *Hepburn v. Griswold*, 75 U.S. 603 (1870); *Knox v. Lee*, 79 US 457 (1872); *Juilliard v Greenman* [1884] 110 US 421; (The 'Legal Tender Cases'); See also Dam, *Ibid.* In the case of *Hepburn*, the Supreme Court ruled that the *Legal Tender Acts 1862* (which was passed to facilitate the funding by of the Civil War by the North through the issuing of 'greenbacks') was unconstitutional. In a 4:3 decision the Supreme Court held that the federal government was not granted such a power by the Constitution. The main argument in support of the constitutionality of the fiat currency was that the Federal government has the power to make War and the currency arrangements were a necessary incidental power to the War power. Republican president Abraham Lincoln oversaw the enactment of the original legislation. When the Supreme Court struck down that legislation, Republican President Ulysses Grant subsequently appointed two more Justices to the Supreme Court (increasing the number of judges from 7 to 8 with a possible maximum of 9 — see *Judiciary Act 1869*). Within 15 months *Hepburn* was explicitly overruled in the case of *Knox* in a 5:3 decision. The constitutionality of the federally issued fiat currency (even in peacetime) was upheld 12 years later in the Supreme Court case of *Juilliard*.

Most constitutional lawyers in Australia take it for granted that the federal government has the power to issue a fiat currency.⁷ Even if one were able to demonstrate on constitutional grounds the fallacy of such a belief, there is little likelihood that a groundswell of support would emerge demanding the abolition of the current system. Why then is this study relevant? Apart from the inherent value of upholding the rule of law — in that the Australian government ought to abide by the terms of the Constitution — there is a more practical reason for enlivening this discussion at this moment in history.

The global economic system is transforming into a world of cyber-cash and online transactions. It seems extremely out of place for one to discuss ideas of gold and silver specie and a return to ‘hard currencies’ in this economic and technological climate. The virtues associated with hard currency systems, however, are timeless and transcend even the borderless realms of cyberspace. Ideas such as limitations on the availability of currency and restrictions on the unilateral manipulation of a money supply are fundamental. These ideas are being incorporated into the developing cyber monetary system, as seen, for example, in the encryption innovations underpinning the ‘bitcoin’ market and the ability to ‘mine’ bitcoins.⁸ Understanding the history behind the monetary arrangements in Australia and how political forces manoeuvred to hijack national finances is an important discussion in this building phase of the new tech-based economic order.

1. WHAT THE CONSTITUTION ACTUALLY SAYS

The phrase ‘paper money’ was used in the drafting of the Australian Constitution but it was not discussed or defined by delegates at the constitutional conventions of the 1890s.⁹ It would appear that the term had a given meaning that was understood by all delegates and there was no need for clarification. What was that meaning? Did ‘paper money’ mean a fiat currency unconnected with an underlying commodity or store of wealth, or did it refer to privately issued

7 See *Re Skyring's Application (No 2)* (1985) 59 ALJR 561; *Re Cusack* (1985) 60 ALJR 302, 304.

8 See <http://www.forbes.com/sites/kashmirhill/2013/08/15/congress-is-nervous-about-bitcoin/> (accessed on 2/09/2013)

9 *National Australasian Convention, Official Record of Proceedings and Debates* (Sydney, 1891) (*Convention Debates*, Sydney, 1891); *National Australasian Convention, Official Record of Proceedings and Debates* (Adelaide, 1897) (*Convention Debates*, Adelaide, 1897); *Australasian Federal Convention, Official Record of the Debates* (Sydney, 1897) (*Convention Debates*, Sydney, 1897); *Australasian Federal Convention, Official Record of the Debates* (Melbourne, 1898) (*Convention Debates*, Melbourne, 1898). These records can be accessed online at: <http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/Records_of_the_Australasian_Federal_Conventions_of_the_1890s>.

notes that served as a medium of exchange for gold and silver coin? When presented with two alternative and mutually plausible meanings, the interpretation of the Constitution is assigned to the High Court of Australia. The judges of the High Court must resolve such disputes by relying on methods of constitutional interpretation that are consistent with 'judicial power' (which is itself a contested notion) as well as being a method that is acceptable to the legal and broader community. For example, determining the meaning of 'paper money' based on a game of chance would be unacceptable as a legitimate exercise of 'judicial power' and would not accord with what is expected from a judicial tribunal.

For most of Australian history the High Court has adhered to an interpretive approach known as 'legalism'.¹⁰ Legalism purports to be an interpretive philosophy that puts the plain and ordinary meaning of the text first and applies the ordinary modes of statutory interpretation to the context of the Constitution. A judge would look at the literal meaning of the words used, the textual context in which the words appear and perhaps the legal framework (legislative and case based) within which that provision is to operate. Under the guise of legalism, judges purport to avoid making normative preferences by giving the text of the Constitution its plain and ordinary meaning.¹¹ Although there have been some shifts in the constitutional interpretive philosophy of the High Court in the last two and a half decades, legalism remains a dominant force.¹²

Even when applying this legalist approach, however, and taking a closer look at the text of the Constitution a sound case *against* the fiat currency interpretation can still be maintained. Section 51 of the Constitution defines the powers of the Commonwealth Parliament. It grants the federal Parliament the power to makes laws with respect to:

xii) Currency, coinage, and legal tender:

It should be noted that currency, coinage and legal tender appear in the same subsection reflecting that fact that these three concepts are linked.

Subsection 51 (xiii) states that the Commonwealth shall enjoy legislative power with respect to:

xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

10 See generally, Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21.

11 See generally John Whyte, 'Normative Order and Legalism' (1990) 40 *University of Toronto Law Journal* 491;

12 See generally Sean Coyle, 'Legalism and Modernity' (2010) 35 *Australian Journal of Legal Philosophy* 55.

Taking the textual approach again, and recognising that paper money and banking appear in the same subsection, it is clear that the concept of paper money is more closely linked to banking than it is to currency, coinage and legal tender.

Another subsection that should be noted is s 51 (xvi) which gives the Commonwealth Parliament power over:

xvi) Bills of exchange and promissory notes

Taken from the fact these instruments are noted separately from those terms referring to ‘paper money, currency and legal tender’ it would be fair to say that they are distinct from what is meant by ‘paper money’.¹³

Finally, and perhaps most damning for those believing that the Constitution permits a fiat currency to prevail, is s 115 of the Constitution. Section 115 provides:

A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

The provisions of the Constitution may not explicitly create a monetary system, yet they hint at an underlying system upon which the Constitution was created. Based on the text of the Constitution alone a strong argument can be constructed that a fiat currency arrangement is indeed *not* the underlying system originally contemplated. How, then, did a fiat currency arrangement come about in Australia? There are few if any noteworthy arguments or intellectual defences that posit that the Constitution permits a fiat currency – it seems to be assumed knowledge that it does. To play devil’s advocate, the argument in favour of the constitutionality of a fiat currency might be: Given s 51 (xiii) allows the federal parliament to make laws about paper money — that phrase, being read broadly, necessarily includes a federal power not only to regulate privately issued paper money but in fact provides a constitutional basis for the federal Parliament to legislate the issuing of its own paper money. Moreover the federal government, pursuant to s 51 (xii), can then declare that issued paper money legal tender. Section 115, however, provides a clear and insurmountable obstacle in that the individual States are constitutionally restricted from making anything other than gold and silver coin legal tender in the payment of debts.

If it was not constitutional design that permitted the fiat currency arrangement to arise in the Australian context, what were the ultimate motivations and reasons driving this process? The political forces that introduced and justified the fiat paper money system were mainly concerned with unshackling their respective administrations from the constitutional and financial constraints of government. Those involved in establishing such a system in Australia, such as King O’Malley,

13 Although it is acknowledged that some of the provisions within s51 of the Constitution may indeed overlap: *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 193 (Latham CJ).

understood these dynamics and how they played out in both the English and US contexts and explicitly sought to emulate those developments down under.

II. WHAT WERE THE POLITICAL MOTIVATIONS UNTETHERING AUSTRALIA FROM A GOLD AND SILVER CURRENCY?

He who controls the money supply controls the purchasing power of that money. Money, be it a fiat currency or a hard currency, is therefore a means of political control. By creating financial incentives and disincentives, an overt reliance on physical force is unnecessary as people's behaviour can be influenced indirectly. The booming area of 'behavioural economics' is testament to this generally held belief.

The history of paper money in the United Kingdom and the United States demonstrates that controlling the money supply is an important step in the consolidation of power. Australian politicians learned from these episodes and sought to copy them in order to unshackle the central government from the strictures of financial limitations. It is a self-evident fact that fiat currencies are capable of being easily manipulated. By contrast, 'hard currencies' require the creation of physical stores of wealth. The creation of each additional unit of hard money takes time and incurs costs to produce. As such, hard currencies such as gold and silver coin are less susceptible to overt manipulation. They therefore provide an extremely effective limit upon the ambitions of governments seeking to garner greater control through financial means.

This story has been played out many times through the course of history.¹⁴ The English manifestation of this dynamic is acutely relevant to Australia. The Australian Constitution is born of the English tradition and is a branch of that same tree (as are the American and Canadian constitutions). The English experience is also important for another reason. The events of the late 17th and early 18th century in England capture and convey the way in which paper money enhances and concentrates organised state power. Those who wanted to introduce the fiat paper money system into Australia had their eyes fixated upon a strong centralised Commonwealth government capable of establishing a socialist society.

Accomplishing this fiat currency arrangement in Australia was a political victory explicitly framed upon the fiscal strategies established in England immediately following the Glorious Revolution of 1688. A century later these same arrangements were implemented by Alexander Hamilton in the early years of the American republic.¹⁵

14 The American experience is an important chapter in this field of research but it is not examined in this article.

15 For a classic inquiry into the history of paper money in the US see William Gough, *A Short History of Paper Money and Banking in the United States* (1833). The full copy of the 1968 reprinted version can be accessed at <http://library.mises.org>.

A. *The Glorious Revolution and New Financial Order*

The English constitutional changes of 1688 in England are the ultimate origins and inspiration of the Australian system of fiat currency. This period is important because it saw the development of the paper money system as well as significant constitutional changes aimed at addressing profligate, authoritarian and arbitrary monarchical rule. Both of these developments are linked.

The late 17th century is important from a constitutional standpoint because it is the period when the English experimented with various constitutional systems, including republicanism, and finally settled upon the system of limited constitutional monarchy. In 1688 the Protestant William and Mary of Orange were invited to assume the English throne. The settlement of 1688 or the 'Glorious Revolution' saw a shift in executive power from the absolutist model of monarchy to a model characterised by parliamentary sovereignty. Those supporting the changes hoped that Parliament could control Royal authority — if not militarily then at least through the proverbial 'power of the purse'. The real financial power had shifted from the old money characterised by lavish estates and titles to the new money of the commercial classes represented by Parliament. The power of Parliament over the Monarch through its control of Royal finances was well understood at the time. As one English parliamentarian noted 'tis money that makes a parliament considerable & nothing else'.¹⁶

The dynamics between parliamentary restrictions and greater Royal autonomy were thus set in motion. The development of paper money and the system of central bank mediated credit-public finance developed in response to this dynamic as a source of funding enabling executive (royal) power to grow beyond the limitations of the settlement and financial restrictions imposed by the arrangements of 1688.

In the late 17th century Amsterdam was the commercial centre of Europe and William and Mary, being Dutch, were aware of the innovations in finance that were arising on the continent. The settlement of 1688 saw foreign policy and foreign affairs retained as a royal prerogative. Seeking to fund foreign expeditions against Catholic forces and generally shake off the restrictive fiscal limitations of Parliament, William of Orange sought willing creditors and/or other financial arrangements. One of the main innovations that arose in response to this need was the chartering of the Bank of England in 1694. This ignited a rapid chain of social and governmental developments that historians call 'the financial revolution'.¹⁷

16 Anchil Grey, *Debate of the House of Commons from the year 1667 to the year 1694* (10 volumes, London, 1769) Vol. 4 at 115.

17 See Dickson, P.G.M, *Financial Revolution in England: A Study in the Development of Public Credit 1688-1756* (1967); See also Bruce Carruthers, *City of Capital: Politics and Markets in the English Financial Revolution* (1996).

Financial constraints were nothing new for European royalty. But in the past it was not always an assembly that restricted the fiscal power of the monarch but rather the physical scarcity of precious metals. This saw Spain, among other powers, send explorers such as Columbus across the Atlantic and to the ends of the known world in search of treasures to expand the stock of available gold and silver coin. In furtherance of this goal, it was not unknown for Royal houses to invest significant sums of money in the questionable science of alchemy where base metals were to be turned into precious metals in order to expand their wealth and overcome the limitations imposed by the scarcity of monetary resources.

Prior to the Bank of England centralising the banking system and the issuing of paper money, the issuing of paper notes as money had only really been developed and exploited by shrewd independent goldsmiths. These goldsmiths realised the receipts they issued for deposited gold were being circulated as currency and they could issue, use, circulate and loan at interest more receipts than the actual gold they held. The power of such practices did not escape Royal attention and combined with the Dutch innovations, a new system of central bank credit public finance was born. The centralisation provided by the Bank of England allowed for greater flexibility in reserve ratio lending by banking houses resulting in an expansion of credit via the medium of paper money. The Bank of England was also able to issue public bonds to raise funds that it could lend to Parliament or the Crown and the money received for the bond sales could be lent against several fold. When bonds matured they could be rolled over or new bonds issued to pay off the old. In a sense alchemy had finally been perfected. As scholar Carl Wennerlind has argued:

[A]s the practice of transmutation proved insurmountably difficult, an interest developed in credit-money as an alternative method of expanding the money stock. ... In the 1690s, the Bank of England finally engineered a system of credit-money. The success of this system coincided with (or caused) a rapid decline in royal support for alchemy, elevating credit-money to the status of sole tried and reasonably successful mechanism for the expansion of the money stock. Hence, while the prospect of expanding the money stock at will might have been conceived initially in alchemical terms, it only materialized in the form of credit-money...¹⁸

By 1708, a mere 20 years after the Glorious Revolution, the Crown had reasserted itself in fiscal matters by controlling what financial legislation could be introduced into Parliament. The Crown now also enjoyed the services of the Bank of England as a source of independent funding outside the control of Parliament. The new source of credit was greatly empowering the Monarch and re-inflating

18 See Carl Wennerlind, 'Credit Money as the Philosophers Stone: Alchemy and the Coinage Problem in Seventeenth Century England' (2003) 35 *History of Political Economy* 234-61, 255-57.

royal power after the assertion of parliamentary control at the end of the 17th century. The Bank of England, however, was also providing commercial opportunities to those emerging middle classes who benefited most from the settlement of 1688 and sought to defend it — this class is often referred to as Whigs. Having invested in bonds and generally having their commercial lives intertwined with this new settlement these citizens had a vested interest in maintaining the status quo. They could provide no real opposition to the growth of centralised royal power. It would be cutting off their nose to spite their face given the interests they accumulated through their investments facilitated by the credit money system.

The landed gentry and aristocratic classes, however, had their wealth in independent estates and could thus present a more autonomous resistance against the expansion of royal power precisely because their interests were not so tied and dependent upon the new settlement — these were of course known as the Tories.¹⁹ Even these upper classes succumbed to the promise of lucrative returns being generated by corporate investments and touted by the ‘stock jobbers’. The aristocracy therefore also tied their ancient wealth and their fate into the new system.

With private wealth now vulnerable to the ‘alchemy’ of potentially limitless creation of money by the Bank of England, society was transformed into a polity characterised by a popular patrimony vested in the prevailing system, where financial inter-dependence between society and government sharpened and enhanced royal power to the detriment of *the intended constitutional structure safeguarding English liberty* — that is, parliamentary control of the Executive. The rapid expansion of credit led to several outcomes. Three notable outcomes are:

1. Severe boom and bust cycles ensued as money was loaned out and invested in ever more outlandish schemes such as unnecessary railways projects. One such boom of particular prominence was in relation to the ‘South Sea’ company. In response to the implosion of the ‘South Sea bubble’, UK Parliament passed the infamous *Bubble Act* of 1720 in an attempt to limit the detrimental outcomes of the financial instability by limiting the ability of joint stock companies to form and operate.²⁰

19 See Bob Harris, ‘The House of Commons, 1707-1800’ in Clyve Jones (eds), *A Short History of Parliament in England, Great Britain, the United Kingdom, Ireland and Scotland*, 172-175.

20 The bubble act made things worse because having stifled the availability of joint stock companies as a vehicle for investment without government consent, people could only raise money from loan capital rather than share capital thereby increasing the demand for available credit — leading to further bubbles. This was exactly the opposite of what was intended when the *Bubble Act* was legislated. See also Douglas French, *Early Speculative Bubbles and Increases in the Money Supply* < <http://library.mises.org/books/Doug%20French/Early%20Speculative%20Bubbles%20and%20Increases%20in%20the%20Supply%20of%20Money.pdf> > last accessed on 14 October 2013.

3. The system of credit money also allowed the United Kingdom to embark on nearly a century of warfare, from Spain, to France to the American colonies as England became what some scholars have called 'a fiscal military state'.²¹
4. Finally, the system of credit creation was corrupting the role of government. By the end of the 18th century British industry was putting out its hand in search of government bailouts and subsidies. Politicians were closely aligned with the commercial interests and money was being doled out to 'prop up' struggling sectors.²²

Severe booms and busts, constant warfare and bailouts are all phenomenon that bear an eerie similarity to occurrences seen in more modern times and recent years.

Passages from a parliamentary debate from the late 18th century capture some of the prevailing concerns and sentiments of that time. The context was one where a parliamentary report had recommended the government take action in response to a credit crisis in the manufacturing sector. This debate captures the constitutional tensions aroused in the context of a credit-money system.²³

As would be familiar to contemporary students of government, several experts fronted the parliamentary committee of 1793 on the credit crisis and explained how many of the industries that needed assistance and money to pay incumbent debts and obligations were interlinked with the broader economy. In a sense, these economic players were 'too big to fail'.²⁴ This prompted the report to conclude that the 'evils were ... likely rapidly to increase to a serious extent, if some extraordinary means were not adopted to restore credit and circulation'.²⁵ The report recommended that up to 20 commissioners should be appointed to administer a scheme of government-funded loans.

When the report was debated in parliament on the 29th and 30th of April 1793 several MPs took serious issue with the bailout recommendation. The arguments

21 See John Brewer, *Sinews of Power War, Money and the English State 1688-1783* (1989).

22 See debates regarding the financial crisis of the 1790s extracted below.

23 In the 1790s the convertibility of paper money into gold or silver coin was ceased in England due to the economic turmoil being faced and a near complete fiat system prevailed during the Napoleonic Wars. It was not until 1821 that convertibility was resumed: See Jagjit Chadha and Elisa Newby, 'Midas, transmuting all, into paper: the Bank of England and the Banque de France during the Napoleonic Wars', 2. This paper is unpublished. For the draft text from the London School of Economics website see http://www.lse.ac.uk/economicHistory/seminars/ModernAndComparative/papers2011-12/MidasMay2012_Chadha.pdf (last accessed 06/09/2013).

24 This was a phrase commonly used in association with the 2008 Global Financial Crisis in relation to banks that were nationalised or given financial assistance.

25 Ibid, 5.

against the government loan proposal came from a minority of members. Some notable speeches were from a Mr Jekyll who asked the House that ‘if the executive government is to interfere in such a case are we not beginning a system, where we did not see the end of it?’²⁶ Another member, Mr Fox, then noted:

If the sum now proposed to be raised (£5, 000, 000) should be insufficient — were we to stop? ... Parliament and government were to assume a new character and a new function, the one legislative, the other executive; but now they were about to depart from their natural functions and to support the credit of commercial houses by advancing money upon their stock in trade ... the system was ... dangerous to the constitution ... in a constitutional view the commercial should never be blended with the legislative or the executive ... it was a measure exceedingly alarming to the freedom of Englishmen.²⁷

Mr Fox then implored the House to pause ‘before they sanctioned a system unknown to our constitution and which might subvert our liberties.’²⁸ A Mr Alderman also argued:

How was government to take what related to commercial dealings into its hands, without establishing a precedent of the most dangerous and alarming nature ... How were the committee sure that this would not damp the ardour of commerce, and shake the general principle, which was the life of commerce itself, the control which every man had over his own property ... Was this not opening the door to the most unconstitutional and dangerous patronage? Good God! Did the committee see the extent of the power which this might give to the executive government? - a power which it was the first duty of the House jealously to watch.²⁹

The argument that won the day however is encapsulated by a Mr Pitt who expressed the sentiment that ‘on some occasions the urgency of particular instances must outweigh general principles’.³⁰ On that sentiment, the House of Commons passed the bailout legislation ignoring the constitutional arguments expressed. Even though these views were minority views it was important that the dissenting views were recorded for posterity.

26 Hansard, 756.

27 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 756 (Mr Fox).

28 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 758 (Mr Pitt).

29 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 764 (Mr Alderman Anderson).

30 United Kingdom, *Parliamentary Debates*, House of Commons, 27 April 1793, 758 (Mr Pitt).

The English experience embodies the principle that when the government can control the money supply, government power becomes centralised to an extent that is beyond accountable limits. One of the most important accountability mechanisms that the system of Westminster Parliamentary government is supposed to embody is that of parliamentary control of finances — that is — parliament has the power of ‘supply’. The system of credit-creation and central banking fetters this mechanism by giving the Executive a means of raising funds outside the control of Parliament.

B. The Australian Experience

In this second part of the discussion the focus is shifted to the Australian historical and political context around the turn of the 20th Century — the period when the Constitution was drafted and adopted.

From 1788 the monetary system in the Australian colonies had been quite ad-hoc with Spanish dollars floating in and out of the colonies, promissory notes and other mediums being used to facilitate trade and commerce. The market needed a viable medium of exchange in workable denominations. In response to this need, private currencies started to appear around the 1840s and 1850s. This period up to 1911 has come to be known as the ‘free banking’³¹ era and the Australian colonies generally experienced what has been called the ‘long boom’³² from 1850-1890.

Banks were barred by statute from over issuing against their reserves but also had a market incentive not to over issue currencies lest public confidence in their services be shaken. All paper money was backed and convertible to gold. In this period there was one important banking crisis in 1893 but that was largely due to a perfect storm of land speculation and the availability of English capital through Australian banks. The land bubble burst and the mal-investment was realigned within the space of a few months to a year.

Paper money that was un-backed by bullion or gold coin was unknown and the thought of a government issued fiat currency was outrageous. Imperial authorities just would not allow it. The main example of this imperial predisposition against government issued un-backed legal tender notes can be seen in the controversy surrounding the resignation of Queensland Premier Arthur Macalister in July 1866. The Macalister administration had taken on a program of extensive public works financed by quite substantial loans and debentures

31 See Kevin Dowd, ‘Free Banking in Australia’ in Kevin Dowd (ed) *The Experience of Free Banking* (1992).

32 Ken Buckley and Ted Wheelwright, *No Paradise for Workers. Capitalism and the Common People in Australia 1788-1914* (1988) 8.

issued in London.³³ When the loans dried up Macalister took the dangerous step of initiating legislation that would allow the Queensland colonial government to issue paper money (unsupported by hard currency and not convertible) and declare the issued paper as legal tender in order to pay workers. Governor Bowen made it known that any such legislation would not obtain Royal Assent. Macalister and his administration promptly resigned.³⁴

In the late 1890s the Labor movement in Australia was just starting to get organised. From its earliest years one of the main platforms advocated by the Labor movement was a government owned central bank. Labor was increasingly suspicious of London based capital and the influence it wielded in the Australian colonies through private banking houses. It was thought that a government bank would address this concern and stabilise the economy making life that little bit more bearable for the masses of Australian workers. Furthermore, as with the English experience discussed above, a central government bank could allow the executive government to pursue its own agenda (in this case - socialist ideals) without financial limitations.

Labor quickly set about establishing its influence in the politics of the new Commonwealth. The main political issue dividing Australia at federation, however, was not banking or finance but rather it was trade. Australia's first Prime Minister, Sir Edmund Barton, was part of the Protectionist Party. The Protectionists generally advocated high tariff barriers in order to protect Australian industry. The main political opposition to the Protectionist Party was the Free Trade Party of Sir Henry Parkes (the 'Father of the Federation'). One of the reasons the Protectionist Party was able to form government under Barton was that it received support in Parliament from the newly formed Labor party. Labor's influence in Barton's government, and later when it won office in its own right in 1910 put the issue of banking and currency on the Commonwealth agenda right from the start.

The Australian Labor movement was, in global terms, a ground-breaking development. In 1899, Anderson Dawson of Queensland formed the first Labor led government anywhere in the world.³⁵ Granted, it was a minority government and lasted for one week, but it was a government nonetheless. In 1904 Labor formed a minority government at the federal level, but it was not until 1910 under Andrew Fisher that a majority Labor government ruled federally and in fact for the first time in Australia's short history had a majority in both houses of Parliament, allowing for the radical monetary changes to be enacted.

33 See Sidney J Butlin, *The Australian Monetary System 1851-1914* (1986) 60.

34 See R. B. Joyce, 'Bowen, Sir George Ferguson (1821-1899)', *Australian Dictionary of Biography, Volume 3* (1969) 203-207. English authorities approved of Bowens actions.

35 See D J Murphy, 'Dawson, Andrew (1863-1910)' *Australian Dictionary of Biography, Volume 9* (1981).

The history of the establishment of the Commonwealth Bank of Australia is closely intertwined with the influence of one man: King O'Malley. O'Malley was known to have considered himself the Australian Alexander Hamilton³⁶ and passionately articulated the case for a Commonwealth Bank. The origins of the idea of a national bank in Australian politics can be traced to the sixteen-plank platform drawn up by Labor leaders in New South Wales in 1891 as they prepared to nominate some of their own to contest parliamentary elections.³⁷ King O'Malley, a Canadian by birth, but American by upbringing, naturally gravitated towards Labor in order to see the plan of a national bank to fruition.³⁸ As noted by Jauncey, though O'Malley first approached anti-Labor forces that were in power after 1901 to promote this idea, he soon abandoned such a path given the business connections such forces had with the private banks;³⁹ it was unlikely that men of such ilk would support a government bank that would directly compete with the private banks. Labor had already been in power once (albeit for a few months) in 1904 but had refused to consider O'Malley's plan. O'Malley's advocacy at party conferences ensured that the next time Labor would be in power a national bank along the lines that he envisioned would be closely considered.

When Labor regained power in its own right in 1910 King O'Malley was part of the Federal Cabinet. O'Malley faced opposition to his plan from within the Labor party and as such, in order to push the idea of a national bank into a viable bill before parliament, O'Malley became the driving force behind a secret caucus movement known as the 'Torpedo Brigade'⁴⁰. The Torpedo Brigade operated in secret and prevented the national bank issue from being openly discussed. This gave the ostensible impression that the matter of a national bank had been settled and this insulated the government from attracting the ire of influential banking interests. The final establishment of the bank was a well-planned development. As Jauncey concludes:

...the Commonwealth Bank cannot justly be said to be the result of a national political upheaval. The bank is the consequence neither of an economic disturbance nor of hasty political action but rather the result of calm conjecture in a time of prosperity.⁴¹

36 A R Hoyle, *King O'Malley The American Bounder* (1981) 108. Hamilton having played an integral part in the establishment of a US national bank in the early 19th century.

37 Robin Gollan, *The Commonwealth Bank of Australia* (1968) 13. Gollan notes that the idea of a national bank is also a feature of Marx and Engel's *Communist Manifesto*.

38 Larry Noye, *O'Malley MHR* (1985) 87-92.

39 L C Jauncey, *Australia's Government Bank* (1933) 47-8.

40 Ibid 57. See also Noye, above n 37, 114-20.

41 Ibid, 59.

In 1911 a tax was placed on privately issued paper money — driving that part of the banking industry into the ground — and the Treasury directly took over the issuing of paper money. Upon its establishment, the Commonwealth Bank was not established as a central bank. It had the ordinary powers of a chartered bank with the important exceptions that it was the banker to the Commonwealth. The Commonwealth Bank would operate as an ordinary trading bank but would also set up a savings bank business that could take over the post office savings facilities that had to date been at the disposal of the State governments and a source of investment funding open to the States outside the banking sector.⁴²

During the First World War the Australian government determined that large parts of the banking sector were to be brought under the direct control of the government.⁴³ The modalities of this initiative required the Commonwealth Bank to take a leading role in the organisation and administration of the banking industry in line with government requirements. This episode meant that the stature and importance of the Commonwealth Bank to the Federal government was consolidated and its position as an integral institution of national importance confirmed.

The actual issuing of paper money remained the province of the Treasury until 1924 when this function was also handed to the Commonwealth bank.⁴⁴ In 1932 the gold standard was ceased and the notes issued by the Commonwealth bank were no longer backed by gold yet remained legal tender.⁴⁵

The enhancement in royal power experienced in England through the credit money arrangements facilitated by the Bank of England in the late 17th and 18th centuries were mirrored in the establishment of the Commonwealth bank and the expansion of the fiscal scope available to the Federal government in Australia. It is essentially the same trick in a different context.

In recent years the question of paper money under the Australian Constitution has been brought before Australian courts on several occasions and in most cases by the same litigant — Mr Alan George Skyring.⁴⁶ Mr Skyring has

42 Butlin, above n 29, 71.

43 Noye, above 35, 129. The federal government was most likely able to control banking during the war years on the basis of the 'defense power': s51 (vi) of the Constitution.

44 Commonwealth Bank Act 1924 (No. 15)

45 Commonwealth Bank Act 1932 (No. 16)

46 *Re Skyrings Application (No 2)* (1985) 59 ALJR 561; *Re Alan George Skyring v Commissioner of Taxation* [1991] FCA 564; *Jones v Skyring* [1992] 66 ALJR 814 (declared a vexatious litigant in the High Court. Justice Toohey extensively details the history of litigation up to 1992 instituted by Mr Skyring in furtherance of his position); *Re Attorney-General (Cth); Jones v Cusack* (1992) 66 ALJR 815; *Re Skyring* [1994] 68 ALJR 618; *Re Attorney General (Cth) Ex parte Skyring* (1996) 135 ALR 29; *Re Skyring* [1995] QSC 55; *Ex Parte Skyring* [1996] HCA 4; (1996) 135 ALR 29; (1996) ALJR 321; *Alan George Skyring v Paul Desmond Sweeney* [1998] FCA 1661; *Gunter v Hollingworth* [2002] FCA 943; *Skyring v Lohe* [2000] QCA 451; *In the Matter of Skyring* [2004] FCA 827; *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151; *Krysiak v McDonagh* [2012] WASC 270 (26 July 2012).

consistently argued that paper money in Australia is unconstitutional. Mr Skyring, an engineer by training, usually represents himself in court proceedings, including proceedings before the High Court. Such are his convictions on this matter that Mr Skyring once defaced Australian bank notes, in order to bring the matter before court and present his argument. Mr Skyring was eventually convicted for the crime and his argument dismissed. On another occasion Mr Skyring attempted to pay registration costs for a state election in Queensland with gold coins (as required by s 115 of the Constitution) and when the coins were refused Mr Skyring took the registrar to court. Again the Queensland court dismissed his argument without it really being taken seriously. The courts have consistently rejected Mr Skyring's submissions on this point and he has now been listed as a vexatious litigant.

To his credit Justice Kirby in 1998 once gave Mr Skyring over an hour to make his submission in chambers. On reading the full transcript of the proceeding it is obvious that Mr Skyring is sincere and indeed knowledgeable about legal procedure but unfortunately his arguments are unfocussed, repetitive and imprecise. The argument he presents is based solely on s 115 with little if any recourse to historical context. The High Court has dismissed this line of argument with minimal engagement of its merits by concluding that s115 does not apply to the Federal government and that it only applies as a limitation upon the States.⁴⁷ That reasoning may hold with respect to the States issuing their own paper money and deeming that currency legal tender, yet the reasoning of the High Court does not explain how the States can make or permit the federally issued paper to be legal tender in the payment of State debts (such as payroll tax, stamp duty and other debts/fines imposed by State bodies).

III. WHAT IS SO BAD ABOUT A FIAT CURRENCY ANYWAY?

Many of the leading scholars associated with the Austrian School of economics consider fiat money arrangements dangerous to the prosperity of a society and personal liberty.⁴⁸ The main arguments offered in support of these beliefs emerge from an understanding of the government dynamic explained above. When the government can arbitrarily control the value of wealth and the purchasing power of a currency unit, that wealth can be taken away (stolen, taxed or whatever you

47 See *Skyring, Ex parte; Re Attorney-General of the Commonwealth B111/1996* [1996] HCATrans 376 (20 September 1996); *Re Attorney-General (Cth); Ex Parte Skyring* (1996) 135 ALR 29.

48 See primarily, Friedrich A. Hayek, *Denationalisation of Money: The Argument Refined* (1990); Murray N. Rothbard, *What has the Government done to our Money?* (1980); See also Andrew Dickson White, *Fiat Money Inflation in France* (1993); Guido Jorg Hulsmann, *The Ethics of Money Production* (2008).

want to call it) at whim. At the macro level, values remain steady when arbitrary manipulation is removed from the system. A steady economic environment favours planning and investment whereas a system that embodies unpredictable deviations in monetary value discourages those important phenomena.

Using the money supply to stimulate the economy may meet with some short term success. In the long term, however, artificial value bubbles (stocks, technology/internet companies, property) inevitably burst wreaking havoc with people's lives, livelihoods and families. The flow-on effects of economic instability and the consequent damage this causes to the fabric of society is catastrophic. Economic decline in concentrated sectors have severely damaging effects on associated communities. For example the decline in the US automotive sector has seen Detroit now exist in post-apocalyptic circumstances where streets are empty, businesses are boarded up and crime is rampant. When politicians feel that they have the power to change things and the tools to make their personal ideals a reality, to build the proverbial tower of Babel, their economic meddling inevitably results in unforeseen consequences as incentives and dis-incentives are perverted in a mass of fiscal confusion.⁴⁹

Whether it was the English Monarchy seeking military funding to expand its wealth and impose its personal morals on other peoples, lands and civilizations; or Alexander Hamilton seeking to create the American utopia; or even King O'Malley seeking to stand on their shoulders — fiat currencies skew the real bounds and limitations imposed by calculations of value based in the physical world. For those that do not accept the fiat currency and its falsely proscribed value, there is always the iron fist of the State ready to proselytize non-believers.

What are the prospects that a monetary system will emerge that embodies the principles of liberty, property and non-coercion? Given the technological advances of the internet age fuelled by the growth in online commerce, the emergence of a cashless monetary system is very likely. Will this cashless society, however, still be subject to the same state-sanctioned monetary manipulation and control to which the current fiat currency system is susceptible? These problems, along with several other monetary insights identified by the Austrian school, represent the obstacles that any tech-based monetary system must address. Creative solutions to these problems, although perhaps unimaginable at the moment, will inevitably arise so long as the autonomy of the internet is maintained and the cyber realm remains a place where people can freely share ideas.

49 This assessment makes the naïve assumption that politicians are following their internal ideals rather than making decisions based on political convenience - or even worse - that they are the tools of external special interests attracted to the concentrated power that exists in the hands of politicians.

IV. CONCLUSION

In a congressional confirmation hearing Reagan Supreme Court nominee Robert Bork was asked by then Senator Joe Biden (now US Vice President) if he could identify any precedents that should be reconsidered in light of their original meaning. Bork pragmatically replied:

I cite to you the legal tender cases. These are extreme examples admittedly. Scholarship suggests that the Framers intended to prohibit paper money. Any Judge who today thought he would go back to original intent really ought to be accompanied by a guardian rather than sitting on the bench.⁵⁰

The American position on the constitutionality of paper money has developed a schizophrenic outlook. Scholars agree that the Constitution was meant to prohibit State or federally issued paper money. Nevertheless there is a mainstream chorus that still maintains and tows the line that it is constitutional for the federal government to issue a fiat paper currency 'on pragmatic grounds'. A similar sentiment can be seen in the debates surrounding the English financial crisis of the 1790s where William Pitt the Younger (who was the youngest ever English Prime minister at 24 in 1783) expressed the sentiment 'on some occasions the urgency of particular instances must outweigh general principles'. Rocking the boat, it would appear, is deemed too controversial and the consequences too extreme or unpalatable to be seriously contemplated at the highest levels of government today. Even the dictates of basic constitutionalism are seemingly superseded by the interests of those invested in the prevailing State system of financial corporate-and-public patrimony.

Although the issue of fiat money is not as widely acknowledged and discussed in Australia as it is in the US, this article argues that the same fundamental conclusions are shared in both jurisdictions. The intellectual classes in Australia either do not know about this particular perspective or deem it a curious anomaly without appreciating the historical and political significance of this constitutional sleight of hand.

The accepted approach to constitutional reasoning in Australia holds that the text of the Constitution takes primacy. If the text is indeterminate only then can an examination of other factors be entertained. One of the approaches which the High Court has in the last 25 years adopted in this context is the use of history in constitutional reasoning. Yet even if the unwarranted concession is made that the text of the Australian Constitution is unclear on the point of whether a federally issued fiat currency is constitutional as a national currency, the historical

50 'The Supreme Court Nominee's Record Examined: Bork Faces Tough Questions on Privacy and Equal Rights', 45 *Cong. Q Weekly Rep.* 2258-59 (September 19, 1987).

record provides a similar perspective on the unconstitutionality of paper money. History illuminates the relationship between the concept of executive fiscal accountability and paper money. Seen through this prism the framework that emerges is one where fiat currency is positively correlated with a reduced executive accountability.

In order to sustain an argument that the text permits a fiat currency you must subscribe to a constitutional philosophy whereby the document can be bent and stretched to mean something that it obviously does not mean. Under this philosophy the Constitution thus becomes a tool box through which scholars and politicians rummage to find justifications for the expansion of government power rather than representing a genuine limit on government power.

Even if the strong economic arguments against fiat currency are put to one side, and you examine this issue from a strictly constitutional perspective, any way you slice it, the system of fiat paper money in Australia must be closely examined and questioned. Any honest inquiry will inevitably conclude that the Australian Constitution does not support a system of fiat currency that can apply nationally across federal and State jurisdictions. Whether it is the text of the Constitution, or looking at the historical record, or even examining broad constitutional principles such as executive accountability, the fiat currency arrangements in Australia are premised on shaky constitutional grounds.

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MARCUS WITCHER

Taking a Little off the Top: How Henry VIII and Edward VI Destroyed the Value of England's Currency

ABSTRACT: Throughout the Tudor era, the Crown turned to debasement of the currency — the replacement of the gold or silver content of coins with a base metal — as a non-parliamentary method of raising revenue. Tudor kings and queens used debasement to tax their subjects without the consent of the people that is guaranteed in English common law. The heaviest period of debasement occurred from 1542 to 1551 during the reigns of Henry and Edward. Throughout this period, England also experienced the greatest increase in prices. From 1485 to 1603, agricultural prices increased by 338% and industrial goods increased by 131%. Contemporaries began commenting on the high prices in the late 1540s and the Crown, needing a scapegoat, blamed the wealthiest members of society. But it was the Crown that made life more difficult for its subjects by contributing to price increases through its policy of debasement.

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Many economic historians have studied the price increases of sixteenth-century England. A consensus has emerged that focuses more on population increases and harvest failures than on the Crown's policy of debasement. John Munro argues that harvest fluctuations had more of an effect on the lives of everyday people than the debasement of the coinage.¹ However, while it is true that population increases and agricultural disasters played a significant role in England's

1 John H. Munro, "Debasement of the Coinage and its Effects on Exchange Rates and the Economy" in *Money in the Pre-Industrial World* edited by John H. Munro, (London: Pickering & Chatto, 2012), 68.

price rise, the most rapid increase in prices occurred when King Henry VIII and later his son King Edward VI turned to debasement to fund wars. Elizabeth reestablished the value of the coinage early in her reign but later turned to debasement as a means to pay for her European campaigns. The result of the Tudors' policy of debasement was a rough century in which real purchasing power for English subjects decreased and hardships were the standard not the exception.

I.

The story of King Henry VIII and his six wives is well-known. It is equally well-known that Henry's tumultuous personal life dramatically influenced his policies. The decision to separate from the Catholic Church can be attributed to Henry's desire to divorce his first wife Katherine of Aragorn. Less studied is the effect that Henry's fifth wife, Catherine Howard, had on policy. Henry and Catherine were married in July of 1540, the marriage proved to be short lived. Catherine had an affair with Henry's courtier Thomas Culpepper and by 1541 rumors of her infidelity spread through the Court. Initially, Henry refused to believe the accusations against Catherine. Only believing the accusations when evidence of her adultery was presented to him, Henry asked for a sword so that he might kill Catherine but soon after dissolved into tears and complained of having "such ill-condition wives."² In short, the king was distraught and his manhood had now been directly challenged. According to historian John Guy, "with his ego in this fragile state, Henry resolved to restore his 'honour' in a war against France."³ Thus Catherine's betrayal contributed to Henry's decision to invade France.

France and Spain had withdrawn their ambassadors to England in 1539 in response to Pope Paul II's excommunication of Henry and for once were allied together against England. Yet the truce between the Spanish and the French did not last and by the summer of 1541 — when Catherine was discovered to have cheated on Henry — the two nations were once again at odds.⁴ Henry and Charles I of Spain agreed to a treaty in 1543 and had plans drawn up for a joint invasion of France in the summer of 1544.⁵ The decision to go to war came easy to Henry who had always fantasized about restoring the glory that Henry V had won for England at the Battle of Agincourt and restoring his ancient, and preposterous, claim to the French throne.⁶ The decisions about how to finance the war,

2 David Starkey, *The Reign of Henry VIII: Personalities and Politics* (London: George Phillip, 1985), 128; Karen Lindsey, *Divorced, Beheaded, Survived: A Feminist Reinterpretation of the Wives of Henry VIII* (New York: Addison-Wesley, 1995), 175.

3 John Guy, *Tudor England* (New York: Oxford University Press, 1988), 190.

4 Guy, 184.

5 J.J. Scarisbrick, *Henry VIII* (New York: University of California Press, 1968), 434; Guy, 190.

6 Scarisbrick, 54, 135.

however, proved more elusive. Direct taxation had to be approved through parliament and was therefore not at the top of Henry's options. Henry had considerable lands that he had acquired from the dissolution of the monasteries, an amount totaling £120,000 a year.⁷ These rents would have provided the Crown with financial independence for many years had Henry not gone to war. Needing to finance his war, however, Henry sold off the lands for the market value of twenty years of rent. As a result, Henry raised a substantial amount of money in the short term to pay for the war.⁸ But the king still needed to raise more revenue and in 1542 he turned to debasement of the coinage as a means to make up the difference.

While Henry ordered for the coinage to be recalled and debasement to proceed in 1542, the coins did not all flow in immediately. The Crown led in the debasement by devaluing the coins in its possession. Individuals reminted their own coins because by doing so they could pay less "real money" for their debts — including their taxes.⁹ Demand to remint coins was so great that the government opened six new mints.¹⁰ Henry received a total of £363,000 from the debasement of the coinage. While this was a substantial amount of revenue, it was not enough on its own to pay for the war, which cost £2,134,784. Further revenues to pay for the war included £656,245 from taxation, £799,310 from the sale of ex-religious lands, £270,000 from forced domestic loans, and £100,000 from loans from Antwerp.¹¹ The cost of the war put serious financial stress on the Crown.

If funding the war had seemed difficult, the fighting itself did not go much better. The plan that Charles and Henry had agreed on was never carried out. The two never marched on Paris; instead Charles negotiated a separate peace with Francis I of France and left Henry to besiege the town of Boulogne in the fall of 1544. After nearly two months the fortress town surrendered.¹² Shortly thereafter, Henry came to understand that without Charles' help there was no way he could defeat the French. Realizing the war was over, he returned to England. In the Treaty of Ardres, the French conceded Boulogne to the English until 1554 when France would pay £600,000 in exchange for the town. Furthermore, Henry received £35,000 per year and the French would use their leverage to bring the Scottish into a new peace treaty with England.¹³

Although on paper it might appear that Henry had won the war and restored his masculinity, the war had bankrupted the Crown and the effects of debasement

7 Alison Weir, *The Six Wives of Henry VIII* (New York: Grove Weidenfeld, 1991), 393.

8 Starkey, 135.

9 J. D. Gould, *The Great Debasement: Currency and the Economy in Mid-Tudor England* (New York: Oxford University Press, 1970), 20.

10 Gould, 3.

11 Guy, 192.

12 Guy, 191; Scarisbrick, 448.

13 Guy, 192.

were being felt by the English population. The debasement of the coinage, which helped finance the war against France, devalued the currency and raised prices. In 1550, an Englishman explained why prices had risen: "By occasion of the warre at Boloine the coyne of Englande was first impaired by Kyng Henry, and from that tyme continually to this day was corrupted and made worse and worse."¹⁴ While some contemporaries directly linked the rise in prices to the debasement of the coinage, those who did were certainly in the minority. Most people simply realized that prices had increased and that making their daily bread had become harder.

II.

In 1348, the Black Plague broke out in England. The plague killed around 60% of the English population.¹⁵ As a result, wages soared and prices declined. It took over a century for England to regain its population. By the early sixteenth century, the demography was beginning to catch up with England and the expanding population was pushing prices up and wages down. Some economic historians, such as Geoffrey Maynard, have argued that the growing population in England was more important to the rise in prices than debasement.¹⁶ This argument is built around the idea that the agricultural sector of the economy was unable to expand its output to meet the demand of an expanding population. These historians explain that agricultural prices increased more rapidly than did industrial prices. This, they explain, is due to the inelasticity of foodstuffs, and the far greater demand that was present for agricultural commodities.¹⁷ One criticism of the population argument is that the thirteenth and eighteenth centuries both saw more rapid population increase than the sixteenth century and prices did not drastically increase.¹⁸ Furthermore, if the demand for foodstuffs was so great then there should have been ample incentive for the demand to be met — unless there was an outside force preventing the demand from being filled. In which case that force, and not population growth, would be the cause of price increases.

14 "Evil Effects of the Debasement of the Coinage noted in Contemporary Chronicles, 1550" in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 186.

15 Ole Jorgen Benedictow, *The Black Death 1346-1353: The Complete History* (New York: Boydell Press, 2004), 383.

16 R.B. Outhwaite, *Inflation in Tudor and Early Stuart England: Second Edition* (London: Macmillan Press, 1982), 43.

17 R.B. Outhwaite, *Inflation in Tudor and Early Stuart England: Second Edition* (London: Macmillan Press, 1982), 43; Keith Wrightson, *Earthly Necessities: Economic Lives in Early Modern Britain* (London: Yale University Press, 2000), 129.

18 Outhwaite, 49.

Prices increased throughout the Tudor era indicating that the large increase in population did play a role in the price increase. From 1501 to 1530, prices for foodstuffs increased by 50%, while industrial products saw a 12% increase.¹⁹ During the first third of the century, prices rose without any major debasement of the coinage. Furthermore, agricultural prices increased more rapidly than industrial prices. The population argument therefore makes sense for the first third of the century when a surge in population would have rendered an increased number of young people without land — who would need to consume foodstuffs but perhaps would have little need for industrial items. It is also possible that there was price stickiness in the production of food due to an economic environment where taking a risk might mean starvation. Additionally, conventional Christian doctrine identified the pursuit of wealth as illegitimate; such pursuits were “tainted with the sins of covetousness and avarice.”²⁰ Also, restrictions existed that controlled the number of people who could supply a market, there were no economies of scale, there was very little specialization, and most farmers embraced conservative planting practices that focused on controlling risk instead of maximizing production.²¹

Those who emphasize population growth as the major cause of the increase in prices deny that the debasement of the coinage by Henry — and later by Somerset during Edward’s reign — had a great effect on prices. Between the years of 1542 and 1551, the heaviest years of debasement, the money supply more than doubled.²² The only way in which doubling the money supply would not have a dramatic impact on prices would be if the velocity of the currency somehow decreased. There is little evidence that velocity decreased as a result of the debasement, in fact the debasement increased it by encouraging silver, which had a higher velocity than gold, to flow into England — where it was overvalued.²³ The debasement of gold and silver was not done evenly and “although both metals suffered in the great debasement following 1542, silver suffered much more than gold, with the result that the ratio dropped from 12.3 to 1 in 1541 to a ridiculous 5 to 1 by 1546, a ration which grossly undervalued gold.” Contemporary observers noted the flood of silver into the country. William Lane wrote to Cecil in 1551 and complained that “the lyke of thys myscheffe hapnyd here in ynglo[n] d in the monthes of June, Julij, and awguste laste, in the wyche 3 monthes was caryyd owte of ynglond not so lyttyll as a hundarthe thousand powndes of gold; and yette dyd there sylvar come in to the land as faste.”²⁴ Gold flows out of the

19 Outhwaite, 12.

20 Wrightson, 57.

21 Wrightson, 56-57.

22 Gould, 83.

23 Outhwaite, 56.

24 “William Lane to Cecil on the Coinage and other matters, 18 Jan, 1551.” in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 183.

country were so extreme that the Crown passed the *Act Against the Exportation of Gold and Silver* in 1553. The legislation asserted that “the Golde and Sylver of the Coygne of this Realme hathe and daily ys and been carried and conveyed into France” and established “that no person sholde carrye or make to be carried out of this Realme or Wales from no part of the same, anye maner of money of the coigne of this Realme... upon peine of Felonye.”²⁵ It is clear that the amount of silver in circulation increased in England during the time of debasement. Therefore, it is unlikely that the debasement of the coinage was accompanied by any decline in the velocity of the currency.

The thirty year price index from 1531 to 1560 demonstrates that prices during the debasement increased much more uniformly than from 1501 to 1530. The price of foodstuffs increased by 96% and the price of industrial products increased by 69%.²⁶ When prices increase because of devaluation of the currency, they tend to rise across the economic spectrum (with some consideration for the elasticity of demand). The increase in all goods during this time indicates that something beyond population was driving prices up. Some economic historians have claimed that because there was a delay between the debasement and the upward rise in prices that debasement must not have caused the increase in prices. This view does not take into account that while the standards were altered by Henry in 1542, the debased coins did not go into wide circulation until 1544-1545.²⁷ Therefore, there would have been a lag between the enactment of debasement as a policy and the increase of prices. Furthermore, the greatest factor that was altered between the 1501-1530 index and the 1531-1560 index was the debasement of the coinage. The debasement of the coinage played a pivotal role in the drastic increase in prices between the death of Henry and the coronation of Elizabeth I.

III.

While Henry started the debasement process in 1542, the policy was continued during Edward's reign. Edward took the throne when he was only nine. As a result, a regency council was established to govern until Edward came of age. The head of the council was Edward Seymour — Edward VI's uncle. Seymour, who had been the Earl of Hertford during Henry's reign, awarded himself a new title and became the Duke of Somerset. Somerset's major obsession was the conquest of Scotland and the unification of the English and Scottish thrones through

25 “Act Against the Exportation of Gold and Silver 1553” in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 178.

26 Outhwaite, 12.

27 Outhwaite, 46.

the marriage of young Edward to Mary Stuart. Somerset invaded Scotland in September of 1547, just seven months after the death of Henry. He failed to implement an effective blockade and in the summer of 1548 the French sent six thousand troops with artillery to Scotland.²⁸ As a result, the war was extended and the price of the campaign increased.

When the war was finally over, it totaled £580,393. Somerset's invasion of Scotland cost an extraordinary amount of money and almost forced the French to declare war on England.²⁹ The campaign ultimately failed to achieve Somerset's goals and he withdrew his forces from Scotland in 1549. In order to finance the conflict, Somerset turned to debasement. Since Henry had debased the currency, rents had increased by 77% per cent.³⁰ Common people felt the impact of the devaluation of the currency and some began to form explanations for their hardship.

Complaints about the rising price of goods and rent became commonplace. A merchant responding to complaints about the increase in his prices complained that the cost of all textiles had risen "and all other kynde of clothe made within this Realme is lykewyse raysed at suche lyke pryses, And the pryses notwithstandinge, the sayde clothe was never so yll and falsely made."³¹ Pamphleteers and preachers such as Hugh Latimer and Robert Crowley blamed enclosures for the rise of food prices claiming those that raised sheep for the European clothing market were "men without conscience... cormorants, greedy gulls, Yea, men that would eat up men women and children."³² There was a growing sense that the rich land holders were exploiting the poor by raising sheep instead of planting foodstuffs. One social commentator questioned how "seing ther is at this present so maney Shepe within the realme, howe chance it, that woll is now doble the price that it was at within this vij years."³³ There was deep suspicion of the wealthy and many believed that enclosures were to blame for the increase in prices.

Widespread frustration with high prices put pressure on the Crown to take action. In June of 1548, Somerset decided to enforce existing legislation against enclosures. He established a commission to travel across England to implement the law. The head of the commission explained that his goal was "to remove the self-love that is in many men, to take away the inordinate desire for riches... to

28 Guy, 199, 201-202.

29 Chris Skidmore, *Edward VI: The Lost King of England* (New York: St. Martin's Press, 2007), 109-110.

30 Skidmore, 91.

31 "Rise in the Prices of Cloth Goods, 1551." in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 191-192.

32 Skidmore, 91.

33 "Policies to Reduce this Realme of Englande Unto A Prosperous Wealthe and Estate" in *Tudor Economic Papers*, vol. 3. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 320.

expel and quench the insatiable thirst of ungodly greediness wherewith they be diseased, and to plant brotherly love among us.”³⁴ According to historian Chris Skidmore, Somerset understood what he was doing: “he was the first politician to realize the full value of popularity, which he ostentatiously used to supplement his quasi-regal authority.”³⁵ Unfortunately for Somerset, his attack on enclosures created deep animosity among many at Court. Many of those who made up the government were the wealthy land owners that Somerset’s policy attacked. Others in Somerset’s service questioned if enclosures had led to high prices and rents.

Sir Thomas Smith was forced to retire from his secretary duties in 1549, due to his insistence that the debasement of the coinage was the major reason for high prices. Smith had presented Somerset with a vigorous financial policy that he believed would solve many of England’s economic problems. At the heart of Smith’s program was his opposition to debasement and in the summer of 1549, he was forced to leave London and settle down in his country home. From there he wrote *A Discourse of the Commonweal of This Realm of England*. According to Mary Dewar — the historian who identified Smith as the author of the work — the central thesis of Smith’s work is “that the social distress and widespread economic dislocation were directly related to the debasement of the coinage.”³⁶ *Discourse* consisted of the imaginary conversations of five characters, each representing a different socio-economic section of England. Four of the characters complain about the poor economic conditions and the Doctor analyzes their complaints and provides explanations. In one exchange, the Knight says to the Doctor: “Then you think plainly that this alteration of the coin is the chief and principal cause of this universal dearth?” The Doctor responds that “experience and proof does make more plain; for even with the alteration of the coin began this dearth, and as the coin appeared so rose the pace of things withal.”³⁷ Smith, speaking through the Doctor, conveys to readers what he could not get through to Somerset: that the Crown, through debasement, was responsible for the enduring decline of the English economy.

Around the same time that Smith fell out of favor, Somerset himself began a political descent. In June of 1549, the council pleaded with Somerset to end the parliamentary session and reestablish order in the country. Somerset’s policy towards enclosures had emboldened those who wanted to see more equality and fairness in society. John Hales, a member of Parliament, added to the council’s anxiety by passing the *Act for the Relief*, which established a poll tax for

34 Skidmore, 92.

35 Skidmore, 93.

36 Mary Dewar, “The Authorship of the ‘Discourse of the Commonweal’” *The Economic History Review*, January 1 1966, 389-390.

37 Sir Thomas Smith, *A Discourse of the Commonweal of This Realm of England*. Ed. Mary Dewar (Charlottesville: The University Press of Virginia, 1969), 101.

each sheep owned. After this act became law, Somerset attempted to reassure the nobility — who were livid with the *Act for the Relief* — that his administration still held their interests at heart. He did so by pardoning enclosure offenders from the previous year. After a couple weeks, however, Somerset doubled down and reestablished his tone of condemnation of the wealthy for their greed. The court preacher Hugh Latimer, whose sermons condemned enclosures and had influenced Somerset's policies, spoke with Edward VI in the summer. He complained that there was no discipline in England and that Edward's subjects "be without all order."³⁸ Riots broke out across England in the late spring of 1549. While the riots had multiple causes — religious, economic, and social grievances all played a role — some who protested pointed to Somerset's own policies believing that it was lawful for them to destroy the gentry's property and redistribute the wealth.³⁹ Edward, in his chronicle, blamed enclosures for the uprisings.⁴⁰ Regardless of what inspired the uprising, the council determined that Somerset was to blame and by October Somerset had been removed as Lord Protector and imprisoned.⁴¹

John Dudley, the Earl of Warwick and later the Duke of Northumberland, took control of the government and imprisoned Somerset. Northumberland's first goal was to restore England's finances. He sold Crown lands, raised taxes, and melted confiscated church gold into coins. Northumberland also turned to debasement. He raised over £100,000 by devaluing the currency. Furthermore, Northumberland employed the talents of Sir Thomas Gresham, who was able to manipulate the exchange rates between England and Flanders — as a result England was repaid over £240,000. In 1552, Cecil convinced Northumberland that he needed to reestablish confidence in the currency. Northumberland agreed to a slight recoinage and as a result prices began to stop their accent.⁴²

Somerset went on trial in 1552. Edward asserted that Somerset had committed crimes against him and charged that he had entered "into rash wars in mine youth... enriching himself of my treasure, following his own opinion, and doing all by his own authority."⁴³ Somerset was not put on trial for any crimes until after 1551 when he was accused of planning the death of Northumberland. During the trial Seymour (now stripped of his titles) admitted to talking "with some of his familiars and friends about finding means to abase Northumberland, but not to kill him."⁴⁴ Somerset returned to the Tower after being found guilty. On January 22, 1552 Somerset was executed.⁴⁵ Edward began to play a more active role in the

38 Skidmore, 112-113.

39 Guy, 208-209; Skidmore, 113.

40 Jennifer Loach, *Edward VI* (New Haven: Yale University Press, 1999), 85.

41 Judith M. Richards, *Mary Tudor* (New York: Routledge, 2008), 96-97.

42 Guy, 217.

43 Loach, 91.

44 Skidmore, 218.

45 Guy, 215.

affairs of government in 1552, but in the winter of 1553 he fell ill with pneumonia. The young king, on the verge of taking the reins of his kingdom, died that July.⁴⁶

IV.

Although Northumberland had issued a recoinage, the monetary base had not been returned to what it was prior to Henry's debasement in 1542.⁴⁷ As a result, when Queen Mary I took the throne prices remained high. Mary's reign began in economic turmoil. She inherited a debt "of more than four times the expected annual surplus in royal revenue."⁴⁸ Furthermore, Mary was thirty-seven when she came to the throne and she was Catholic. Mary's primary objectives were to get married, have a child, and roll back as many of Edward's protestant reforms as possible. Mary's marriage to Phillip of Spain brought her into conflict with the French and as a result her debt problem magnified. She achieved much of the needed revenue by raising taxes in 1555 and 1558, but like Henry and Edward before her she could not resist debasement. Mary's debasement raised £58,000 and ensured that prices would continue to rise.⁴⁹ Mary died in November of 1558 and her younger sister Elizabeth I, Henry's daughter with Anne Boleyn, became queen.

As soon as Elizabeth took the throne, there were calls for her to restore the value of the coinage. Sir Thomas Gresham wrote a letter to the queen explaining that in order to "restore this your reallme" you should "bringe your basse money into fine of xi ounces fine, and so gowld after the ratte." Gresham also suggested that Elizabeth stop granting licenses to nobles, not to incur debt, and to keep up the Crown's credit.⁵⁰ Elizabeth — or perhaps her council — took Gresham's advice to heart and decided that the coinage should be reformed to the standard that was in place prior to Henry's reign. The Crown realized that this policy would hurt debtors and those who had long term contracts that set prices. As a result, Elizabeth decreed that all debts and rents must be adjusted to the new standard.⁵¹ In an official memorandum, Elizabeth concluded, after questioning

46 Richards, 108; Diarmaid MacCulloch, *The Later Reformation in England, 1547-1603* (New York: Palgrave, 2001) 17.

47 Northumberland was executed for treason in 1553 — he had endorsed an elaborate plot endorsed by Edward to place Lady Jane Grey on the throne (who was also married to his son) instead of Mary.

48 Richards, 122.

49 Guy, 240-241.

50 "Gresham to Queen Elizabeth on the Fall of the Exchange, 1558" in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 149.

51 "Memorandum on the Reasons Moving Queen Elizabeth to Reform the Coinage, 1559" in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 194-195.

why the country was in economic decline, “that the greatest and almost the only cause therof hathe proceded by the inhauncementes of the coigne in the tyme of her father and brother, and that the only remedy thereof is to reduce the monies to the auncient standard.”⁵² The official proclamation announcing a reform of the coinage echoed Gresham and Elizabeth’s conclusion that “nothyng is so grievous, ne likely to disturbe and decaye the state and good order of this Realme, as the suffraunce of the base monies.”⁵³ Elizabeth’s message to the country was clear: Henry, Edward, and especially Mary had run the country into the ground but she would restore England. While the country was experiencing hard times, Elizabeth played up the image of herself as England’s savior. Nonetheless, her policy of recoinage was effective. Confidence in the currency was restored and prices began to stabilize.⁵⁴ During the first ten years of Elizabeth’s reign, the price of foodstuffs decreased for the first time in the sixteenth century. From 1561 to 1570, agricultural prices decreased by 5% and industrial products increased by only 17%. During the 1550s both agricultural and industrial products had increased by around 45%.⁵⁵ Elizabeth’s policy of recoinage was successful in slowing the increase in prices.

Elizabeth was successful in controlling price increases for the first thirty years of her reign. While agricultural prices increased by 91%, industrial products only increased in price by 12%. While agricultural price increases mimicked the increases that occurred during the debasement period (the thirty year index from 1531-1560), industrial price increases returned to the rate of increase experienced from 1501 to 1530.⁵⁶ Overall, the recoinage decreased the monetary base from £1,580,904 in 1560 to £1,391,325 in 1562, a 12% decrease in the monetary base. The monetary base in 1562, however, was still 64% above the 1542 monetary base.⁵⁷ Though Elizabeth had taken a step towards reestablishing the currency, she did not return England to its pre-debasement monetary base.

Elizabeth’s success in restoring the value of England’s currency, however, came to an end when she became involved in European wars. The defense of England from the Spanish Armada and England’s campaign in the Netherland’s

52 “Memorandum on the Reasons Moving Queen Elizabeth to Reform the Coinage, 1559” in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 193.

53 “Proclamation Announcing a Reform of the Coinage by Queen Elizabeth, 27 September 1560” in *Tudor Economic Papers*, vol. 2. ed. R.H. Tawney and Eileen Power (New York: Longmans & Green, 1924), 196.

54 Wrightson, 119.

55 Outhwaite, 12. The parity in the percentage of price increase during the 1550s supports the claim that price increases that are due to inflationary monetary policies should increase prices in all sectors at roughly the same rate.

56 Outhwaite, 12.

57 Gould, 82-83.

cost £1,580,781.⁵⁸ Elizabeth debased the coinage in the 1590s as a means to pay for her military conflicts. While Elizabeth deserves some credit for restoring confidence in the English coinage early in her reign, she was also a pragmatic ruler who embraced debasement when she was desperate for funds.

V.

Throughout the Tudor era, the Crown turned to debasement as a non-parliamentary means to raise revenue. In reality it was a way for Tudor kings and queens to tax their subjects without the English people's consent (through Parliament) — which is guaranteed in English common law. From 1485 to 1603, agricultural prices increased by 338% and industrial goods increased by 131%.⁵⁹ The heaviest period of debasement occurred from 1542 to 1551 during the reigns of Henry and Edward. Throughout the period of greatest debasement, England also experienced the greatest increase in prices — this is no coincidence. Debasement of the coinage had a significant effect on the price of goods in England. Contemporaries began commenting on the high prices in the late 1540s and the Crown, needing a scapegoat, blamed the wealthiest members of society.

The story of debasement in Tudor England has been replicated throughout history. Governments who desire to wage wars that the populace would be unwilling to pay for increase the money supply. This increase in the money supply depreciates savings, raises prices, and imposes a de facto tax increase on the entire country. During the sixteenth century, the English people suffered incredible increases in the price of food, industrial items, and rent. Common people found it incredibly difficult to just get by under the reign of the Tudors. Population increases undoubtedly played a role in the overall price increases during the century. But the Crown made life more difficult for its subjects by contributing to the price increases through the policy of debasement.

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58 Christopher Haigh, *Elizabeth I* (New York: Longman, 1998), 138.

59 Outhwaite, 12.

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BRIAN BEDKOBER

Free Markets, Competition and Medical Practice

ABSTRACT: Rather than attempting to find some way to make a centralized, taxpayer-funded system work in a less offensive and less costly manner we should be examining how to remove government altogether from the delivery of health care services. Real and effective reform of medical practice involves a return to genuine markets where consumers are able to choose who to consult from the full range of possible providers at a price set in markets.

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Competition is the patron saint of the consumer.

- George Stigler

INTRODUCTION

Most medical practitioners believe that when it comes to the supply of medical services markets simply do not work. Most doctors tend to support equality of consumption and many believe that the best way to maximize access to medical care is through an economic system based on public ownership or control of the means of production and distribution. They believe that people ought to be (and can be) protected from harm by using the power of the State to limit their choices so that the opportunity to make bad ones will arise less frequently. And they have been seduced by the claim that the most compassionate society is one in which the State provides for the needs of all its citizens.

Doctors have been indoctrinated in their training with the view that the pursuit of individual self-interest is necessarily harmful to the interests of the whole and that there is something about the practice of medicine that makes it inappropriate to apply to it the kinds of values and actions that might be acceptable

elsewhere. The ethical and philosophical positions adopted by medical profession organizations have been further fuelled by the fact that doctors themselves have always benefited from the monopoly protections and privileges granted to them by the State.

Even when the failures of their preferred system become increasingly obvious, most doctors continue to give it their full support. Unfortunately, many physicians simply do not want to be disturbed by any evidence that might force them to re-examine their long and strongly held views. Indeed, to suggest that the views they hold may be wrong is often interpreted as an attack on the identity (or, at least, the professional identity) of those who hold them.

1. PROFESSION-SPECIFIC MORAL VALUES?

Medical ethicists commonly assert that the medical profession has an “internal morality” of its own with ends that are ends in themselves and to which the ends of the individual professional must be subordinated. The characteristics of professional relationships that are said to generate this internal morality are: (1) the vulnerability and exploitability of the person seeking help; (2) the unequal power relationship; (3) the trust involved and the dominant professional place as a guardian of the client’s interests. These are features of the profession that it is claimed lead to the consequence that the doctor-patient relationship cannot be regarded in merely commercial terms. Doctors must act altruistically in the interests of patients, attending to their needs without regard to their own financial position or to the patient’s ability to pay. According to Edmund Pellegrino, those physicians who apply the philosophy of Adam Smith¹ to the practice of medicine are really only tradesmen and “should not commit the hypocrisy of considering themselves professionals in any lofty sense of the term”.²

However, the ‘special’ characteristics on which the profession-specific ethical requirements are based actually apply across a broad range of other relationships. The clients of computer technicians, financial advisers or car mechanics are also vulnerable and many people would consider it immoral for even a tradesperson to take advantage of the ill-informed or injudicious buyer. Similarly, trust is involved in any situation in which the division of labor means that there is asymmetry of information.

The claim that medicine imposes special ethical requirements on practitioners because they must deal with patients whose decision-making capacities may be clouded by the illnesses from which they suffer is equally unconvincing.

1 Adam Smith, *The Wealth of Nations* in Ernest Rhys (ed) Everyman’s Library (1937).

2 E Pellegrino, ‘Character, Virtue and Self-Interest in the Ethics of the Professions’, *Journal of Contemporary Health, Law and Policy*, Vol.5, No.53 (1989) pp 53-73.

The vast majority of physician-patient interactions are unaffected by such considerations and when they are there are good reasons, based on concepts of self-interest and innate good will (also a concept advocated by Smith³), for physicians to act in their patients' best interests. Furthermore, it is important to neither distort general rules in order to allow for special situations, nor to make special rules that contradict those that generally apply (for, in legal parlance, 'hard cases make bad law').

On closer inspection it appears that those who attribute special characteristics to the doctor-patient relationship are often simply promoting their own view about how doctors ought to behave — and by having their views confirmed in binding ethical codes they have usurped the right of others to have alternative views. In practice the claim that doctors should tend to patients without regard to financial considerations has led to their more ready acceptance of a socialized system for the provision of health care services. A particular problem for this ethical belief is that the cumulative effects of the repetitive small sacrifices that doctors are required to make might significantly disadvantage them financially. In the past, the capacity to manage this responsibility in a sensitive and sensible fashion (sometimes distinguishing between worthy and unworthy recipients and charging wealthier patients more) was one of the reasons why doctors were held in such high regard in the community. Furthermore, the private control of charity limited the financial abuse inherent in 'free' systems and the provision of 'conditional' aid enabled attempts to encourage behavioral change in recipients. Inevitably, the occasional undeserving individual had to go without the kind of assistance that was available to others — or they were compelled to seek assistance from sources they considered less dignified.

Nowadays, however, it is believed that the receipt of charity is demeaning to the individual and that nobody (regardless of their character) should be without the kind of health care that is available to everybody else. In modern societies health has become a collective responsibility; the incomes of health care professionals are guaranteed by the State and doctors are relieved of the responsibility for distinguishing between the worthy and the unworthy. Access to health care is now said to be a 'right' that is limited not by the ability to pay but by the non-price rationing systems of government.

Paradoxically, however, doctors have also had to accept the dismantling of features of their ethical codes that they had previously claimed were an integral part of the internal morality of their profession. They are now required to acknowledge, for example, the State's interest in the doctor-patient relationship — doing away with strict standards of patient confidentiality and compelling the doctor to consider the financial interests of the State. The centralized control of

3 Adam Smith, *The Theory of Moral Sentiments*, Prometheus Books (2000). Originally published by Richard Griffin and Co. (1854).

health care delivery has also brought with it a whole new range of problems that are created when a very diverse group of individuals (both patients and doctors) must comply with a universally applied set of rules. This has presented particular problems in multicultural communities where governments guarantee access to services that some practitioners find morally objectionable. The 'free' system also encourages cheating by both patients and doctors and produces an entitlement mentality that damages everybody (creating, for example, dependency in recipients and violence against service providers).

The claim that doctors or the practice of medicine are "different" has worn a little thin of late. Nobody really believes, for example, the Australian Medical Association's claim that when it negotiates for increased rebates it is for the benefit of patients rather than its members, or that doctors only consider withdrawing their services when the interests of patients (rather than their own) are threatened. If doctors were really driven by altruism rather than by commercialism, why is under-servicing such a problem? Why are there so many rural communities without a doctor when doctors undertake to serve wherever they are needed (and AMA members sign an undertaking to that effect)? These kinds of contradictions, along with the impression that many doctors would rather have patients receive no care at all rather than care from somebody else, have undermined the credibility of professional leaders and those they represent.

II. PROTECTING PATIENTS

Another reason given for supporting centralized control and for overruling the decisions reached in markets is the belief that people ought to be prevented from making decisions that may not be in their best interests. Many authorities believe that other people are simply too ignorant to know what is best for them. The British Medical Association, for example, opposed the suggestion that patients be given direct control over their personal healthcare budgets on the basis that they may choose to spend their money on "inappropriate and non-evidenced based services such as alternative and complementary therapists".⁴

Such considerations are thought to be particularly relevant in the medical context because of the high costs associated with making bad decisions. Yet not only do most medical decisions not fall into this high risk category, but if all potentially high cost decisions are to be taken by somebody who supposedly knows better, what about choosing a career, getting married, going into a business, taking a loan, emigrating or having children? Once it is accepted that it is government's responsibility to protect us from harm then we risk losing the

4 John Carvel, 'Doubts raised over plan to give personal budgets to NHS patients', *The Guardian*, 17 January 2009.

capacity (and ability) to make anything other than the most trivial decisions for ourselves, thus infantilizing the population.

The capacity to take away choices that allow some people to harm themselves may have merit in occasional instances. However, the desire to protect these particular individuals can only be had at the cost of removing choices from the vast number of people who do not require protection and who are usually far better placed than anybody else to determine what is in their own best interests. Moreover, while nobody likes to see other people make bad choices, there are good reasons based on individual liberty why they should be permitted to do so.

Proponents of the nanny state argue that people should not be allowed to make decisions that negatively impact on other people and point to particular uncommon (often valid) instances to justify a very much wider and invalid control over free choice. The current centrally-driven emphasis on preventive health, for example, is principally driven both by budgetary concerns and the reasonable expectation that people should not be forced to pay the costs of the bad health care choices of others. But nobody would be nearly so concerned about the choices other people make if they themselves paid for the costs of those choices. These concerns are, therefore, an argument against the socialization of health care costs and not for the restriction of choice.

It is not, of course, politically attractive to suggest that we should wrest control of the decision making process from individuals because they are ignorant or because free health care encourages people to behave more recklessly and cheat. A much more acceptable justification, or so it is thought, is the identification by behavioural economists of various cognitive biases that cause irrational behavior on the part of individuals. These cognitive biases are said to have severed the link between revealed preferences and individual welfare. Intervention is necessary, therefore, to give expression to the “true” preferences of individuals rather than their irrational decisions based on these biases. Typical measures aimed at countering these biases include “sin” taxes, government advertising campaigns, consumer protection laws, compulsory superannuation contributions, opt-out default settings and the outlawing of certain activities and products.

Only some of the cognitive biases from which individuals may suffer can be mentioned here but they include biases about representativeness, about base rates, about sample size, about overconfidence and many more. A common example relates to the way in which we calculate probabilities; physicians, for example, may be more likely to make a particular diagnosis if they have seen a similar case recently, have had a bad experience with a similar case in the past, or if the diagnostic choice has been the subject of some vivid anecdote (all examples of the “availability heuristic”). Similarly, physicians are often exposed to the effects of hindsight bias (that treats what happened as though it had to happen) when juries (and regulators) assess the presence of negligence and the cost-effectiveness of precautions necessary to prevent it. There is also the “overconfidence” bias of those physicians who believe that they can avoid taking even necessary

precautions. Of relevance to preventive health is the unrealistic optimism that may affect people when they believe that they are not at risk from the same health threats that they recognize as being real for others.

However, the mere identification of one or some of these biases does not necessarily pose any serious difficulty for decision-making. In fact, many of the cognitive biases that have been demonstrated in laboratory experiments actually disappear in the real world (although this finding has not prevented legislators from acting as though they do not). They disappear because the behavior exhibited by participants making choices in laboratories is influenced by such factors as the effect of being observed. Furthermore, cognitive biases are most manifest in relation to events that occur infrequently and are trivial. As a particular kind of decision increases in frequency and importance the likelihood of it being adversely affected by some bias decreases. It is when the stakes are high that people are most careful about the decisions they make; and they invest more time, effort and resources (possibly purchasing advice from an expert in the field) in seeing that they make the right one. When it comes to individual decision-making, the persons most affected by the decision being made are the ones most likely to get it right — and should a recognizable error occur, there are good incentives for individuals to make their own corrections. Personal responsibility for the outcomes of one's choices is the best guard against making bad ones.

Some cognitive biases actually serve a useful purpose. There are good reasons, for example, why people should take notice of things like sunk costs rather than forget about them and concentrate purely on (future) opportunity costs. Moreover, some mistakes are efficient because they arise from attempts to economize on information and transaction costs. As Joshua Wright and Douglas Ginsberg point out “not all error implies irrationality because perfection is costly”.⁵

Furthermore, while the emphasis placed on the importance of cognitive biases depends on the view that an individual cannot be trusted to make decisions that are consistent with his true preferences, how can anyone really know whether a preference is a true preference or a biased one? If a patient expresses one preference now and a different one at a later date (perhaps because the question has been framed differently), which is the “true” preference? Virtually all our preferences are formed under one sort of influence or another and if preferences are to be considered uncertain on this basis then none of the preferences that any of us have can ever be certain. In this view virtually no behavior could be considered autonomous. All ethical argument would then be redundant since this position leads ultimately to the destruction of free choice and personal responsibility.

5 Joshua Wright and Douglas Ginsberg, ‘Behavioral Economics, Law and Liberty: The Never Ending Quest for the Third Way’, Presentation to the Mont Pelerin Society, 14 September 2010, p. 50.

It is also assumed that if a decision is made in the presence of cognitive biases then welfare must necessarily be reduced when compared to the results of intervention. However, not only is there no legitimate way in which to compare the welfare of one individual with another, but regulators must logically be governed by a similar range of cognitive biases affecting their rational choices. The optimism bias, for example, leads decision makers to take on too much because they underestimate the likelihood of a bad outcome. Similarly, the availability bias (giving increased probability to an event that is most easily recalled) is likely to prompt inappropriate legislation in response to relatively isolated events. Legislative actions are also more likely to cause harm than actions in markets; while control from on high may work well when there is no possibility of error, the decentralization of power (when it is the individual who makes the relevant decision) limits the extent of the damage from wrong decisions when uncertainty exists.

As Michael Warby so succinctly puts it, “The greatest single weakness of the illiberal doctrine is its arrogance; the belief that while most people are, in a real sense, incapable, there is yet an elite who are so capable they can make up for the inadequacies of the rest of us.”⁶ Individuals or private firms, with all their biases, are more likely to get decisions right than are alternative institutional structures.

Furthermore, to deny individuals the right to choose risks losing a greater part of what it means to conduct a meaningful life. As John Stuart Mill has pointed out, “the human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice.”⁷ And while it would be absurd not to take note of the lessons provided by the experience of others, it is up to the individual to interpret experience in his own way — “to find out what part of recorded experience is properly applicable to his own circumstances and character.”⁸ Protecting people from bad choices reduces the incentive for individuals to learn from their mistakes and to become better at choosing in the future (increasing the error rate in the long run).

Protecting people in this way also discourages entrepreneurial activity (or as Mill puts it, renders the “character inert and torpid instead of active and energetic”). In general, say Wright and Ginsberg, entrepreneurs have a particular thinking style that makes them more alert to opportunities that require linking previously unrelated information and this cognitive style is less-well developed when individuals are relieved of the responsibility for making important decisions for themselves.⁹ Studies in Eastern Europe, China and Russia provide strong

6 Michael Warby, ‘The Political Obsession Revisited: Eva Cox’s Boyer Lectures’, *Policy* (Autumn 1996) pp 43-46.

7 John Stuart Mill, *On Liberty*, Watts and Co. (1936) pp 70-71.

8 Ibid.

9 Wright and Ginsberg, pp 76-77.

evidence that “even after controlling for relevant variables, all countries with a communist past have a lower rate of entrepreneurship activity than do other countries”.¹⁰

Nevertheless, the mere identification of the existence of cognitive biases (at least in experimental situations) continues to provide social planners with what they claim to be a legitimate justification for interfering in the choices of others and compelling conformity with their own plans for society. As Wright and Ginsberg point out, “because behavioral economics generates indeterminate predictions in many settings, it encourages the central planner to substitute his own preferences, or those of special interests, when identifying true interests”.¹¹

III. MIXED UP ABOUT MARKETS

Not only are medical professionals opposed to competition for deep seated philosophical reasons, but they often seriously misunderstand the true nature of markets. According to the AMA, competition works in an adversarial rather than in a cooperative paradigm. Markets, says the AMA, derive their moral values purely from the pursuit of profits, they are devoid of charity or compassion, they threaten standards and the self-interested behavior of those working in them must inevitably undermine the kind of trust that is necessary for an effective doctor-patient relationship. The profession, says the AMA, should be governed by the “public interest” and doctors should be accountable to their peers (self-regulation) rather than to their patients.¹²

With monotonous regularity, members of the AMA hierarchy trot out slogans such as “cooperation not competition” or “compassion not competition”. As a past president of the AMA put it, “in plain English, competition works by *muscling in* on somebody else’s market, stealing market share from a competitor, *extracting* more effort from staff or simply throwing some on the heap of the unemployed, or by *grabbing* the profitable areas of business and ignoring the less profitable markets. There is not one pleasant concept or solitary ounce of ‘mateship’ underpinning competition. In my view, it is the economic equivalent of road rage” (italics in original).¹³

One of the ways in which the AMA and its medical ethicists misunderstand the nature of markets is by implying that what one party gains, another loses — that exchange is a zero sum game. However, market exchanges are voluntary,

10 Wright and Ginsberg, p. 79.

11 Wright and Ginsberg, p. 66.

12 Peter Arnold, ‘The misapplication of competition law’, *Australian Medicine* (19 October 1998) p. 14.

13 David Weedon, ‘A blueprint for the new millennium’, *Australian Medicine* (21 June 1999) p. 8.

cooperative ventures that only occur when both parties stand to benefit. Moreover, while markets cannot themselves be described as moral or immoral (they are only a system of relationships), they encourage moral behavior on the part of those persons working in them. As Tibor Machan points out, the principles of capitalism tend to foster an attitude of responsibility and respect for others and in a capitalist system based on rights to private property, the rational and responsible use of property is encouraged since the ill-effects of irrationality are borne by the owner. This fact means that capitalism “actually encourages virtues such as thrift, industry and prudence and discourages vices such as greed, envy, and dishonesty. It is in planned economies that those vices are rife”.¹⁴ Furthermore, as Edward Younkens points out, “there can be no morality without responsibility and no responsibility without self-determination” and markets permit “the greatest possibility for self-determination and moral agency”.¹⁵ In fact, it is precisely because markets give people what they want rather than what other people think they ought to want that some people find them so threatening. Or, to put it another way, “The reality is that opposition to competition is opposition to consent, for competition gives content to consent by creating choice”.¹⁶

Strangely, the pursuit of self-interest in markets is also said to undermine trust despite the fact that it is very much in the interests of individuals working in markets to establish a reputation for trustworthiness. It pays individuals to be nice and to develop a reputation for trustworthiness so that people will deal with them in the reasonable expectation that they will behave honestly. Very little business would get done, and the costs of doing business would be very high, if the underlying assumption was that everybody was trying to cheat everybody else. It is in paternalistic relationships, where people are limited in the range of choices they are permitted to make, that the opportunities for exploitation and the need for trust are greatest. This is the model preferred by those who support advertising restrictions and licensing laws and who act as agents of the State, denying access to particular services and exhorting consumers to behave in certain ways.

Contrary to the beliefs of many of those in the AMA, nobody needs to make an all or nothing choice between competitive and cooperative behavior — neither in markets generally nor in the specific enterprises of science and medicine. Scientists, for example, compete for reputation and fame (usually more so than for money) and often the best way to get that reputation and fame is to cooperate in the discovery process. Fierce rivalry for fame and profit has always fuelled

14 Tibor Machan, *Classical Individualism: The supreme importance of each human being*, Routledge, 1998, p. 71.

15 Edward Younkens, *Capitalism and Commerce*, Lexington Books (2002) p. 2.

16 Michael Warby, ‘The Political Obsession Revisited: Eva Cox’s Boyer Lectures’, *Policy* (Autumn 1996) pp 43-46.

the discovery process. When we cooperate it is because we believe that it is in our interests to do so; considerations of reciprocity encourage cooperation between research teams and individuals cooperate within a research team not because they are altruistic but because their interests are linked to the interests of the group.

On the other hand, there is long history of scientists who, based on their assessments of the risks involved, decided not to cooperate and to conceal information partially or fully or refuse to publish or publish early. James Watson and Francis Crick could have told Linus Pauling that his model of DNA had to be wrong, but they concealed that information from him and determined the correct answer first. As a result, says Thomas Kealy, they “were transformed from unsuccessful, struggling, unpopular members of Cambridge’s scientific community into world stars. They won the Nobel Prize, they picked plum jobs, and they had fun forever more”.¹⁷

While competition and cooperation are not the same thing and there are some tensions between the two, these tensions are usually readily resolved in markets. Conversely, centrally planned economies lack adequate incentives to cooperate. If there is no penalty for ignoring the wishes of consumers, for example, the chances are that producers will do so. As David Friedman has pointed out, the plea for “cooperation, not competition” finds its origins in socialist societies where everybody is compelled to cooperate towards the same end because it is assumed that everybody’s ends are the same. In the world of free markets where everybody is permitted to pursue their individualized ends, everybody is said to be competing. However, says Friedman, “the institution of private property allows for cooperation within that competition; we trade with each other in order that each may best use his resources to his ends”.¹⁸

The relationship between competition and compassion is similarly widely misunderstood. As we have seen, most doctors believe that access to medical services should not depend on the patient’s capacity to pay and that the most compassionate society is one in which the State pays for everybody’s medical needs. But a logical consequence is that access is limited by the State’s *capacity* to pay. Moreover, there is nothing morally worthy or compassionate about complying (or forcing others to comply) with rules and regulations that compel particular behaviors. When the State overrules individual property rights — and takes money off some people to give to others — it creates dependency and an entitlement mentality that reduces the need and lessens the capacity for individuals to develop a culture of voluntary, genuine compassion. In fact, surveys have repeatedly shown that people who support government solutions to social problems give far less to charity and charitable causes than those who emphasize personal

17 Terence Kealey, *The Economic Laws of Scientific Research*, St. Martins Press (1996) p. 333.

18 David Friedman, *The Machinery of Freedom*, Open Court Publishing (2nd ed, 1989) p. 133.

(over collective) responsibility.¹⁹ Similarly, as James Surowiecki has pointed out, studies of the ultimatum game, the dictator game (where the responder cannot refuse the proposer's offer), and the public goods game (testing whether people will choose to free-ride), demonstrate that prosocial behavior is maximal the higher the degree to which the society in which the studies are performed is integrated with the market.²⁰

A. *The Work Done by Market Prices*

Nowadays it is common for doctors to complain about the way in which different services are remunerated: that the rebates for procedures are excessive when compared to the rebates awarded to consultations, that country doctors ought to be rewarded more than city doctors (for the same service), that the rebates to nurse practitioner services are too high, that doctors are overpaid or underpaid with respect to other professional groups and so on. These concerns are usually addressed by lobbying government and its committees to change the various relativities. In support of these efforts, surveys are often produced to "prove" how much consumers value the services provided by one group of providers rather than another.²¹

One of the problems for government is that there are so many services provided that it has a tough time deciding which of them to fund and setting the appropriate remuneration for each; and the more services there are the more disagreement there will be (both within a profession and between professions). A critical problem with surveys and other similar tools is that there is a vast gulf between the choices people say they will make and the choices they actually make. Furthermore, surveys cannot really discover what people want in an economically relevant sense since those who take part bear no financial responsibility for the answers they give.²² People's genuine preferences can only be revealed by the actual choices they make in real-life situations — and when the choice made is not influenced by a subsidy provided to one good or service and not another.

Government actually has no valid way of knowing how different members of the public value the many different services they might be called upon to supply. The fact that it is simply not possible to compare my good to yours and to determine the relative goodness of different goods also seriously damages both the idea of the "common good" and the claim that income and other redistributions

19 Arthur Brooks, *Gross National Happiness*, Basic Books (2008) p. 31.

20 James Surowiecki, *The Wisdom of Crowds*, Doubleday (2004) pp 125-126.

21 Paul Smith, 'People give verdict on health', *Australian Doctor*, 3 December 2010, p. 4.

22 Donald Boudreaux, 'The Market: The Only Trustworthy Pollster', *The Freeman*, July 1997.

can be justified on the basis of utility maximization. Indeed, whether or not a particular service satisfies “the public interest” test of competition policy is a nonsense since there is no “public” to test (only a multiplicity of individuals) and there is no legitimate way to compare the benefits and costs of any two prospective states of affairs.

The same is not true of markets since in markets we can get a good idea of how individuals value different things by observing how much they are prepared to pay for them. As Jeffrey Herbener points out, the difficulty of comparing the ordinal preference ranks of different individuals is a problem that can be solved in the monetary, private property, market system by converting those preferences into a quantity of common cardinal units. These money prices are then used by entrepreneurs “to make calculations of profit and loss, and in so doing compare, in objective value, different factors of production against each other and one set of factors against others in producing each consumer good and each factor or set of factors in producing different consumer goods”.²³ The price motivates consumers to ask for that same aggregate quantity of the good that potential suppliers have been motivated, by the same price, to produce. No consumer is driven by the lowness of the price to buy more than what is available (excess demand). No provider is driven by the height of the price to produce more than is in fact being sought (excess supply). The coordinative role of prices works towards a correct allocation of resources despite the information being widely dispersed throughout society (as the often incomplete and conflicting views of all producers and consumers). This is information that no single authority can ever hope to possess. Of course, the allocation of resources in markets is not always perfect. However, the profits (or threat of loss) that arise from identifying imperfections in market allocations of resources are what drive entrepreneurs into finding ways to correct them. Competition is a dynamic discovery process in which prices provide their own incentive for modification. Unfortunately, the fact that perfect results are not achieved is often used as an excuse for perpetual interference by far less perfect government decision makers.

Despite all the evidence to the contrary, governments continue to believe that they can improve on the outcomes achieved in markets (and maximize welfare) by manipulating the choices that their subjects make. One means to this end is to alter the signals that prices give. In the medical context this means subsidizing (or licensing) one provider or procedure and not another (or both to different degrees). What we end up getting is a range of services that government thinks we ought to get (or that it can afford) at a cost that is determined by committees - and the volume and quality of services are produced in response to these valuations. What this process involves is actually the exercise by government of moral

23 Jeffrey Herbener, “The Pareto Rule and Welfare Economics”, *Review of Austrian Economics*, Vol.10, No.1 (1997) p. 81.

judgments about the goals that people choose (which is something that markets do not do).

Furthermore, when governments tax, redistribute and manipulate they can only benefit some people while harming others - and yet the impossibility of making interpersonal and inter-temporal comparisons of utility makes it impossible to adequately balance the benefits provided and the harms done. The mere fact that taxation has to be made compulsory suggests that many people believe that they are made worse off by the transfers. On the other hand, the voluntary nature of market transactions ensure that all participants anticipate being made *better* off as a result of an exchange. The sum of these voluntary exchanges constitutes the free market and creates the greatest satisfaction of individual preferences at every point in time.²⁴ Although one or some of the participants may be dissatisfied with the results at a later point in time there is, nevertheless, “a greater tendency for correspondence between *ex ante* anticipations of gains from a sequence of actions and *ex post* realization of gains in a free market *vis-à-vis* an interventionist system”. By distorting economic calculation and interfering with consumer choice, interventionism retards the many factors in markets (such as tests of profit and loss) that tend to match *ex ante* and *ex post* utility.²⁵

It is only in genuine markets, where participants can compete on a level playing field, that income relativities and the allocation of resources reflect what individual consumers desire most rather than what politicians believe they ought to desire as a collective.

B. *The Third Way*

While people have been reluctant to give up their belief in the superiority of a rationally planned, centrally controlled society it has become increasingly difficult to conceal the ineptness of government in determining consumer preferences and in providing for their needs. The “solution” to this conflict between the preferred ideological view and what occurs in practice has been to suggest that a balance can be found between the benefits claimed to be dependent on the presence of strong government and those provided by markets. In “market socialism” or the “third way” an attempt is made to marry socialist principles with the superior economic performance associated with a market economy.

However, as Friedrich Hayek has pointed out, you cannot have a “little bit of socialism” as this is bound to set the democracies on a slippery slope that

24 Jeffrey Herbener, ‘The Pareto Rule and Welfare Economics’, *Review of Austrian Economics*, Vol. 10, No.1 (1997) p. 100.

25 Jeffrey Herbener, ‘The Pareto Rule and Welfare Economics’, *Review of Austrian Economics*, Vol. 10, No.1 (1997) p. 103.

will end, more slowly but just as surely, in the same serfdom. As has been only too evident, once a “flexible” approach to property rights is adopted, the political process in democracies inexorably leads politicians seeking re-election to escalate and widen the redistributive process. Once governments are permitted to interfere with markets to direct benefits to particular individuals or groups, observes Hayek, “they cannot deny such concessions to any group on which their support depends”.²⁶ “The market economy,” says von Mises, “is a finely constructed, interrelated web; and coercive intervention at various points of the structure will create unforeseen troubles elsewhere. The logic of intervention, then, is cumulative; and so a mixed economy is unstable — always tending either toward full scale socialism or back to a free-market economy”.²⁷

The schizophrenic nature of a mixed scheme has been amply demonstrated by the tensions produced by combining (in the Australian system) a taxpayer-funded universal health scheme with a private scheme in which some people are able to gain access to services not provided by the universal scheme. Amidst the rhetoric of equality, however, the private scheme must be regulated to ensure that it does not provide too much more than what is available in the public scheme and that insurers do not “discriminate” between individuals on the basis of individual risk. Clearly, when government enlists the power of markets to help in its assumed role in the delivery of health care it has a very unusual and restrictive view of what competition and markets are all about. We are told, for example, that competition in the medical profession must be regulated so that its effects can be applied differentially. The job of the regulators is, in this view, “not about allowing competition, but about seeing that anti-competitive policies are appropriate”.²⁸ Hence, while governments are prepared to deny the medical profession their monopoly on supply, they do so not by opening up supply to market forces but by extending the medical monopoly to other preferred groups.

One of the most recent expressions of the belief in the viability of a “third way” is the establishment of various fundholding schemes. Another example is the idea that the centralized funding of health care can be successfully combined with local control by re-establishing Local Hospital Medical Boards. It is important to note that while these changes are intended to capture some of the benefits associated with free markets, they most definitely do not represent a gradual return to genuine markets in health care delivery - which is what is really required.

26 Friedrich Hayek, *Law Legislation and Liberty*, Vol.3. *The Political Order of a Free People*, Chicago University Press (1979) p. 151.

27 Murray Rothbard, ‘Ludwig von Mises and the Paradigm for Our Age’ in *Egalitarianism as a Revolt Against Nature and Other Essays*, Ludwig von Mises Institute (2nd ed, 2000) p. 232.

28 Deborah Cope, Deputy Executive Director, National Competition Council (Australia), *Competition in Health Conference* (31 July 1998).

Unfortunately, the core belief underlying all recent attempts at “reform” continues to be that it is government’s responsibility to deliver health care services to the nation. Hence nothing will really change - the mix and price of services delivered will continue to be centrally determined, there will be a continual failure to match resources to demand and there will be only limited innovation in service delivery. Hospitals will be required to deliver a core range of services that government recognizes as politically expedient (their community service obligations), prices will be centrally determined, key hospitals will not be permitted to fail and Casemix funding will simply lead to a new range of problems as hospitals game the system to maximize their returns. Local control can never be truly local unless providers and consumers are exposed to the profits and losses that result from spending their own (or shareholders’) money.

IV. CONCLUSION

The idea that society is “fairer” and “more compassionate” when everybody has equal access to health care of the same quality has led to the creation of a centralized system and the abandonment of markets in the delivery of health care. The abandonment of traditional concepts of fairness has created dependency and an entitlement mentality; access based on the ability to pay in the one system has been replaced by access limited by queues and the unavailability of services in the other, and the genuine compassion associated with private, voluntary assistance has been replaced by the second-hand “compassion” of a centralized authority distributing the spoils derived from a coercive system of taxation. The abandonment of markets in the delivery of health care has led to an escalation in costs, a decrease in quality (below what might have otherwise have been achieved) and the destruction of what were previously considered to be vital features of professional ethical codes (such as the exclusivity and confidentiality of the doctor-patient relationship).

While the leaders of professional organizations frequently complain about many of the negative features of the current system they appear not to recognize that they are complaining about things that constitute an inseparable part of the socialist system that they have embraced — things that could mostly be removed by a return to markets. Despite the fact that individuals are best placed to know their own circumstances and that personal responsibility is critical to learning, it is inevitable that in a centralized system individual choice will be manipulated and controlled to match the choices approved by those who believe they know better (often with the intention of controlling costs). And yet professional organizations that support this state of affairs frequently claim that they are committed to a “patient centred” approach.

Any suggestions about reform are limited to tweaking the current system rather than questioning the legitimacy of the system itself. The role of prices and

consumer choice in allocating resources and of competition in reducing prices and increasing quality are routinely dismissed. The AMA believes that the problems inherent in the current approach can be resolved if only the government takes more notice of the AMA! "The allocative decisions that are made," says the AMA, "must be informed by those who know best about patient outcomes and the effectiveness of various treatments, procedures and programs".²⁹

Doctors have nothing to fear from markets. If they provide a cost-effective service, then consumers are quite capable of recognizing and responding to that fact. Similarly, there is little for consumers to fear about the effects of markets on the supply of medical services. The pursuit of radical self-interest would be a stupid strategy for anybody to adopt; cooperation is an absolute necessity for survival in a market society but a disposable commodity in the centralized State. Similarly, trust, confidentiality and genuine compassion are features of a voluntary, contractarian environment rather than of a State sponsored system in which funding is coercively extracted from taxpayers and all interactions must be closely monitored. And, of course, competition is the most effective way to increase standards. As Steven Schwartz observes, "A market driven system makes providers compete for patients in the way providers have always competed, by improving quality and lowering costs".³⁰

Privatisation would remove the ethical constraints that impede comparisons between providers and rules that compel patients to be treated within a specific geographic area or by a specific range of providers. If the incentives are to be properly placed, so that physicians can benefit from their own cost-saving innovations, laws that prevent physicians from referring to centers in which they have a financial interest or to use medical devices in which they have a financial stake should also be removed (although disclosure should still be encouraged). The problems that may arise with self-referral are potentially serious only when the patient is not responsible for the fee paid or is not made aware of their advisor's possible conflict of interest.

The existence of taxpayer funded services mean that everybody has a guaranteed clientele, where good and poor performers are rewarded (rebated) equally and where government is authorized to exercise total control over all facets of the system. As a result, instead of looking for the profits available by discovering better ways to satisfy customers, entrepreneurs now concentrate on finding the best way to get the most of any available government money.

Of course, we cannot suddenly revert to a system of markets after so many years of centralized health care delivery. There are, however, many things that

29 Francis Sullivan (AMA Secretary General), 'Doctors the Key to Meaningful Health Reform', *Australian Medicine* (March 2011) p. 4.

30 Steven Schwartz, 'Saving Australia's Health Care System: Nostrums or Cures?', *Policy* (Autumn 1999) pp 3-7.

could be done now to move us in the right direction. One of the most important of these would be to free up the health insurance industry and permit and encourage the development of Health Savings Accounts — and allow those who are prepared to take this kind of insurance to opt out of Medicare.³¹ Alternatively, Medicare coverage could be gradually reduced until it covers only catastrophic events. These appear to be the most likely ways to start returning normal price signals to medical purchases.

No system is perfect; occasional mistakes will occur and not everybody will receive the same access to services. The argument is not that markets are perfect in the results that they achieve, but that they can almost always be favorably compared with those achieved in centralized economies. Health care is a scarce resource and who receives what is simply a question of who does the rationing — the individual or the State. Egalitarian considerations merely ensure that everyone is equally inconvenienced in gaining access to whatever care is available. And less will be available in a system that dampens incentives for productivity and innovation and encourages excesses in demand and supply.

31 Brian Bedkober, 'Health Savings Accounts' in *Problems in Health Care Delivery: Government as cause not cure*, Bookpal (2009) pp 298-304.

The Journal Of Peace, Prosperity & Freedom

VINAY KOLHATKAR

A strategy for the fourth estate, in a world engulfed by narrative

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INTRODUCTION

As a writer, I have known that narratives sway people, but I never investigated the why of it. Recently, I came across investigative journalist and novelist Robert Bidinotto's glowing review of a book (*The Storytelling Animal: How stories make us human*, by Jonathan Gottschall) and also his post about how the then prevalent narratives were shaping the 2012 U.S. presidential election against Mitt Romney. That got me thinking in a different direction — ratings driven media businesses can concentrate on populist entertainment, but how is the fourth estate function to conduct itself if narratives persuade, and principles are boring?

Call it narrative, story, or rhetoric, political spin is now standard fare in all major democracies of the world. If we examine the relevant research from psychology, neuroscience, philosophy, and the media sciences, we can account for the why — *why are we stuck with a political world that deals incessantly in rhetoric, spin, and story, and only fleetingly with facts, analysis, and evidence?*

To answer the why, we must start with the theory of aesthetics, and examine the profound need for art in human life. We will continue by recognizing story as the dominant form of art. We will examine why humans are *story-telling, story-listening, and story-obsessed* animals ("so what's your story?" is, in fact, a ubiquitous expression). We will delve into neuroscience to get a peek at whether life imitates art, not just in events, but whether absorbing fictional narratives creates lasting personality changes. Finally, we will inquire into cognitive science

to inform us whether critical thinking is lowered when people are hooked by a narrative unfolding in front of them.

Truth is always more likely to be absorbed when cloaked in a compelling narrative, as is falsehood. The world of spin is here to stay. Moving consequentially from this research-led inference, we can postulate a strategy for the fourth estate function.

The fourth estate function may be better served by journalists not trying in vain to force a discussion of the facts. Instead, they should get inside the political spin, unravel it, and deliver the *unscrambled egg* to their audience. It would be *as if* the journalist had a bug inside the private strategy room, which facilitates making the public a participant in the campaign narrative strategy formulation, as against being a mere recipient of the polished product. Eavesdropping may be illegal, but a Sherlock-Holmes-style deductive ‘Watergate’ is laudable.

This requires political journalists who aspire to a fourth estate responsibility to learn from their populist entertainment colleagues that they may have long looked down upon. More importantly, the detectives practicing the sublime art of PR unwrap will lose, permanently I suspect, the government handouts (the ‘breaking news’ exclusives), but eventually gain a new audience, a new trust, and reputation.

I. AESTHETICS AND THE HUMAN OBSESSION WITH STORY

In *The Storytelling Animal: How Stories Make Us Human*, Jonathan Gottschall (2009, pp 96-103) derives the above inference from the work of split-brain neuroscience researcher Michael Gazzaniga:

It [the brain] is addicted to meaning. If the storytelling mind cannot find meaningful patterns in the world, it will try to impose them. In short, the storytelling mind is a factory that churns out true stories when it can, but will manufacture lies when it can't.

Gottschall goes on to postulate how these findings explain the preponderance of conspiracy theories. He cites a Scripps Howard poll in which 36% of Americans believed that the U.S. Government was complicit in the 9/11 attacks, and 24% of Republicans believed that President Obama might be the Antichrist. Gottschall (2009, p 103) also cites evidence of how honest memories are unreliable, something law enforcement officials have long since discovered. “Conspiratorial thinking,” infers Gottschall (2009, p116), “is not limited to the stupid, the ignorant, or the crazy. It is a reflex of the storytelling mind’s compulsive need for meaningful experience.”

We read less than we used to, says Gottschall (2009, pp 8-9), not because we no longer like stories, but because we watch fiction on screen — hours a day on television, and then some more in theatres plus watch-at-home DVDs, and then

we dream. The television viewing includes soft news, and a hybrid called reality TV. Gottschall further cites musicologist and neuroscientist Daniel Levitin's astounding estimate of five hours per day as the average time spent listening to music — including elevator music, tunes humming in the background at home, work, and play, plus commercial jingles, most of which have lyrics that revolve around a “story”.

Gottschall (2009, pp 21-45) calls this human obsession with the story form “the riddle of fiction,” but posits no answer to the riddle. However, in his epic, *Story: Substance, Structure, Style, and the Principles of Screenwriting*, famed Hollywood screenwriting guru Robert McKee does forward an answer. To quote McKee (1997, p 12), “Our appetite for story is a reflection of the profound human need to grasp the patterns of living, not merely as an intellectual exercise, but within a very personal, emotional experience.” According to McKee, the view of art as merely entertainment is flawed, otherwise we would not love films or songs that make us cry. In every known civilization, there has been art, and it has often served no obvious practical purpose. Yet it existed, and still does, because there is the potential for an exhilarating pleasure to be derived from it. McKee traces this potential to learning about life itself.

Philosopher-novelist Ayn Rand (1970, pp 35-70) goes much further, developing both a formal definition of art and an entire theory of aesthetics:

Art is a selective re-creation of reality according to an artist's metaphysical value judgments. Man's profound need of art lies in the fact that his cognitive faculty is conceptual, i.e., that he acquires knowledge by means of abstractions into his immediate, perceptual awareness. Art fulfills this need [for illustrative reality] by means of a selective re-creation, it concretizes man's fundamental views of himself and his existence. It tells man, in effect, which aspects of his experience are to be regarded as essential, significant, important.

It is no surprise that McKee is (as was Rand) a consummate fan of the polymath Aristotle, whom Rand (1971, p 71) quotes as having said that “Fiction is of greater philosophical importance than history, because history represents things as they are, while fiction represents them as they might be and ought to be.”

With such weakness for narrative inherent in human DNA, is critical thinking lowered when human fancy is grabbed by an interesting yarn? Gottschall (2009, pp 150-52) answers this question with a resounding yes. Michael Dahlstrom (2012, pp 304-305), a media psychology researcher at Iowa State University, also informs us that models of persuasive narrative infer that “engagement with the narrative, as well as identification with characters, serves to increase persuasive impact through reducing the formation of counterarguments, lessening message scrutiny, and inhibiting psychological resistance.” So strong is the power of narratives in fact, says Dahlstrom (2012, p 303), that “the Centers for

Disease Control and Prevention have begun working with Hollywood to monitor the truthfulness of medical information in television dramas.”

However, does our critical faculty, sedated as it is by the emotional high of fiction, clean up (i.e. reorganize the accepted knowledge framework inside the mind) when the emotional roller-coaster ride is over? Dahlstrom (2012, p 304) answers the question in the negative — “Results from belief-based studies, which examine the acceptance of specific, factual assertions made within narratives and their incorporation into mental belief structures about the world, generally find that individuals do tend to accept narrative assertions and utilize them to answer questions about the world.” In 2007, writing in the journal *Media Psychology*, researchers Markus Appel and Tobias Richter (2007, pp 113-114) had an even stronger inference — “persuasive effects of fictional narratives are persistent and even increase over time (the absolute sleeper effect),” and that “beliefs acquired by reading fictional narratives are integrated into real-world knowledge.”

II. ALL THE PRESIDENT’S SPIN, AND THE COMPLICITY OF THE MEDIA

Skillful media narrators have made the sports field a battlefield of egos, personalities, cheating, deception, underdogs, redemption, and the against-the-odds victory. Often we hear about a sportsman’s/reality contestant’s past, his/her human story — the effect is to render the encounter presented as the grand, allegorical climax of their ‘story’. The so-called ‘reality’ shows on TV are preordained to create a compelling, extravagant narrative, and the clips edited to conform to the script. The World Wide Wrestling Federation and its successors have even been promoting a form of “professional” wrestling in the U.S. that is entirely scripted. Despite its apparent brutality, this theatrical ‘sport’ draws a large audience, in pay TV and as well as in the flesh.

Notwithstanding the increased form of drama everywhere, humans have not recently become more obsessed with story. They were always instinctively drawn to it, but as media platforms have become privatized ratings are driving content more than ever. Ratings, at the end of the day, must yield to human instinct.

Small wonder then, that political campaigns fit the mold. John Heilemann, national political correspondent for *New York* magazine, and Mark Halperin, editor-at-large and senior political analyst for *Time* magazine, conducted more than three hundred interviews with over two hundred insiders on a ‘deep background’ (sources not revealed) basis to give us *Race of a Lifetime: How Obama won the White House* (published in the U.S. as *Game Change: Obama and the Clintons, McCain and Palin, and the Race of a Lifetime*), an extensively researched, and meticulously laid out, insiders’ account of the 2008 U. S. presidential campaign. Despite their center-left credentials, Heilemann and Halperin imply that Obama’s campaign was focused primarily on marketing and message, and not on substance (2009, pp 1–438).

This is hardly new. In 2004, Ben Fritz, Bryan Keefer, and Brendan Nyhan (2004, pp 1-273) — all former journalists — published *All the President's Spin: George W Bush, the Media, and the Truth*. In the preface to their scrupulous account of how spin is overtaking the political world, they write:

During the 2000 election and subsequent Florida recount, the three of us saw how the national debate had been reduced to an endless barrage of spin. Politicians, pundits, and reporters twisted facts until they bore little relation to reality, compressing the election into a melodrama pitting Bush and his supposed lack of intelligence and gravitas against Vice President Al Gore's alleged arrogance and dishonesty.

In other words, the media dumbed it down, or at the very least, was complicit in the dumbing-down process. Writing in *Esquire*, author and journalist Randall Rothenberg (1996, pp 70-73) also reached a similar conclusion, i.e. that the media caved in. He titled his piece — 'The age of spin: perception has at last won its war over reality'.

In their book, Fritz, Keefer, and Nyhan (2004, p 77) quote an example of an Associated Press reporter (Alan Fram) and a CNN reporter (Kelly Wallace) practically transcribing George W Bush's radio address; Fram reportedly wrote "the president said on the radio that his plan was fair and would help all taxpayers." GW Bush repeatedly said that his plan was to help *all* taxpayers; those at the lowest end were to receive the *largest* benefit. In fact, his plan assisted only those who paid *federal income taxes*, and obviously, those who paid the least received the highest *percentage* effect, whilst those on the highest tax bracket received the largest *dollar benefit* — a fact consistently overlooked by the Bush PR machine.

In *Spin Control: The White House Office of Communications and the Management of Presidential News*, John Maltese (1994, pp 1-242), department head of political science at the University of Georgia, chronicles how and why Richard Nixon created the White House Office of Communications ("WHOC") — to influence what news will appear in the media, and how it is to be portrayed, using PR techniques. Maltese's bipartisan conclusion was that the WHOC was not only retained, but also used in this manner by presidents Nixon, Ford, Carter, Reagan, GHW Bush, and Clinton — and disturbingly, in each case, more aggressively than by their predecessor in office.

III. FIGHTING DECEPTIVE NARRATIVE WITH A TRUTHFUL COUNTER-NARRATIVE

It is of little consequence to the watchdog responsibility that reality shows are unreal, and sporting events unfold as operatic finales. When the business of government resorts to trickery, however, the watchdog must bark.

Successful politicians have always been marketers of a heart-warming tale about their candidacy. Behind the scenes, their PR agents deliver a well-spun story attacking their rivals as elite, misguided, and uncaring. The 1993 federal election in Australia was seen as an ‘unlosable’ election for opposition leader John Hewson. Hewson conscientiously spelt out all his policies in a 650-page volume called *Fightback*. The underdog, Paul Keating, fought back with just rhetoric, and won. Whether you were pro-Labor, pro-Liberal, or a swing voter, the lesson was learnt, and has never been forgotten — the better marketers win, the fact-tellers lose.

As market research repeatedly verifies this inference — the wrapping of narrative, the staying-on-message, the “this is how we wish to convey the truth” *modus operandi* increasingly confronts fourth-estate journalists. Meanwhile, governments are holding their employers hostage to the carrot of privy, news-breaking deals.

One solution was suggested by Canadian political columnist Andrew Coyne. Writing in *Maclean's*, Coyne (2011, pp 26-28) asks for a provision in the *Elections Act of Canada* (implicitly as a beacon for the world), which would impose sanctions and/or penalties on politicians found to be making materially misleading statements. Coyne clarifies that such new legislation should only bind statements provided voluntarily to the grip of such a provision — in the sense that one can be let off for off-the-cuff statements in the street, but what you say in a sworn affidavit needs to be true. Coyne opines that the climate in Canadian politics is so infested with deceit that no one is believed, and thus honest politicians suffer. Still, the question remains — if honest politicians are in a small minority at best, what chance is there of such a provision becoming law?

In our search for a viable fourth estate strategy, we get a new lead via Markus Appel, a psychology and cultural studies researcher from Johannes Kepler University of Linz, Austria. Appel (2008, pp 62-83) gives us this insight — “the more people watch television, the more their beliefs correspond to the television world.” I do not believe that the ‘TV as gospel’ issue is an intractable problem; in fact, it has the seeds of a solution. The truth can also be wrapped in an entertaining narrative. The greatest triumph of fiction over fact, as Aristotle implied, is that it can show the world as it *can be and should be*. In fiction, for a vast majority of cases, good triumphs over evil, unlike in the reality of the *Al Jazeera* global news bulletins.

Here is why I draw comfort from Appel’s unique experiment (2008, pp 62-83) — it corroborates an optimistic, but nevertheless, fascinating hypothesis — “watching fictional narratives on television goes along with an increased belief in a just world, whereas general television use and watching infotainment nonfiction are related to the belief in a mean world.”

Story is part of human DNA. Logic cannot beat story — not for persuasion anyway. Nevertheless, journalists can sparkle with a counter-narrative about why they think that a story, particularly during campaign times, is being spun

a certain way. They can conjecture, with panache, trying to be a fly on the wall in the strategy room by deduction, and present their conjecture honestly as a hypothesis. The fourth estate could have colorfully covered the story about how John Howard bastardized the republic referendum in Australia by asking a loaded question: polls had suggested two-thirds of Australians did not favor a foreign national as the head of state. Fourth estate journalists could have, Jon Stewart-style, satirized G W Bush's Claytons funding of stem cell research, whereby funding was provided only for a limited number of contaminated lines. Wayne Swan's tall claim that the Labor Government prevented Australia from the GFC-led worldwide recession has not been, but could have been, countered with the élan of insightful satire.

Such a breakaway group, intent on spilling the beans, would inevitably have an adversarial relationship with the government in power. The rebel group could be denied, for its entire masthead, access to government-sponsored breaking news. It is not something an entire brand can bear easily.

Perhaps the fourth estate cannot be part of a media empire. A media platform cannot freely examine the hand that feeds it. Notwithstanding the issue of being necessarily late on government-led news, a story, about how *The Story* was manufactured, could be just as entertaining as *The Story*. The brand that tears rhetoric apart, may need to, for commercial reasons, be legally excised from the rest of the masthead, which can then follow the herd. Nonetheless, a brand focused exclusively on the watchdog function can entertain as well, by making us 'almost' privy to the backroom strategy with *reverse engineering*. Entertainment pulls people in. Advertising revenue is secured by audiences in numbers that matter. The rest is easy.

That is the prototype I am suggesting — engaging, deductive 'Watergaters', sworn to objectivity, as the new fourth estate. They could become the exemplars that survive the soft-news revolution.

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The Journal Of *Peace, Prosperity & Freedom*

SEAN PARR

Departurism Redeemed — A Response to Walter Block's 'Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr'

ABSTRACT: I will make the case that the departurist view corresponds to libertarian legal theory in a way that Walter Block's evictionist theory on abortion does not. By allowing for an unwanted fetus to continue and complete its departure from its mother's womb, departurism is a manner gentler than would be its eviction from the womb. The departurist theory therefore satisfactorily adheres to the libertarian axiom of gentleness and imposes no positive obligation on the part of the mother in so doing.

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In this paper I will respond to Walter Block's contribution to the abortion debate entitled 'Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr' in an attempt to come to terms with the philosophical issues in this area.¹ Block's evictionist view argues that the mother may evict, but not kill, a trespassing fetus on her property. However if this eviction happens to necessitate the death of the fetus — which, given the current state of medicine, it almost certainly does — then according to evictionism 'the owner of the land is still justified in upholding the entailed property rights.'² In an unwanted pregnancy, then, the mother is within her rights to evict the fetus from her womb because, and despite the fact that, in this case, the alleged "gentlest manner possible" implies the death of this very young human being."³

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- 1 Walter Block, "Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr," *Libertarian Papers* 3, No. 36 (2011).
 - 2 Walter Block, "Response to Wisniewski on Abortion, Round Two," *Libertarian Papers* 3, No. 4 (2011), p. 2.
 - 3 Ibid.

The departurist view on the other hand argues that if once a property owner has deemed a non-criminal occupying his premises a trespasser and the process of the trespasser's departure initiates or else continues (i.e. "a respect for the owner's private property rights"⁴ is demonstrated), then this trespasser's continued and completed departure, rather than his death-necessitating eviction at the hands of the property owner, is to be allowed for — as this (and this alone) is what, in this instance, constitutes the gentlest manner possible.

Departurism is perhaps best explained by means of the following argumentation scheme where S^1 represents the situation of a trespasser (a) without guilty mind (*mens rea*) (b) in the process of departing the premises of the owner of the property in question and where (c) eviction from said premises would necessitate the death of the trespasser, and S^2 represents the situation of a fetus on the premises of the mother. Also, let A represent the continued and completed departure of the trespasser.

Premise 1: The course of action that libertarian legal theory ought to endorse in S^1 is A .

Premise 2: S^2 is relevantly similar to S^1 .

Conclusion: Therefore, the course of action that libertarian legal theory ought to endorse in S^2 is A .

This departurist argumentation scheme has been included in order to systematically respond to each of the relevant criticisms put forth by Block in his article. An organized approach, it is hoped, will afford 'an almost line by line, certainly paragraph by paragraph, critical commentary and refutation.'⁵ The paper will then conclude.

1. LIBERTARIANISM AND GENTLENESS

Gentleness — the 'basic axiom of libertarianism [that] non-criminals are to be treated in the gentlest manner possible [consistent with stopping their aggression]⁶ — has been placed into law 'so as to preclude the victim from acting so strongly against the perpetrator that the victim, too, violates the libertarian code.'⁷

4 Sean Parr, "Departurism and the Libertarian Axiom of Gentleness," p. 10. All that is meant here and throughout this paper by the notion of "respecting private property rights" is that proper deference is, in some manner, being displayed with regard to them as evidenced by a marked discontinuation of their violation (e.g., an inadvertent trespass in the process of being corrected).

5 Walter Block, "Critical Comment on Klein and Clark on Direct and Overall Liberty," *Reason Papers* 33 (2011), p. 112.

6 Walter Block, "Rejoinder to Wisniewski on Abortion," *Libertarian Papers* 2, No. 32 (2010), p. 3.

7 Block, "Response to Wisniewski on Abortion, Round Two," p. 3.

From this notion there have spawned two opposing ‘liberty and private property rights approach[es] to the issue of abortion.’⁸ evictionism and departurism. Each of these approaches acknowledge the personhood of the fetus and make the case that if the occupation of a fetus in its mother’s womb is to be viewed as a trespass (and the fetus, a trespasser), then this fetus is to be treated by the mother in ‘the gentlest manner possible, for the trespasser in this case is certainly not guilty of mens rea.’⁹ That is, the unwanted fetus is to be so treated because it is not a criminal. The feud between these competing views owes to a disagreement concerning the constitution of the principle of gentleness, or, rather, of what this principle ought to consist. Where Block offers addendum after addendum to the axiom of gentleness in order to have it conform to his theory, departurism stands firm in its pure comprehension of the concept as ‘the least harmful manner possible’¹⁰ wholly consonant with putting an end to the aggression.

II. REJOINDER TO BLOCK’S CRITIQUE OF DEPARTURISM

Block, the most formidable of critics on this issue, has claimed to have set out with the purpose of ‘pulverizing the departurist theory.’¹¹ Although, as will be shown, he does not quite succeed in his task, his effort has allowed for both a clearer explanation and a more thorough defense of those aspects of the departurist thesis that have drawn his criticism. Now, in the past, Block’s mode in debate has been ‘to kick, claw and scratch, aiming for the crotch and the neck.’¹² And his spirited style is certainly on display here. He does offer genuine points against departurism for consideration, however, most often, Block’s barbs against the view stem from mere misunderstanding, disingenuousness, or efforts to make himself into an ever-shrinking target.

A. *Premise One*

1. *Gentleness*

Block finds it justifiable for the pregnant mother to lethally evict her unwanted fetus. But why does *this* meet any standard of gentleness?

8 Walter Block and Roy Whitehead, “Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy,” *Appalachian Law Review* 4, No. 1 (2005), p. 1.

9 Block, “Rejoinder to Wisniewski on Abortion,” p. 3.

10 Block, “Response to Wisniewski on Abortion, Round Two,” p. 3.

11 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 2.

12 Walter Block, “Arguing with a Leftist,” *Lewrockwell.com* (2011, January 5), paragraph 4.

Perhaps it is because Block contends that it is not simply the aggression (or, in this case, the trespass), but the *aggressor* (or the *trespasser*) that ‘*must be stopped*’¹³ — a take on the matter which conveniently amends “the libertarian legal nostrum ‘gentlest manner possible’”¹⁴ in a way that serves to bolster the evictionist view. The gentlest manner possible, then, certainly would entail the mother’s death-necessitating ousting of the fetus from her womb. Under this skewed conception of the principle, *of course* it would.

Or perhaps it has something to do with the fact that, to Block, the non-criminal perpetrator is due gentleness, sure, but ‘provided, only, that the rights (sic) of the property owner to evict trespassers is upheld’.¹⁵ This is something like saying, ‘I’m all for monogamous relationships. Provided, only, that either member of them is free to date other people.’ Such would be defining monogamy in a way that absolutely precludes a relationship with only one person at a time. In like manner, Block attempts to preempt departurism from the jump by insisting that the only licit gentleness is the one that allows for the total effacement of the distinction between criminal and non-criminal aggressors.

Block’s view is well understood. He never supports the gentlest manner possible in an unwanted pregnancy because allowing for the fetus to continue and complete its departure would prevent the property owner from evicting it. The view discussed in this paper, on the other hand, indeed supports the eviction rights of property owners provided, only, that the libertarian axiom of gentleness is not violated.

2. *Unintentional Action?*

Block is vehement in his refutation of what he incorrectly takes to be ‘a crucial aspect of departurism’.¹⁶ He has brought to attention my contention that ‘the fetus is not purposefully committing a trespass. It is unable to engage in any sort of human action at this stage of its development’.¹⁷ If this is true, Block has further pointed out, it cannot also be true that this fetus be engaged ‘in the act of stopping his trespass’,¹⁸ for ‘if this infant person cannot *commit* a trespass, he cannot *act* so as to *stop* his trespass either’.¹⁹ This is very true. What is very false is Block’s

13 Block, “Response to Wisniewski on Abortion, Round Two,” p. 4.

14 Ibid.

15 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 2.

16 Ibid, p.4.

17 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 2.

18 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 4.

19 Ibid.

claim that the ability of a fetus to act in order to depart the mother's premises is some sort of genuine contention of departurism.²⁰

The entire departurist thesis does not stand or fall on this impossibility. Rather, it stands or falls²¹ on the quite realistic notion that gestation constitutes a process that works to affect the cessation of property-directed aggression. Because of this, then, the mother may not properly employ violence against the fetus — and this by Block's own admission: 'only if [a non-criminal trespasser] refuses²² to respect private property rights ... may [the owner of the property in question] properly employ violence against [him]'.²³

What's more is that the departurist paper on topic has expressly enumerated throughout²⁴ the fact that a non-criminal aggressor need not be capable of human action in order to be the object of a departure-eliciting process — his departure may be the result of something outside of his sphere of control. It is only necessary to peruse the departurist argumentation scheme, the principal function of which is to 'organize and make clear [the departurist] position',²⁵ for where it might indicate that the trespasser's departure must be the result of

20 Where the term "action" was used by me to refer to purposeful behavior on the part of actors (e.g., mothers or property owners evicting fetuses or trespassers, or else allowing for them to continue and complete their departure), the term "act" was (perhaps inappropriately) used to refer to a process (think: "in the midst of") — one argued throughout the paper as being engaged in either unwillfully by the fetus or others, or willfully and in compliance with a property owner's request to vacate by the various non-criminal trespassers used in the paper's examples.

21 Well, stands.

22 If, as both evictionism and departurism maintain, a fetus is incapable of human action, then it most certainly cannot *refuse* to respect private property rights. It cannot refuse to do anything *at all*. So, even if the departurist position — that the process of gestation constitutes a respect for the mother's private property rights — were to somehow be proven false, according to Block the mother would *still* not be in a position to employ violence against it because she may properly do so *only* if it *refuses* to depart her womb, something that the fetus is incapable of doing. It, perhaps, would be unfair to state that Block's entire thesis falls on the basis of this contention of his — but such is a crotch-aiming digression.

23 Block, "Rejoinder to Wisniewski on Abortion," p. 3.

24 Parr, "Departurism and the Libertarian Axiom of Gentleness," p. 11: "[Rather than being in compliance with a request to vacate] departure might simply [be] incidental to Y's very nature (that is, departure from the premises might well be a necessary condition of his visit [or of his trespass]);" p. 15: "Y's certain departure from the premises ... represents a force of nature;" p. 15: "Even if [a fetus] were to be deemed by the mother a trespasser, it is nonetheless respecting private property rights by vacating her premises (albeit not of its own volition, but by force of nature);" p. 15: "A overcompensates in his reaction. Losing his balance, A happens to engage in the correction of his misstep (that is, as it so happens, A demonstrates a respect for B's private property rights). Gravity (force of nature) is causing A to regress off of B's lawn."

25 Ibid, p. 1.

human action. One may peruse to their heart's content and never come across this stipulation. Block's attacking of this position and his describing it as foundational to departurism, rather than ascribable to a terminological error on the part of the author, is just one example of his aiming for the crotch.

3. *Rape*

In an effort to represent what he understands to be a departurist position, Block has constructed a clever, though flawed, scenario in which a rapist pleads with the police officers ordering him to immediately stop for 'a little time to finish up'.²⁶ Block concludes, then, that it is the departurist position that the cops ought to allow the rapist's request. When coming to this conclusion, Block has either innocently mistook departurism, or else he has disingenuously presented it.

Firstly, rape is a crime — and the rapist in Block's example, a *criminal*. Because 'gentleness is applicable to non-criminals',²⁷ the departurist would not proceed as though this principle was applicable to the rapist on topic. Secondly, rape is an aggression against person, and not one against property, and, for that matter, so is any consideration of pregnancy in which 'the mother's life is at stake'.²⁸ Block, here, demonstrates both that he places no importance on this morally relevant distinction and that he does not correctly understand the departurist view: 'Parr's theory ... would mandate that the mother die ... so that the baby may live, and then the mother, who could otherwise have survived unhurt, would be allowed to pass away'.²⁹ To borrow a turn-of-phrase from this author's debating partner, 'not so, not so'.³⁰ In light of the following explanation, 'not so a thousand times'.³¹ Special care has been taken to offer that 'aggressions against person and those against property occupy different levels of moral concern'³² and that, as such, any course of action supposedly appropriate for one is not necessarily appropriate for the other.

4. *Positive Obligations*

Departurism does not legally oblige individuals to help others. Because its requirement makes no appeal to any notion of 'extreme need,' 'extreme cases,'

26 Block, "Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr," p. 4.

27 Parr, "Departurism and the Libertarian Axiom of Gentleness," p. 3.

28 Block, "Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr," p. 6.

29 Ibid.

30 Block, "Rejoinder to Wisniewski on Abortion," p. 7.

31 Block, "Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr," p. 7.

32 Parr, "Departurism and the Libertarian Axiom of Gentleness," p. 16.

or “the common good” (and because it originates not from these notions, but from the narrow and limited principle of gentleness, as applicable to non-criminal aggressors), departurism is immune to any objection that would claim that, if it were to be broadly adopted, ‘there would be no way to contain the collectivist flood,’³³ or that society would be ‘logically obligated to accept a right to food, clothing, shelter, medical care, etc.’³⁴

The departurist view acknowledges and agrees with Block’s libertarian analysis in support of the doctrine of negative obligations: ‘people are obligated, *only*, to refrain from initiating, or threatening, physical violence against innocent people or their property. They are not at all legally obliged to ... be a Good Samaritan.’³⁵

But what serves to distinguish whether or not a requirement regarding trespasser eviction is a positive or a negative one? On what factor is the onus to be placed? This paper argues that this factor is gentleness.³⁶ Because ‘gentleness is a libertarian fundamental,’³⁷ any requirement beholden to it must also be libertarian and, thus, a negative requirement because ‘there are no positive obligations in the libertarian lexicon.’³⁸ And when Block acknowledged that the evictionist “obligation to notify the authorities is a requirement of the gentlest manner possible”³⁹ he seemed to have agreed that such is the case.

But what exactly is this evictionist notification requirement? As Block has put it, it is the obligation ‘that the mother notify the authorities to see if they will take over responsibilities’⁴⁰ for keeping the unwanted fetus alive. It would, no doubt, be gentler to notify others of one’s intent to lethally oust a non-criminal trespasser from one’s property than to simply evict this trespasser unto death without first engaging in said notification. But this does not constitute the *gentlest manner possible* of affecting this trespasser’s removal. That honor goes to departurism’s means, for they do not employ force or violence against the non-criminal trespasser. They do not entail the death of any innocent person. This is clear. That

33 Alejandro A. Chafuen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (USA: Lexington Books, 2003), p. 42.

34 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 6.

35 Ibid.

36 To clarify, I no more asked for an exemption from the rejection of positive obligations on behalf of departurism than Block and Whitehead did an exception on behalf of evictionism when they cautioned, “if [the evictionist is] indeed guilty of making an exception to the general libertarian stricture against positive obligations, it is a very narrow and limited one” (Block and Whitehead, “Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy,” p. 36).

37 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 3.

38 Walter Block, “Libertarianism, Positive Obligations and Property Abandonment: Children’s Rights,” *International Journal of Social Economics* 31, No. 3 (2004), p. 281.

39 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 8.

40 Block, “Response to Wisniewski on Abortion, Round Two,” p. 2.

being said, does Block's notification requirement regarding trespasser eviction even qualify as libertarian? To qualify as such, it must be a negative requirement. But is it? It flatly does not adhere to gentleness as satisfactorily as does departurism's requirement, but is there some fall-back position, some contingency, that Block could use to square his theory with the libertarian stricture against positive obligations? To determine this, it is necessary to investigate Block's view on, of all things, child abandonment.

It is Block's position that child-abandoners be required to notify others of their intention to relinquish control of their children (abandon them). Why does this requirement of his not constitute a positive obligation on the part of the parents? Because, claims Block, property owners are required to do the same if it is their intention to abandon their property. To explain, if said property owners do 'abandon' their property, without first fulfilling this obligation to notify, then they are not, in fact and by definition, 'abandoning' this property, they are behaving as absentee owners over it. The notification of others is what is (logically) required of property owners if they are to licitly abandon their property (and not simply 'temporarily, for the moment, even for the rest of [their] life'⁴¹ put it to disuse). In the same way, it is what is (logically) required of parents if they are to licitly abandon their children. It is a definitional justification of the notification requirement in that, in the absence of it, the term 'abandonment' loses its meaning. This is fine and there is nothing to say against it. It is an alright theory on the subject of child abandonment.

But how does it apply or even relate to trespasser eviction? Well, here Block seems to muddle things up a bit. He would have it that even pre-birth children (fetuses) fall prey to this analogy of his. They, too, are to parents what land or property is to property owners. Claims Block, 'the exact same analysis holds'.⁴² So, requiring parents to 'notify the orphanage, church, monastery, etc., of an (sic) no longer-wanted infant'⁴³ is not, in Block's view, a positive obligation.

But wait a tick, were not pre-birth children (fetuses) to be viewed as *trespassers*? Did not Block state that 'the relation of the fetus to the mother is akin to the one that obtains between the ordinary trespasser and the owner of the property in question'?⁴⁴ Is it not *this* analogy that is the thrust of the entire evictionist thesis? Are fetuses non-criminal trespassers? If so, it is only the gentlest manner possible that would prevent any requirement pertaining to them from being un-libertarian. Or are they property? If this is the case, it is only the notification of others that could avoid this dark result. Now, if most

41 Block, "Libertarianism, Positive Obligations and Property Abandonment: Children's Rights," p. 279.

42 Block, "Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr," p. 9.

43 Ibid.

44 Block, "Response to Wisniewski on Abortion, Round Two," p. 2.

analogies limp, then this must be doubly true when one analogy dances around another to the point where even its author dizzyingly confounds what it is that is being likened. If a suggestion may be offered, perhaps Block ought to decide in what way he would have pre-birth children dealt with — as property or as non-criminal trespassers *on* property. This might clear up some confusion, as only one of these things, the former, can be abandoned and, thus, subjected to any notification requirement.

Where Block is ultimately mistaken is in this: he assumes that the notification of others is what is (logically) required of property owners if they are to, in fact and by definition, evict trespassers. This, however, raises questions. If a property owner does not notify others of his intention to evict trespassers, does he relegate himself, somehow, to becoming merely an ‘absentee trespasser evictor’ or an ‘absentee private property rights upholder’? Do such notions even make sense? It is, with all respect to Block, ridiculous to claim that a property owner has ‘not yet succeeded’⁴⁵ in evicting a trespasser whom he has just ousted from his premises simply because this property owner has notified no one of his deed. There is no definitional justification of Block’s notification requirement in which, in the absence of it, the term ‘eviction’ would lose its meaning. This means that notification is not a requirement for eviction in the same way that it is for abandonment — and it *must* be if Block’s thesis is to be a coherent one.

The objective of this subsection is to sort of corral Block into dealing with this issue: the notification of others is not part and parcel of what proper eviction *means*. That is, a property owner can evict a trespasser without notifying anyone and his action, the eviction, *remains what it is and nothing less*. Block’s eviction requirement to notify derives not ‘from what it means to evict trespassers,’⁴⁶ or even from the gentlest manner possible. Rather, this eviction requirement to notify derives simply from Block’s say-so and, as such, it is a positive obligation. It truly ‘tis.

5. Duration

It is difficult to assail the position of one’s opponent when this position cannot be relied upon to remain constant throughout defenses to different criticisms. In this way, Block’s take on the relevance of trespass duration is something like ACME’s pen ink — disappearing, and then reappearing. So it is necessary, before this paper responds to Block’s most recent comments on duration, to briefly engage in a history of the subject and his recorded take on it.

In response to Wisniewski’s position that the NAP “trumps the right to evict trespassers from our property if it is us who are responsible for making someone

45 Block, “Libertarianism, Positive Obligations and Property Abandonment: Children’s Rights,” p. 279.

46 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 9.

a ‘trespasser’ in the first place,”⁴⁷ Block advanced a thought-experiment, involving a deadly storm: “I invite you inside my house Ten years go by. The storm persists. If ever I disinvite you . . . I will be guilty of murder . . . because I have made you ‘a trespasser in the first place.’”⁴⁸

Wisniewski responded well to Block’s thought-experiment by leveling against it the charge that it was a disanalogous criticism ‘in terms of duration’⁴⁹ because, while Block’s storm is indefinite, pregnancy only lasts somewhere between 0 and ‘approximately 37–42 weeks.’⁵⁰ But Block ‘is not without a fall-back position.’⁵¹ He stated, ‘we are talking *principle* here. It matters not one whit how long a duration we are talking about.’⁵²

I have addressed the embedded incongruity within this position. The problem with maintaining that the duration of a trespass is a matter of principle *and* arguing for a requirement of a property owner to notify others of his intention to evict trespassers is that it is self-defeating:

[F]or the evictionist obligation to notify gives the trespasser ‘a positive right to squat on what would ordinarily be considered the [owner’s] private property’ for the duration of notification. If it takes the property owner only nine minutes to notify the authorities, then these nine minutes ‘could be turned to nine or even ninety years, without any change in principle whatsoever.’⁵³

But Block ‘is not without a rejoinder to this sally of mine,’⁵⁴ and it is here that he runs into trouble. ‘No, the amount of time is crucial,’⁵⁵ that author confusingly states. So, embarrassingly, Block’s now rescinded statement, immediately above, that ‘it matters not one whit how long a duration we are talking about,’⁵⁶ ‘cannot be true, and, by that author’s own admission.’⁵⁷ In order to avoid the implications of the reductio leveled against his view (detailed in the below subsection), Block, caught between Wisniewski’s rock and Parr’s hard place, bites the bullet,

47 Jakub Bozydar Wisniewski, “A Critique of Block on Abortion and Child Abandonment,” *Libertarian Papers* 2, No. 16 (2010), p. 3.

48 Block, “Rejoinder to Wisniewski on Abortion,” p. 6.

49 Jakub Bozydar Wisniewski, “Rejoinder to Block’s Defense of Evictionism,” *Libertarian Papers* 2, No. 27 (2010), p. 5.

50 Ibid.

51 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 8.

52 Block, “Response to Wisniewski on Abortion, Round Two,” p. 11.

53 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 10.

54 Block, “Response to Wisniewski on Abortion, Round Two,” p. 5.

55 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 8.

56 Block, “Response to Wisniewski on Abortion, Round Two,” p. 11.

57 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 4.

so to speak, and opts, at the risk of being labeled unprincipled or inconsistent, to defend himself against the 'self-defeating' hard place at the expense of getting smashed by the 'disanalogous' rock.

6. *Implicit Contracts*

Parr's reductio of the evictionist position, based on Block's *original* position that the duration of a trespass is a matter of principle, goes as follows: Y is in the penthouse of X's nine-story manse when X declares him unwanted. As Y is departing, X notifies another of his intention evict Y, and then does so on the basis of not wanting to bear the burden of Y's nine-minute departure, of which Y is in the midst. The nine-story fall, of course, kills poor Y.

"On the basis of this example," claims Block, "Parr concludes that evictionism is open to the ... charge [that evictionist] 'libertarianism, if it did not altogether destroy the civil society, would most certainly destroy the host-guest relationship.'"⁵⁸

Block, however, states that the above criticism 'misses its mark'.⁵⁹ Because Y (and libertarian law) would be properly aggrieved if he were to be tossed to his doom for burdening X with only a nine minute departure, Block's position is that the ninth-story window-tossing of Y ought to be viewed as a condemnable act. This on the basis of the phenomenon of implicit contract between host and guest, which, Block argues, is not applicable to the mother-fetus relationship 'because a necessary condition for a contract ... is that there be *two* contracting parties. But ... at the time of ejaculation, there is only *one* person alive, the mother.'⁶⁰

However, this criticism misses *its* mark. Departurism does not make the argument that it is because of the phenomenon of implicit contracts that fetuses must not be aborted. Its conclusions are not drawn on the basis of how non-criminal trespassers come to be such. The existence or nonexistence of an implicit contract plays no role in determining whether or not an aggressor is a criminal or non-criminal or, if he in fact is the latter, whether or not he should be the object of gentleness. This paper is simply not concerned with the above objection of Block's.⁶¹

It does, in fact, seem the case that, under evictionism, those non-criminal trespassers whose duration of departure is not in violation of the implicit

58 Ibid, p. 10.

59 Ibid.

60 Ibid, pp. 10–11.

61 For a discussion on the topic of implicit contracts as they pertain to abortion, it is recommended that one read Block, "Rejoinder to Wisniewski on Abortion;" Block, "Response to Wisniewski on Abortion, Round Two;" Block, "Response to Wisniewski on Abortion, Round Three," *Libertarian Papers* 3, No. 37 (2011); Wisniewski, "A Critique of Block on Abortion and Child Abandonment;" Wisniewski, "Rejoinder to Block's Defense of Evictionism;" and Jakub Bozydar Wisniewski, "Response to Block on Abortion, Round Three," *Libertarian Papers* 3, No. 6 (2011).

contract between them and the evicting property owner receive, courtesy of this phenomenon, a sort of stay of execution. But what of non-criminal trespassers to whom this phenomenon is not applicable? Those without the capacity for human action — those who cannot ‘be a partner in a contract in any case.’⁶² Those persons who have not the capacity to ‘understand and agree to a contract’⁶³ (a category of persons to which much more than simply very young human beings belong)? ‘How could there be a *contract* of any type or variety’⁶⁴ with these type folk? What is to become of *them* under evictionism? Well, out of the ninth-story window with them! So, while evictionism may not obliterate the host-guest relationship, it seems it is not “a bit of hyperbole to assert that under evictionism: ‘libertarianism is transformed into an ideology of corpses.’”⁶⁵

“There are really two separate issues under discussion here, and we do well to distinguish between them.”⁶⁶ On the one hand, there is the question (addressed directly above) of whether or not the phenomenon of implicit contracts keeps intact the host-guest relationship. On the other hand, there is the question of whether or not the absence of an implicit contract ought to permit a property owner to treat the non-criminal trespasser on his premises in a manner decidedly more harmful than the gentlest one. But gentleness is *foundational* to libertarianism. On what grounds ought not libertarian theory default to it in the absence of a (implicit) contract? After all, gentleness is a basic axiom of this ‘branch of law’.⁶⁷

If non-criminal trespassers happen to be in the process of ceasing their property-directed aggression, what madness could move one to maintain that employing violence against them, which proves fatal in mother’s wombs or in the penthouses of nine-story manses, is a less harmful means of stopping the tort than allowing for this departure-eliciting process to play out? Because an implicit contract cannot obtain? So. So what? Is it not *the gentlest manner possible*, and not the manner subject to implicit contract that is being discussed?

B. *Premise Two*

Because Professor Block “has not only maintained that ‘the fetus is not purposefully committing a trespass,’ but also that, in the author’s perspective, ‘if a fetus

⁶² Ibid, p. 11.

⁶³ Block, “Response to Wisniewski on Abortion, Round Three,” p. 12.

⁶⁴ Ibid., p.11.

⁶⁵ Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 10.

⁶⁶ Ibid, p. 9.

⁶⁷ Walter Block, “David Friedman and Libertarianism: A Critique,” *Libertarian Papers* 3, No. 35 (2011), p. 3.

is aborted, he must *necessarily* have been killed,”⁶⁸ he concedes that these conditions of S^1 are present in S^2 . And, because he has not leveled any charges against the claim that gestation ensures that the fetus is in the process of departing the mother’s premises, there is every reason to think that Block would contend that this final condition of S^1 is also present in S^2 . The closest he comes to disputing premise two is to state that

[I cannot] accept Parr’s claim that ‘allowing for such a trespasser to depart in this situation is the gentlest manner possible consistent with stopping the crime (sic).’ Allowing the fetus nine months of trespass is hardly upholding the private property rights of the mother; it is not (sic) all *stopping* the tort.⁶⁹

There are two points to clarify here. Firstly, in no way does the departurist requirement that the property owner ‘withhold eviction for the duration of departure’⁷⁰ necessitate a nine month unwanted occupation of the fetus in the mother’s womb. A nine month occupation is *possible*, assuming that the pregnancy is unwanted from the outset. But the duration of departure might be as little as nine minutes, assuming that the pregnancy becomes unwanted only toward the very end of gestation.

What seems to stick in Block’s craw, here, is that he sees departurism as a view different in theory, but not in practice from the pure pro-life stance, which he describes as the take on abortion in which ‘the woman must carry the fetus for nine months.’⁷¹ States Block: ‘While departurism might differ from the extreme pro-life position in its theory, in the law it espouses there is no difference between the two of them whatsoever.’⁷² But if Block’s observation, here, currently counts as a mark against departurism, it is only a matter of time, then, before it condemns his view as well. For Block, who is pro-life at heart,⁷³ is on record as stating that the pro-life position is the inevitable fate of evictionism: ‘Fifty years ago, the evictionist theory was then pro-choice. Five [or possibly one] hundred years from now... we’ll be pro-life.’⁷⁴ That is, as medical technology advances and evictionism matures toward its ultimate ideal, ‘the law it

68 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 14.

69 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 4.

70 Parr, “Departurism and the Libertarian Axiom of Gentleness,” p. 9

71 Evictionism: Abortion and Libertarianism (Walter Block) [Videofile]. Retrieved from <http://www.youtube.com/watch?v=QNTAmwUHcLM>

72 Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” p. 5.

73 Walter Block, “A Not So Funny Thing Happened to Me in Tampa,” Lewrockwell.com (2012, August 30), paragraph 3.

74 Evictionism: Abortion and Libertarianism (Walter Block) [Videofile]. Retrieved from <http://www.youtube.com/watch?v=QNTAmwUHcLM>

espouses' will be identical to that espoused by departurism. In practice, there will be 'no difference between the two of them whatsoever.' By attacking departurism in this manner Block confronts a dead end and displays a strange breed of theory-envy in which departurism catches his ire for achieving the pro-life end before his view.

Secondly, the departurist requirement does not entail, simply, withholding eviction for the amount of time it takes a morally innocent trespasser to discontinue his violation of the owner's private property rights — for such would allow for absurdities something along the lines of Block's (poor) rapist example. Rather, it entails the amount of time it takes this non-criminal to *continue and complete* the process of ceasing the aggression which constitutes his trespass. This implies that the effect (the occupant's departure) exist simultaneously with the cause (the property owner's declaration of the occupant as unwanted), or that this non-criminal trespasser, upon his declaration as unwanted, *already be* 'in the process of departing the premises of the owner of the property in question'⁷⁵ — for one cannot continue and complete something that has not already begun. Block ignores the fact that the trespasser's departure in S^2 is already underway. The tort is being stopped. But this is not adequate for Block. He would have libertarian law endorse a theory, his, that ensures that the tort's stoppage be stopped in order to stop the tort — and in a separate, more harmful way.

In any event, the relevant similarity of the situations compared in premise two is not, it seems, under contention.

C. Conclusion

Because Block took no issue with the overall soundness of the departurist argumentation scheme in its original context, there is every reason to think that he would agree to the notion that *if* both premises of it are more plausible than their negations, then its conclusion follows. This paper, of course, maintains that these premises indeed are more plausible than their contradictories.

III. CONCLUSION

Evictionism does not subscribe to any libertarian axiom which affords non-criminals treatment in the gentlest manner possible consistent with stopping their aggression. It subscribes to an axiom quite outside of this and quite outside of libertarianism; one which affords non-criminals treatment in the most expedient

75 Parr, "Departurism and the Libertarian Axiom of Gentleness," p. 5.

manner, or in the manner that most satisfactorily upholds eviction rights, or in the manner that best adheres to the phenomenon of implicit contracts. Block's comprehension of the evictionist theory seeks, unnecessarily and to the injury of the innocent, to be fully compatible with stopping the aggressor, rather than with stopping the aggression. 'Say what you will about this theory of his, it is not a libertarian one.'⁷⁶

76 Block, "Rejoinder to Wisniewski on Abortion," p. 6.

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WALTER BLOCK

Rejoinder to Parr on Evictionism and Departurism

ABSTRACT: This present paper is part four in a debate Sean Parr and I are having on abortion. Part one consisted of Parr, 2011. Part two consisted of Block, 2011A. Part three consisted of Parr, 2013. In my view, the proper libertarian position on abortion is neither pro-life nor pro-choice. Rather, 'evictionism', where the mother of a fetus has a right to evict it from her womb, in the gentlest manner possible (that is, to preserve its life during the process of eviction if at all possible), but not to kill it. As I see matters, Parr (2011, 2013) interprets "in the gentlest manner possible" so radically as to claim that the fetus may only be evicted if it is viable outside the womb; that is to say, he maintains that libertarianism is consistent, only, with the pro-life position. My claim is that this constitutes a radical misconstrual of libertarianism.

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INTRODUCTION

I first offered the evictionist solution to the pro-life versus pro-choice quandary over abortion in Block (1977). When I did so I expected that libertarians would welcome this initiative with great enthusiasm and that non-libertarians would scorn and reject it. I was wrong on both counts. I expected support from libertarians because the evictionist theory is totally predicated upon private property right, one of the two basic building blocks of our shared philosophy.¹ Also, I thought, this idea would really put us libertarians on the political philosophy map; we would no longer be ignored, marginalized. After all, the pro-life pro-choice controversy is perhaps the most highly charged philosophical debate ever to have fascinated not only the general public, but the intelligentsia as well.

1 The other is the non-aggression principle, or NAP. See on this Rothbard, 1973, 1998; Hoppe, 1993.

Unlike other divisive issues,² each side must concede that the other has at least one valid point. No pro choicer can be fully comfortable in his heart of hearts in seeing the massive number of deaths of even potential human beings, as they view the unborn child. No pro-lifer can be completely happy about forcing the victim of rape to a further nine months of suffering. If we libertarians could show a way out of this quandary, while sticking to our principles, this, I expected, might well be the vehicle to capture the positive attention and the loyalty of the public to our banner. In the event I was sorely disappointed. Every libertarian who wrote about evictionism, at least those who published in refereed journals such as this one, vehemently rejected it, and no libertarian published any defense of it in such format. As to the general public, and the non-libertarian academicians, they ignored it entirely.³

What is evictionism? Very quickly, it posits that human life begins with the fertilized egg, not nine months later at birth. One point for the pro-lifers. But what of the property under dispute between the mother, who does not want, for *any* reason, or no reason at all, to carry the fetus in *her* womb for the full gestation period of three quarters of a year, and the human baby whose life is in dire danger if she has her way, and who wishes⁴ to remain exactly where he is for the full duration? Why, clearly, it belongs to the mother, and entirely so. The womb consists of parts of her very body. One point for the pro-choicers. Who has a right to control property in the libertarian view? Why, its *owner* of course; that is precisely who. The unwanted fetus is thus akin to a trespasser for the mother who wishes him not to occupy that or indeed any part of her body. Do property owners have the right to kill trespassers, such as unconscious people, or babies, who lack *mens rea*? Of course not. Must the homeowner allow the trespasser, however innocent to remain in her domicile for as long as the latter need to do so to preserve his life? No, certainly not either. Therefore, the proprietor of the property in question⁵ may evict, but not kill the stowaway. He must remove him in the gentlest manner possible consistent with retaining *full* rights over his own property, lest he, too, engage in an act incompatible with libertarian law.

With this introduction, we are now ready to respond to the critique of evictionism offered by Parr (2013). That is the burden of section I. Section II continues this process, following the organization of Parr's (2013) paper. We conclude in section III.

2 E.g., guns, war, welfare state, foreign policy, education, etc.

3 The non or pseudo libertarian Jonas even refused point blank to discuss it, after first raising the issue of libertarianism and abortion himself. See on this Block, 2013A, 2013B.

4 As expressed by his champions, the pro-lifers.

5 Whatever kind of property it is: house, car, boat, plane, land, and, also, womb.

I. GENERAL RESPONSE TO PARR

My critic starts out on the wrong foot as early in his paper as the abstract. Parr (2013) states: “It will make the departurist case that allowing for the unwanted fetus to continue and complete its departure from its mother’s womb is a manner gentler than would be its eviction from there and, as a result of this, that the departurist view corresponds to libertarian legal theory in a way that the evictionist one does not.” But to say this is to elevate “gentleness” to a basic premise of libertarianism.⁶ To do that is to very seriously misconstrue this philosophy. Libertarianism is based, rather, on the non-aggression principle (NAP) coupled with private property rights based initially on homesteading. The only time “gentleness” becomes an issue is when it comes to the question of how to deal with criminals, trespassers. The libertarian philosophy provides that such a person⁷ not be harmed any more than is necessary,⁸ while still fully protecting the rights of the property owner.

Parr (2013) gets this right when he quotes me (Block, 2010, footnote omitted): “Gentleness, the ‘basic axiom of libertarianism [that] non-criminals are to be treated in the gentlest manner possible [consistent with stopping their aggression],’ has been placed into law ‘so as to preclude the victim from acting so strongly against the perpetrator that the victim, too, violates the libertarian code.’” But he fails to emphasize here, the all-important proviso I mention: “consistent with stopping their aggression.” Without that stipulation, the backbone of libertarian law is destroyed.

It is gratifying that Parr and I should achieve such a great degree of agreement. Both of us “acknowledge the personhood of the fetus and make the case that the occupation of a fetus in its mother’s womb is to be viewed as a trespass (and the fetus, a trespasser).” Yet it is disappointing that we reach such incompatible and logically inconsistent conclusions from these shard premises. According to my libertarian colleague: “this fetus is to be treated by the mother in ‘the gentlest manner possible, for the trespasser in this case is certainly not guilty of mens rea.’” Of course, this baby human being lacks mens rea, and thus cannot be considered a criminal. However, he is nonetheless violating the libertarian legal code, which forbids anyone, for any reason, from trespassing on, occupying against the will of the owner, another person’s property. It cannot be denied that the fetus is totally devoid of any intention to trespass. But the same can be said for the unconscious adult, who is unknowingly stowed away on someone else’s

6 A philosophy that Parr and I both share, presumably.

7 On libertarian punishment theory, see Block, 2009A, 2009B, Kinsella, 1996, 1997; Olson, 1979; Rothbard, 1977, 1998; Whitehead and Block, 2003.

8 Better said, any more than is compatible with libertarianism, lest such an act violate the rights of the criminal.

airplane or boat. Innocence must not be allowed to prevail over private property rights, at least not for the libertarian.

Let us consider the logical implications of this statement of Parr's (2013, footnote omitted): "The departurist view argues that if, once a property owner has deemed a non-criminal occupying his premises a trespasser, "a respect for the owner's private property rights" is demonstrated (e.g., the process of the trespasser's departure initiates or else continues), then this trespasser's continued and completed departure, rather than his death-necessitating eviction at the hands of the property owner, is to be allowed for—as this (and this alone) is what, in this instance, constitutes the gentlest manner possible."

One problem is that I do not at all consider the fetus as a non-criminal *in effect*. Totally without any mens rea, he is still occupying territory owned by another person, his mother, against the will of the latter. If that is not (ok, non) criminal trespass, then nothing is. Second, Parr does not confront Thomson's (1971, 1986, 1990, 1991) case of the two people, A and B, hooked up to the kidney of only one of them, A. B, in this scenario is also totally innocent — of mens rea, but not of trespass, a distinction not sufficiently recognized by Parr. Suppose that severing A from B will spell the death knell for the latter; the only way A can free herself from the unwanted company of B is to undertake a process that will take B's life. Parr would have none of that because this is hardly "gentle." That means this author would condemn equally innocent A to a lifetime of intimate connection to B, against her will.⁹ And this in the name of libertarianism? Third, Parr again allows the tail of "gentlest manner possible" to wag the dog of libertarian's most basic premises, the NAP and the sanctity of private property rights.

Fourth, let us stipulate, arguendo, that "gentleness" is more important to libertarianism than what I have characterized as its two "basic premises." What, then, about "gentleness" for A in the Thompson case, or the mother, in the issue dividing me and Parr? "Gentleness" for the fetus constitutes the exact opposite for the mother, and, of course, vice versa. It would appear that there is not enough "gentleness" to go around. Another axiom of libertarianism is that rights *cannot* clash. If this appears to be the case as it does here at least on the basis of Parr's analysis, then one or the other or both of these so-called property rights is mis-specified. So in Parr's "gentleness" interpretation of libertarianism, who should be given this benefit? Who should prevail? Parr takes the side of the fetus, not the mother, but that is because, presumably, he looks through his "gentleness" spectacles, not his libertarian ones, and sees only the baby. But on what basis does he award all the "gentleness" to the mother? Perhaps because it will only entail nine months of suffering on her part, as against the baby's very life. On what basis would Parr, presumably, award all the "gentleness" to B, the trespasser on A's kidney in Thompson's example? Again, this might be expected since

9 She, too, lacks any mens rea.

he is weighing up B's very survival against A's great inconvenience. But this does not sound like libertarianism at all. Rather, it smacks of utilitarianism, complete with interpersonal comparisons of utility, or perhaps, Coaseanism (1960), or, maybe, egalitarianism. But not libertarianism.

Fifth, suppose it is a choice between the mother's and the babies' life. Evictionist theory is clear on this, the mother may evict, but not abort, the fetus at any time during her pregnancy, entirely at her own discretion. What is the analysis of "departurism" on this crucial issue? Parr does not say, let alone give any criterion on the basis of which we can weigh the "gentleness" due to the mother and the fetus. However, reading in between the lines, I surmise that this author would favor the baby of the parent. She, posit, is 30 years old, with a life expectancy of say only 60 more years; he in contrast, has not yet been born. If his life expectancy is also 9 decades, it is 50% longer than his mother's. Thus, I think, Parr's nod goes to the latter. But this is an exercise in "gentleness," or Coaseanism, or utilitarianism. It has nothing at all to do with a rights-based libertarianism.

II. CRITIQUE CONTINUED

I now comment on each of the premise headings of the Parr paper.

A. *Gentleness*

Parr (2013) accuses me of making an error, akin to saying "I'm all for monogamous relationships. Provided, only, that either member of them is free to date other people.' Such would be defining monogamy in a way that absolutely precludes a relationship with only one person at a time. In like manner, Block attempts to preempt departurism from the jump by insisting that the only licit gentleness is the one that allows for the total effacement of the distinction between criminal and non-criminal aggressors. Block's view is well understood. He never supports the gentlest manner possible, a derivative of the non-aggression principle (NAP)..."

Parr would indeed have a good point if I did indeed buy into the notion that the essence of libertarianism is "gentleness," not the NAP based on licit property rights, and that "gentleness" applies only to the baby, not to the owner of the womb. I do not. This author admits that "gestation constitutes a process that works to affect the cessation of property-directed aggression," in nine months, but his entire analysis is incompatible with that concession.

Let us consider this sharp rebuke that Parr (2013, footnote deleted) delivers against the evictionist theory:

...to Block, the non-criminal perpetrator is due gentleness, sure, but 'provided, only, that the rights (sic) of the property owner to evict trespassers is

upheld.' This is something like saying, 'I'm all for monogamous relationships. Provided, only, that either member of them is free to date other people.' Such would be defining monogamy in a way that absolutely precludes a relationship with only one person at a time. In like manner, Block attempts to preempt departurism from the jump by insisting that the only licit gentleness is the one that allows for the total effacement of the distinction between criminal and non-criminal aggressors.

To define "monogamy" so as to include liaisons is to commit a logical contradiction, equivalent to "square circle" or "married bachelor." Have I committed so blatant a fallacy? Methinks not. Parr is arguing in effect that what I give with one hand (gentleness) I take away with the other (the right of the mother to evict a trespasser who bears no mens rea). That is to say, there is no difference between the evictionist position and that of pro-choice. The "gentleness" of neither of them does the fetus one single bit of good. Parr could not be more in error in this contention of this. There is a *world* of difference between the two — for babies in the third trimester at present, and, for all babies as medical technology continually improves. Right now, at one fell swoop, if evictionism were to replace our present pro-life legislation, not a single solitary young human being in the seventh through ninth month of his pre-birth life would be allowed to be purposefully killed. Is that not pretty "gentle" compared to present practices? It is more than passing curious that Parr would be unaware of this crucially important distinction. This is the "total effacement of the distinction between criminal and non-criminal aggressors?" The criminal trespassers, in my analysis of libertarian law, may be dealt with harshly if they resist being removed from the premises they are unjustly occupying. The non-criminal ones, in very sharp contrast indeed, the fetuses at present in their third trimester and all of them, eventually, must be handled very differently. Their lives must be preserved. They must be placed in the tender hands of adoptive parents. That is not at all the total effacement of this distinction, Parr to the contrary notwithstanding.

B. Unintentional action

Of course the fetus cannot actively, purposefully, consciously, commit a trespass. But he can *passively* do so. The same applies to the adult person who is drugged unconscious and then stowed away on a boat or plane, or attached to someone else's kidney. Of course the fetus and such an unconscious adult person cannot "refuse" or agree, for that matter, to depart from someone else's property. But he can fail to do so. If he does, he is in violation of libertarian (not "gentleness") law. It is thus justified for the rightful owner or his or her agents to act so as to defend their property.

I agree with Parr (2013) that “gestation constitutes a process that works to affect the cessation of property-directed aggression,” but I do not see the relevance. This process takes nine months. Why should the owner’s property rights be held in abeyance for that period of time? Why should Thompson’s owner of the kidney be compelled to allow her (entirely innocent) trespasser to stay connected to her for nine months or for any other lengthy period of time, if that is what it takes to preserve the life of the latter?

My debating partner is very exercised that I have attempted to kick him in “the crotch,” as he so eloquently puts matters. This stems, I fear, from an admitted “terminological error on the part of the author,” that is, Parr, in claiming that fetuses can engage in human action. Of course, they cannot. I am glad that Parr and I are now in accord on this matter.

C. *Rape*

In this section Parr (2013) attempts to refute my *reductio* against his position. I (Block, 2010) claimed that employing Parr’s logic, the rapist should be able to garner from the cops “a little time to finish up” if we take “departurism” seriously. Parr rejects this criticism on the ground that the rapist is a criminal and the fetus is not. Of course, the latter never has *mens rea*, while this does not at all apply to the former. However, it is possible to concoct a case where this does not hold true. Suppose an ordinary man, a non-rapist, is drugged or hypnotized into engaging in this sort of evil attack on a woman.¹⁰ Then, this “rapist” would lack *mens rea*, just like the baby. If this is the case, then according to “departurism,” he would indeed be entitled to “just a little more time” to complete his despicable¹¹ act, provided, only, that to not allow him to do so might injure him, negatively impact his health, very seriously, even leading to his death. Hey, we are concocting a weird example, we might as well go all the way. We stipulate that if the hypnotized rapist does not fulfill his orders to completion, to ejaculation, he will die. The “departurist,” if he consistently cleaves to his misbegotten views, would have to urge “gentleness” for the rapist. Perhaps, even, if this were physically possible, to allow him to continue his rape of this unfortunate woman for a full nine months. We now assume that rape, not only gestation requires “time to finish up.” “Gentleness” *uber alles*, after all, for Parr’s notion of libertarianism. “Gentleness” for the drugged or hypnotized, and hence non criminal rapist; just not for his victim.

10 I have no idea of whether this is medically or physiologically or biologically possible. Work with me here.

11 Albeit not intentional.

When it is the mother's life at stake versus that of the baby's, Parr's analysis is faulty. Parr bases it on the distinction between aggression against the person on the one hand and violence against mere property on the other. But this will not do. First, in this case it is person versus person. The mother's person hangs in the balance not against the baby's physical property, but against his person, too. And vice versa of course. Secondly, this is a spurious distinction, at least for libertarianism, properly understood. Property is property is property, whether it is physical, inanimate, or human. Murder is a violation of property rights in the person, as is rape. Most of the time, violations against property rights in the person are more important than those which attack non-person property rights. But not always. For example, a minor assault and battery against the person, which leaves him pretty much as he was before, is far less serious than stealing his horse, or his food, or his water, which leads to his death (in the old western deserts). Third, Parr's argument is akin, not to say indistinguishable from, the leftist criticism of markets: "Persons before property rights." But who is it thought that retains the property rights in inanimate matter? Why, it is human beings.¹²

D. Positive obligations

Here, Parr attempts to deflect the charge that "departurism" does not imply positive obligations. He is entirely correct in this claim if and only if "gentleness is a libertarian fundamental." But as it is not at all fundamental to libertarianism but rather peripheral to it at best, Parr's defense fails.¹³ To force an unwilling woman, a rape victim, to undergo additional exquisite torture for the sake of an innocent (drugged or hypnotized) rapist cannot possibly be a negative obligation of hers. Rather, to do so would be a positive obligation, to come to the aid of, to be a good Samaritan to, a person to whom she owes nothing, the non mens rea rapist. Note, I chose a rather sympathetic rapist here, one who does so unintentionally. But the baby who results from rape, of whatever type, kind or variety, is equal to any other fetus in terms of "gentleness" owed to it. That baby, just like every other, is a trespasser, as in the case of all fetuses residing inside the private property of an unwilling mother.

In this section of his paper Parr (2013, footnote deleted) also addresses the issue of why I think the obligation to "notify the orphanage, church, monastery, etc., of an (sic) no longer-wanted infant' is not, in Block's view, a positive obligation." Parr attributes this, falsely, to my views on the abandonment of physical

12 This is similar that that old refrain in urban planning: "People before cars." One wonders who advocates of this refrain think is driving those automobiles? Elephants? Copper wires, maybe?

13 "Gentleness" merely ensures that victims do not punish criminals more severely than libertarian punishment theory allows.

property.¹⁴ Rather, this view of mine stems from homesteading property, not abandoning it. My claim is that land cannot be homesteaded in a manner that shuts off virgin land to the activities of other people, as in the form of a bagel or donut with a hole in the middle of it (Block, 2008). This is entirely a different matter than the one attributed to me by Parr (2013). The point is, the hole in the bagel is analogous to the unwanted child. In each case, the owner is precluding others from homesteading either the land or the child, by homesteading land in that pattern in the former case, or abandoning the child sans notification, to the proper authorities, such as an orphanage, hospital, religious organization, etc.

Parr (2013) offers a follow up critique to my claim that notification of an eviction does not constitute a positive obligation. Again, he sees in my analysis a self-contradiction. On the one hand, I claim, he avers, that the baby is like physical property. On the other, he maintains, that the unwanted fetus is a trespasser. I cannot be allowed to have it both ways, in his view.

My initial response to this sally is that Parr does not understand what an analogy is; but, as I fear to tread anywhere near his crotch, let me put the matter differently: Parr and I have a different understanding of the concept of analogy. In my view, an analogy is merely a story that attempts to explain, to clarify, an otherwise complicated issue. Thus, I used land homesteading in donut format so as to elucidate the concept of forestalling: not allowing other people to homestead the rights to something that a given person does not claim, or, no longer wants. I full well realize that land is physical property, and that babies are not. Both the homesteader of land in the form of a bagel, and the person who does not notify the authorities (orphanage, hospital, religious organization) are precluding others from accessing that which is no longer, or not ever, wanted, the land in one case, the baby in the other. I see no confusion here, no reason to change my attempt at explication, no error of disanalogy.

There is of course an important distinction between an adult trespasser and an infant one: the former can take care of himself, the latter is helpless without adult supervision. The question of notification simply does not arise in the first case, it is of the greatest moment in the second.

E. Duration

In this section I am castigated for changing my stance. It is hard to pin me down if I do this, Parr (2013) complains. I am “like ACME’s pen ink — disappearing, and then reappearing. At one point (Block, 2011B) I aver “It matters not one whit how long a duration we are talking about.” In another article (Block, 2011A) I assert the very opposite: “No, the amount of time is crucial.” Interestingly, Part

14 Kinsella (2009A, 2009B) has written on this, not me.

(2013) gives the full context of the first of these statements, and none for the second. Could it be that the two are set in different contexts, and thus do not constitute a contradiction? For example, time is of the utmost importance on a hot day faced with a dripping ice cream cone, but of no moment whatsoever when it comes to justice (there are no statutes of limitation). There is no contradiction there. It is exceedingly difficult to determine if I am guilty of contradicting myself with no context supplied by Parr (2013).

F. Implicit contracts

Parr (2013) does make the not totally unreasonable point that under evictionism, “libertarianism is transformed into an ideology of corpses.” This of course sounds horrible. But the number of deaths will be *less* than under pro-choice.¹⁵ Of course there will be more than under pro-life, because the pro-life “gentleness” position compels unwilling mothers, including those whose fetuses are the result of rape,¹⁶ to preserve life at the cost of their libertarian rights. And, this highly emotive charge of Parr’s assumes that the pro-life forces, the “friends of babies” organizations, will not step up and adopt unwanted children to any significant degree. Under these conditions, yes, “out the ninth-story window with them,” as Parr (2013) in effect charges. But, at least for the libertarian, there is no such thing as a right to life; that is a positive right. There is only the negative right not to be murdered. And Parr (2013) has not even come close to justifying any such claim.

I congratulate Parr on his very dramatic way of saying that trespassers must be evicted, if the owners of the property in question insist upon that; that comatose patients have no right to be attached, and stay attached for the rest of their lives, to the kidneys of their owners, against the will of the latter. If this means that “libertarianism is transformed into an ideology of corpses” let the opponents of libertarianism such as Parr¹⁷ make the most of it. According to Parr (2013) “gentleness is *foundational* to libertarianism.” It is not. That is a perversion of the libertarian philosophy.

G. Premise two

States Parr (2013) “gestation ensures that the fetus is in the process of departing the mother’s premises...”¹⁸ But, suppose this were not the case. Posit that the

15 At one fell swoop, evictionism will preserve one third of all fetuses, those in their third trimester of development.

16 Real rape, here, not lacking in mens rea

17 I claim that Parr is anti liberty, but only on this one issue.

18 This is somewhat of a concession on Parr’s part. He concedes, that is, that it is the mother’s *premises*. E.g., that she is the *owner* of them, the womb.

human race operates like those Russian dolls that fit into one another. That is, the fetus stays inside the mother forever, or until she dies, and that her grandchild grows within the body of the fetus.¹⁹ Would such a scenario shake up Parr's thesis? No longer could he assert "gestation ensures that the fetus is in the process of departing the mother's premises..." In contrast, the evictionist position would remain the same, impervious to this mental experiment. The point is, noting that the fetus is on his way out is evasive. It takes our eye off the ball. What is the ball? Why, private property rights. In any case, it takes a long nine month period for the trespassing fetus to be removed from someone else's property. I wonder if Parr would be willing to attach his kidney to a stringer through an umbilical chord, if the duration was only nine months.

Parr (2013, footnote deleted) opines: "in no way does the departurist requirement that the property owner 'withhold eviction for the duration of departure' necessitate a nine month unwanted occupation of the fetus in the mother's womb. A nine month occupation is *possible*, assuming that the pregnancy is unwanted from the outset. But the duration of departure might be as little as nine minutes, assuming that the pregnancy becomes unwanted only toward the very end of gestation."

I think my libertarian colleague gives the game away, here. Yes, of course, a nine minute duration is possible. But so is a "nine month occupation." Tell that to the victim of the rapist (who is drugged or hypnotized); tell that to the mother of the baby who is the result of rape; tell that to the person who must share a kidney with another against his will, for nine months. The essence of libertarianism is the NAP. "Departurism," e.g., the pro-life position of Parr, simply is not compatible with this philosophy.

III. CONCLUSION

In order to defend his "departurist" theory²⁰ Parr has to obliterate libertarianism. He converts it from a thesis based on the NAP and private property rights to one of being "gentle." Does he make an exception for rape? For the life of the mother? For incest? For malformed babies who cannot survive on their own outside the womb? In what direction does "gentleness" incline us on these issues? Perhaps this author will clarify these questions in his future writings. If he does make an

19 I know, I know, this implies that boy babies too have fetuses growing within them. Don't ask me how they get inside, e.g., that the male of the species can become pregnant. Work with me here. I'm off on another one of my flights of fancy. Libertarian theorizing is fun, in part because we get to assume, arguendo, contrary to fact conditionals like this one. Nozick has no monopoly over this sort of thing.

20 Why the need for an entirely new name? Why the needless multiplication of verbiage? Parr's theory is indistinguishable from an already extant theory, pro-life.

exception in any or all of these cases, he reneges on his “gentleness.” Or, he uses it arbitrarily. If not, if he would impose continued pregnancy upon those mothers unwilling to bear it, he is hardly being “gentle” to them.

In effect, Parr (2013) is an attempt to hijack libertarianism into something other than what it is. It is reminiscent of Chomsky’s (Chomsky, 2011; Copple, 2010; Correa, 2007; Shaub, 2011) attempt to wrestle the nomenclature of libertarianism away from its present owners by characterizing his very, very different philosophy in this manner.

From a utilitarian point of view, subset “gentleness,” evictionism is to be preferred to “departurism” (I place quote marks around the latter word since I do not see any difference between this view and the extreme pro-life position). Why? Because the “departurists” and pro lifers are now losing the intellectual and moral war. The pro-choice side seems to have won the battle for the hearts and minds of the populace, at least in all western democratic countries. Posit that it stays that way forever. Then there will be very little “gentleness” accorded to unwanted babies. However, if evictionism prevails, then, as medical technology improves, the fetus will be able to live at an earlier and earlier age, outside of the womb. That means that fewer and fewer of them will die as a result of evictionism. Eventually, perhaps, none of them will. Society cannot have a “gentler” policy than that. So, I call upon Parr to give up his departurism, his pro-life position. If he really favors “gentleness” he will embrace evictionism.

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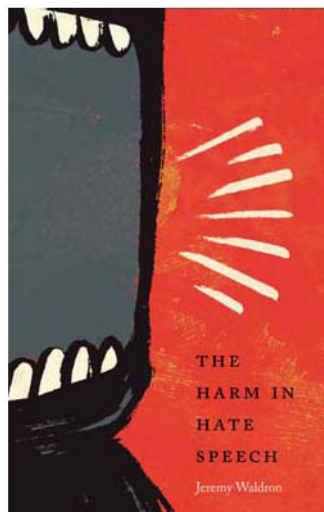
REVIEWED BY DAVID GORDON

The Harm in Hate Speech

Jeremy Waldron

In many countries, though not in the United States, laws prohibit “hate speech.” Those who, in Jeremy Waldron’s opinion, uncritically elevate the benefits of free speech over competing values oppose hate-speech laws; but Waldron thinks that a strong case can be made in their favor. (Waldron thinks that there are “very few First Amendment Absolutists” [p. 144] who oppose all regulation of speech; but he thinks that many other First Amendment scholars are unduly critical of hate speech regulations.) Waldron is a distinguished legal and political philosopher, but the arguments that he advances in defense of hate-speech laws, taken on their own terms, do not seem to me very substantial.¹

Hate speech, Waldron tells, us, consists of “publications which express profound disrespect, hatred, and vilification for the members of minority groups” (p. 27). “Speech,” it should be noted, is used here in an extended sense; and it is the more lasting written material, movies, posters, etc, that principally concern Waldron



1 His *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford, 2010), offers a penetrating assessment of the immorality of recent American foreign policy; and his *God, Locke, and Equality* (Cambridge, 2002) is one of the best recent books on Locke. Waldron’s discussion in the present book of Locke and other Enlightenment writers on toleration is outstanding.

rather than speeches, verbal threats, or imprecations, though the latter are not excluded. Many countries ban such speech:

The United Kingdom has long outlawed the publication of material calculated to stir up racial hatred. In Germany it is a serious crime to display the swastika or other Nazi symbols. Holocaust denial is punished in many countries. The British author David Irving ... was imprisoned until recently in Austria for this offense. (p. 29)

One way to respond to this would be to assess hate-speech laws from the Rothbardian position that I deem to be correct. This would make for a very short review. For Rothbard, free-speech questions reduce to issues of property rights. If, for example, someone writes “Muslims get out!” on a wall, a Rothbardian would ask, “Whose wall is it?” If the author of the message wrote on his own wall, he acted within his rights; if, lacking permission, he wrote on someone else’s wall, he violated the owner’s property rights. People have no general right of restraint against insult. Furthermore, you do not own your reputation, since this consists of the ideas other people have of you, and you cannot own other people’s thoughts. For that reason, laws against libel and slander are for the Rothbardian ruled out. Waldron asks, If laws forbid libel of a person, why not laws against group libel as well? A more un-Rothbardian argument could hardly be imagined.

I think it would be a mistake to leave matters there. Waldron — and those like him who reject libertarianism — would be unlikely to take notice of the foregoing criticism.² But another line of inquiry might be of more interest to them. We can also ask how good Waldron’s arguments are if judged on their own merits rather than evaluated from an external perspective.

If we ask this question, we must first deal with a difficulty. Waldron’s exact position is rather elusive. For one thing, it is not altogether accurate to say that he defends hate-speech laws, though this is certainly the general tenor of his book. He sometimes confines himself to saying that there are considerations in favor of these laws: these would need to be weighed against reasons for not restricting speech.

My purpose in putting all this in front of you is not to persuade you of the wisdom and legitimacy of hate-speech laws. ... The point is ... to consider whether American free-speech jurisprudence has really come to terms with the best that has been said for hate speech regulations. (p. 11)

But I do not think it admits of much doubt that for Waldron the arguments in favor of these laws are decisive.

Why, then, should we restrict hate speech? The primary consideration is that it assaults human dignity. In what Waldron, following John Rawls, calls

2 Waldron treats it as obvious that “markets ... undermine distributive justice” (p. 156).

a “well-ordered society,” there is “an assurance to all the citizens that they can count on being treated justly” (p. 85). But hate speech disrupts this assurance.

However, when a society is defaced with anti-Semitic signage, burning crosses, and defamatory racial leaflets, that sort of assurance evaporates. A vigilant police force and a Justice Department may still keep people from being attacked or excluded, but they no longer have the benefit of a general and diffuse assurance to this effect [of being treated justly], provided and enjoyed as a public good, furnished to all by each. (p. 85)

This goes altogether too fast. If you encounter a pamphlet or sign hostile to your minority group, why would you conclude anything more than that someone wishes you and those like you ill? Would not the hostile view be merely one opinion among large numbers of others? Why would it suffice to weaken your sense of assurance that you were an equal member of society?

Waldron, fully aware of this objection, responds that it neglects the effects of contagion. Even though the effect of an individual hate message may be small, the message signals to other haters that they do not hate alone. The accumulation of many such messages may indeed serve to undermine the assurance of the harassed minority.

In a way, we are talking about an *environmental* good — the *atmosphere* of a well-ordered society — as well as the ways in which a certain ecology of respect, dignity, and assurance is maintained, and the ways in which it can be polluted and (to vary the metaphor) undermined. (p. 96)

Waldron elucidates the parallel that he draws between hate messages and environmental pollution in this way: We see that the

tiny impacts of millions of actions — each apparently inconsiderable in itself — can produce a large-scale toxic effect that, even at the mass level, operates insidiously as a sort of slow-acting poison, and that regulations have to be aimed at individual actions with that scale and that pace of causation in mind. An immense amount of progress has been made in consequentialist moral philosophy by taking causation of this kind, on this scale and at this pace, properly into account. (p. 97)

(Waldron refers here to the well-known treatment of “moral mathematics” in Derek Parfit’s *Reasons and Persons*.)

But why does contagion operate only with bad effects? Will not the cumulative effects of a series of individual encounters in which members of minority groups are treated with equal respect generate a positive atmosphere of assurance, in precisely the same way that Waldron postulates for the amassing of

hate messages? Waldron assumes without argument a quasi-Gresham's law of public opinion, in which bad opinion drives out good.

But which process, the one that produces a positive atmosphere of assurance or the one that arouses Waldron to concern, will in fact prove the stronger? One reason to think that it is the good one is this. Waldron, in response to the charge that hate-speech laws suppress legitimate issues of controversy, notes that some matters are beyond dispute; an established consensus supports them:

Suppose someone puts up posters conveying the opinion that people from Africa are nonhuman primates.... Maybe there was a time when social policy generally ... could not adequately be debated without raising the whole issue of race in this sense. But that is not our situation today.... In fact, the fundamental debate about race is over — won, finished. There are outlying dissenters, a few crazies who say they believe that people of African descent are an inferior form of animal; but for half a century or more, we have moved forward as a society on the premise that this is no longer a matter of serious contestation. (p. 195)

If Waldron is right, and only a “few crazies” believe the hateful doctrine, why is he so much in fear of the malign effects of allowing these people to publish their views unmolested by the state?

To be frank, I think that Waldron at times proceeds in a very unfair way. He says, in effect, to the opponents of hate-speech laws, “You say that you are willing to put up with the evils of hate speech in order to preserve the good of unhindered free speech. But you are not, in most cases, the ones who will suffer from hate speech. Why are you entitled, without evidence, to brush aside the suffering of those whom hate speech targets?”

That is not in itself an unreasonable question, but Waldron ignores one vital issue. He is endeavoring to make a case for the regulation of hate speech. He cannot then fairly shift the *onus probandi* entirely to the side of his opponents, saying to them, “prove that hate speech does not much affect its victims.” It is for him to show that hate speech in fact has the dire effects he attributes to it. It is not out of the question that such speech sometimes does have bad effects, but it would seem obvious that we have here an empirical issue, one that requires the citation of evidence. Waldron so far as I can see fails to offer any, preferring instead to conjure up pictures of people who, seeing or hearing examples of hate speech, recall horrid scenes of past persecution. To what extent do people actually suffer from hate speech? Waldron evinces little interest in finding out.

If Waldron has not succeeded in making a case for hate-speech regulation, is there anything to be said against such laws — aside, of course, from the libertarian considerations that we have for this review put aside? One point seems to me of fundamental importance. Waldron presents these laws as if they limited only extreme expression of hate, e.g., suggestions that people in certain groups

are subhuman or need to be forcibly expelled from society, if not done away with altogether. He rightly notes that we are not obliged to like everyone or to deem everyone equally morally worthy:

Does this [the requirement that we treat everyone with dignity] mean that individuals are required to accord equal respect to all their fellow citizens? Does it mean they are not permitted to esteem some and despise others? That proposition seems counterintuitive. Much of our moral and political life involves differentiation of respect. (p. 86)

Hate-speech laws, Waldron says, do not ignore our rights to prefer some people to others. We further remain free to criticize minority groups, so long as we do not stray into the forbidden territory of outright hatred and denigration. Waldron claims that

most such [hate speech] laws bend over backwards to ensure that there is a lawful way of expressing something like the propositional content of views that become objectionable when expressed as vituperation. They try to define a legitimate mode of roughly equivalent expression.... Some laws of this type also try affirmatively to define a sort of "safe haven" for the moderate expression of the view whose hateful or hate-inciting expression is prohibited. (p. 190)

I do not doubt that Waldron has accurately quoted from the laws he mentions, but he unaccountably fails to comment on a quite well-known phenomenon. Laws of the type Waldron champions have often been used to suppress not just vituperation but all sorts of "politically incorrect" opinions. For example, as James Kalb notes in his outstanding *The Tyranny of Liberalism*, "the High Court in Britain [in 2004] upheld the conviction and firing of an elderly preacher who held up a sign in a town square calling for an end to homosexuality, lesbianism, and immorality and was thrown to the ground and pelted with dirt and water by an angry crowd".³

Those wishing further examples of how these laws work in practice may with profit consult the penetrating studies of Paul Gottfried, e.g., *After Liberalism: Mass Democracy in the Managerial State* and *Multiculturalism and the Politics of Guilt*.⁴ Here we are dealing not with a matter of speculative psychology but of incontrovertible fact.

3 I may be allowed here to refer to my review of Kalb's book in *The American Conservative* for November 17, 2008.

4 See also my reviews of these in *The Mises Review*, Fall 1999 and Winter 2002.

For Waldron, the state ought to watch vigilantly over us, ever alert that some miscreant may cross the boundaries (set of course by the state itself) of acceptable dissent from the regnant orthodoxy of multicultural society. I cannot think that such a tutelary power has a place in a free society.

Harvard University Press, 2012, 304 pages.

The Journal Of Peace, Prosperity & Freedom

REVIEWED BY VINAY KOLHATKAR

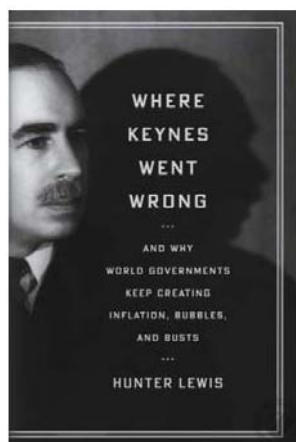
Where Keynes Went Wrong: And Why World Governments Keep Creating Inflation, Bubbles, and Busts

Hunter Lewis

Hunter Lewis is a *Circle Bastiat* contributor on Mises.org and the author of several bestselling books, including the widely acclaimed *Are the Rich Necessary?*, and the much-anticipated *Crony Capitalism in America*.

In this book, Lewis laments the fact that not enough literature exists that rebuts Keynes directly. Friedrich Hayek apparently planned one but gave up because Keynes so frequently changed his mind that Hayek thought it would be a waste of time.¹ Lewis has high regard for Henry Hazlitt's comprehensive takedown in his 1959 epic *The Failure of the New Economics*. Hazlitt exposed the inconsistencies and fallacies by going through *The General Theory of Employment, Interest, and Money*, Keynes' magnum opus, line by line, resulting in a 500-page classic.

Dedicating his book to Henry Hazlitt, Lewis decides to concentrate on the major fallacies, and even then ends up with over 300 pages plus endnotes. In part, this is because of the book's unusual structure, and in part this is because, as



1 Bruce Caldwell, 'Why didn't Hayek review Keynes' *General Theory*?', *History of Political Economy*, Vol. 30, No. 4, 1998, pp. 546-567.

Hazlitt found, there are simply too many absurdities to cover. Part I of the book is a 10-page introduction. Part II is about what Keynes actually said. Part III is the rebuttal. Part IV looks at Keynes the person — going beyond his magnum opus, perusing the so-called master's *Essays of Persuasion*, what his colleagues and biographer experienced, and Keynes' extensive use of various misleading devices such as obscurity, shifting definitions, misuse of mathematics, cause-effect reversals, and unsupported assertions. In Parts V and VI, Lewis concludes his book by demonstrating the pervasive influence of Keynesianism and its horrendously deleterious effects on contemporary economies.

Part II consists of excerpts mainly from *The General Theory*, followed by a commentary on what Keynes most likely meant, with a brief on how that meaning has been derived. Simply getting to what Keynes actually meant is rendered difficult because *The General Theory* is very badly written; even his famous pupil Paul Samuelson — a life-long Keynesian himself — admitted as much.

In Part III, the same excerpts are taken up again, but this time with the rebuttals. Relying on the paradigms of common-sense free-market economics, Keynes is very easily refuted.

These are some of the Keynesian excerpts that are taken up for a comprehensive dismissal. It is hard to say which of these 'Keynesianisms' are the most ludicrous:

1. Interest rates are always too high without government intervention. This is the primary cause of poverty;
1. The stock market behaves like a casino;
2. The State should decide the volume of investment;
3. In an economic crisis federal agencies should print money, borrow money, and spend money to get the economy to recover;
4. Gold is a barbarous relic;
5. Consuming more will lead to higher investment;
6. Commodity prices should be managed by the State; and
7. Markets do not self-correct.

These are not the only preposterous statements that Lewis has to deal with. Part III runs into 165 pages of refutation, and absolute repudiation, of what is essentially *The General Theory*'s whimsical and full frontal assault on the price system, plus its inconsistencies, arbitrary assertions, and serious logical problems. Part III is the crux of this work, and it is extremely well done. It is accessible to anyone with a basic grounding in Austrian or classical theory, and an understanding of the importance of prices determined in a free market.

Although Lewis achieves his intended mission overall, I have three misgivings:

1. The unusual structure: the chapter headings in Part II and III are the same except the two digressions in each of Part II and III. The reader

does *not* have to wade through 68 pages of what Keynes said before getting to the repudiation in Part III, but many readers will tend to read chapters in a sequential fashion. A better structure would have been to combine the two sections by attacking the assertions in the same chapter as they are enumerated, as well as specifying how the assertions were arrived at (which admittedly is quite a task in itself, given the obscurity with which Keynes spoke and wrote).

2. There is an astonishing inconsistency in the take-home sentiment that Lewis leaves us with. On the one hand, he hopes that Keynes will be relegated to the position of false utopians like Marx and Mao, and carries a back cover recommendation which loudly proclaims "Keynes demolished and his quack system refuted". However, Lewis is academically reverential in his praise of Keynes' wit and writing skills, and for the most part, states that Keynes was merely "wrong" (including in the book title), rather than diabolical or horribly confused. Yet Lewis is also happy to quote Keynes' biographer in ways that suggests a very sinister motive.
3. Part IV, a small, 11-page account over three chapters, begins to address the crucial issue of John Maynard Keynes the person. We get a peek into how he was able to manipulate conformity around his views, and whether the man himself truly believed what he had put out. Yet, even as this glorious beginning excites, it does not anywhere near consummate the extremely critical task of unraveling the mystery of how a quack became a superstar, and set economic science back by hundreds of years. Without such an understanding, the benevolent will have a hard time undoing the pervasive damage done by this charlatan to the canons, methodology, and craft of rational economic science.

Nevertheless, a concise disassembly of Keynes was long overdue, and Lewis' book does precisely that. It should form part of the arsenal of every student of real economic science.

Axios Press, 2011, 387 pages.

The Journal Of *Peace, Prosperity & Freedom*

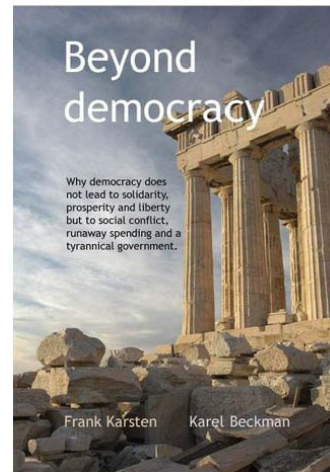
REVIEWED BY SUKRIT SABHLOK

Beyond Democracy: Why Democracy does not lead to Solidarity, Prosperity and Liberty but to Social Conflict, Runaway Spending and a Tyrannical Government

Frank Karsten and Karol Beckman

The government of the United States has frequently professed its deep and abiding admiration of democracy. According to President Barack Obama's National Security Strategy for instance, one of the objectives of American foreign policy is to promote democracy abroad. In fact, so convinced was the former President George W. Bush of the utility of democracy as a political system, that he ordered his generals to invade Iraq and depose the dictator Saddam Hussein at a cost of billions of dollars and thousands of innocent civilian lives.

In *Beyond Democracy*, however, Frank Karsten and Karel Beckman contend that almost everything the leaders of Western society have come to believe about democracy is false. Karsten and Beckman are not interested in offering platitudes supporting majority rule; to the contrary, they instead maintain that democracy is effectively socialism (collectivism) in disguise. They hold nothing back, suggesting that democracy is a system of governance that can be likened to totalitarian ideologies such as Nazism, fascism and communism, and is the opposite of liberty. "In principle, no freedom is sacred in a democracy," they write. "[E]very aspect of the individual's



life is potentially subject to government control... At the end of the day, the minority is completely at the mercy of the whims of the majority (p. 27)".

At a time when over half the countries in the world are democracies, and when prominent academics such as Francis Fukuyama equate democracy with civilizational progress,¹ the analysis contained in *Beyond Democracy* certainly goes against the grain. Freedom House tells us that, out of 195 countries, there are 118 electoral democracies.² In addition, when considering the countries ranked top ten in the world for economic freedom by the Fraser Institute, we find that a clear majority of six are democracies. Also, of the countries ranked top ten by GDP (purchasing power parity) per capita, five are democracies.³ In other words, half of the ten richest countries in the world — according to GDP measures at least — are democracies.

Yet Karsten and Beckman have come to bury democracy not praise it, and they do this by debunking a series of 13 'myths' that are commonly offered in support of majoritarian rule. To begin with, the authors attack the philosophical justification for democracy which suggests that it allows ordinary people to hold accountable those who govern them, by expressing themselves through the ballot box. The authors point out that the right to vote is not as important as we have come to believe, since in practice political parties are frequently beholden to rich and powerful interests:

Everyone knows that governments regularly take decisions that most people oppose. It is not 'the will of the people', but the will of politicians — prompted by groups of professional lobbyists, interest groups and activists — that reigns in a democracy. Big Oil, Big Agra, Big Pharma, Big Medicine, the Military-industrial complex, Wall Street — they all know how to work the system to their advantage. A small elite takes the decisions — often behind the scenes (p. 18).

Why are voters so powerless? There are at least two reasons. First, this state of affairs can be partly attributed to the problem of overly large electorates, and the consequent diminishment in accountability it brings about. While democracy may work reasonably well in small city-states, it faces distinct difficulties in a huge, impersonal electorate with tens of millions of people from varying backgrounds. In local jurisdictions, politicians can be expected to be closer to the people — layers of bureaucracy can be avoided in a city-state as compared

1 Francis Fukuyama, *The End of History and the Last Man*, Free Press, 1992.

2 Retrieved 14 January 2013 from <http://www.freedomhouse.org/sites/default/files/Electoral%20Democracy%20Numbers%2C%20FIW%201989-2013_0.pdf>

3 Retrieved from <<http://www.gfmag.com/component/content/article/119-economic-data/12529-the-worlds-richest-and-poorest-countries.html>>. I do not consider Hong Kong to be a legitimate democracy given its subordinate status to China, a communist authoritarian state (and neither does Freedom House, which classifies it as 'partly free').

to a national jurisdiction.⁴ In many democracies, thanks to the centralization of power, the politicians wielding the *most* power are also the *furthest* from the people and represent massive numbers of voters, making each vote worth comparatively less. But this problem would be greatly alleviated in city-states with a population of around 5,000. Indeed, the coziness of a city-state prevents things getting out of hand with respect to spending and taxes because “in a small group, people are restrained by social control, but with millions of voters that doesn’t work (p. 29)”.

Another reason accountability is diminished is due to the indirect nature of democracy. By relying on the election of representatives rather than utilizing the internet or other technological means to allow citizens to vote on every legislative proposal, citizens have less say than in a direct system.⁵ Voting has become a vague preference that politicians are only loosely obliged to follow, since there are no legal consequences for breaking an election promise. For this reason, the authors suggest that “[v]oting is the illusion of influence in exchange for the loss of freedom” — the probability of one vote making a difference is too tiny to be significant.

The ultimate solution to the illusory nature of voting is, of course, to put more power in the hands of the people themselves, rather than in the hands of an elite political class. The way to make ordinary people more influential is to remove many decisions — over healthcare, education and so on — from the parliamentary arena and instead vest full control in the hands of individual residents acting in the private sector.⁶ Karsten and Beckman are therefore in favour of greater decentralization, local control and secession. They cite Switzerland’s system favorably, and observe that it allows for citizen-initiated referenda (including on constitutional questions) and that the entire country is regionalised thanks to the cantons that play a role in day-to-day management.

Moving away from the topic of voting, Karsten and Beckman also find that democracy has broader detrimental effects on society, including on crime (“The democratic welfare state encourages irresponsibility and antisocial behavior”), educational and cultural standards (“[D]emocracy may be expected to lead to a dumbing down of the population and a lowering of general cultural standards”) and poverty (“Democracy doesn’t lead to prosperity, it *destroys* wealth”).

The authors courageously tackle the ‘holy grail’ of political science scholarship: the idea that democracies are more peaceful than other forms of government

4 Such as Australia, which has a strong federal government, weak state governments, local councils and in addition dozens of regulatory agencies at all levels.

5 A historical example of direct democracy is Athens around 500 BC, although there was no universal suffrage.

6 Their view certainly echoes Ludwig von Mises’ opinion that “[t]he market is a democracy in which every penny gives a right to vote”. See Ludwig von Mises, *Planned Chaos*, Ludwig von Mises Institute, 2009.

because they do not wage war upon one another. The democratic peace thesis is supposedly the most empirically tested proposition in all of political science, but here Karsten and Beckman dissent from this widely accepted assumption by citing several counter-examples of democracies fighting each other:

In ancient Greece democratic city-states regularly fought wars against each other. In 1898 the US and Spain fought a war. The First World War was waged against a Germany that was not less democratic than Britain or France. Democratic India and Democratic Pakistan fought several wars since 1947. The United States supported anti-democratic coups against democratically elected governments in Iran, Guatemala and Chile. Israel has waged wars against democratic countries like Lebanon and the Gaza Strip. Democratic Russia recently fought a battle with democratic Georgia.

Although their criticisms up to this point contain nothing objectionable, they head into dangerous territory when they start talking about the democratic peace thesis — dangerous because it is difficult to draw strong conclusions about empirical questions within the space confines of a short book. My only concern here is that an undecided reader would find the book's arguments lacking in detail and sophistication. Others have done a better job refuting the democratic peace thesis because they go further into the details of each case and address objections (for example, James Ostrowski⁷ or Christopher Layne⁸). For example, the authors do not make clear why they classify Pakistan as a democracy, despite the Democracy Index 2012 compiled by *The Economist* listing Pakistan as a hybrid of authoritarian and democratic regimes, and despite Pakistan's government being seized via military coup no less than three times (1958, 1977, 1999). It is possible they have a reason for doing so but this is not stated.

When speaking of the link between democracy and societal decline, their arguments are also distinctly lacking in detail, and this could be a problem for anyone seeking a comprehensive exposition. A closer inspection of contemporary democracies would have illustrated their points more convincingly. For example, with respect to democracy and crime a comparison of cases such as Australia — where crime is comparatively lower than in South Africa and the US — would have made the arguments stronger.

Beyond Democracy would be most useful as an aid to shake the layperson out of their complacency, and perhaps to inspire them to read more advanced texts such as Hans-Hermann Hoppe's *Democracy: The God That Failed* or Bryan

7 James Ostrowski, 'The Myth of Democratic Peace', Retrieved from <<http://www.lewrockwell.com/1970/01/james-ostrowski/the-myth-of-democratic-peace/>>.

8 Christopher Layne, 'Kant or Cant: The Myth of the Democratic Peace', *International Security*, Vol. 19, No. 2, 1994, pp. 5-49.

Caplan's *The Myth of the Rational Voter*.⁹ Although I agree with their conclusions for the most part, these are not the most impregnable arguments. Certain statements are expressed too confidently when what is required is tact, elaboration and a large amount of citations as authority for the proposition (at one point, the authors cite Wikipedia the user-contributed encyclopedia, which despite its strengths is not a reliable source; see p. 65). These weaknesses do not, however, mean the overall thesis is wrong. Democracy *is* basically overrated and needs serious re-examination.

All in all, *Beyond Democracy* is a refreshing breath of fresh air. The authors have done a great service in compiling the main arguments against democracy in an accessible manner. If more people read this book there is without question a positive future for realizing freedom. Human beings are not opposed to decentralization per se — it is just that they demand a high threshold before seeking to break away. For many people, whether rightly or wrongly, there is a belief that the benefits of large centralized unions outweigh the costs. Unless there is some urgent pressing reason, people prefer to tolerate the status quo. Thus the United States has remained a single political entity despite the War for Southern Independence (1861-1865), partly because of a consciousness of 'one American nation'. But Pakistan successfully split from India in 1947 and the Indian government decided to accept its departure probably due to an acknowledgement from both sides of irreconcilable cultural differences (in this case the clear division between Hindu Indians and Muslim Pakistanis). Hopefully an added impetus to the case for decentralization will be instilled among the public with the arguments in this book.

CreateSpace Publishing, 2012, 102 pages.

9 But see Walter Block's review of Caplan's book in *The Journal of Libertarian Studies*, Vol. 22, 2011, pp. 689-718.

The Journal Of *Peace, Prosperity & Freedom*

REVIEWED BY JEFFREY A. TUCKER

Against Intellectual Monopoly

Michele Boldrin and David K. Levine

At a taped video interview in my office, before the crew would start the camera, a man had to remove my Picasso prints from the wall. The prints are probably under copyright, they said.

But the guy who drew them died 30 years ago. Besides, they are mine.

Doesn't matter. They have to go.

What about the poor fellow who painted the wall behind the prints? Why doesn't he have a copyright? If I scrape off the paint, there is the drywall and its creator. Behind the drywall are the boards, which are surely proprietary too. To avoid the "intellectual-property" thicket, maybe we have to sit in an open field; but there is the problem of the guy who last mowed the grass. Then there is the inventor of the grass to consider.

Is there something wrong with this picture?

The worldly-wise say no. This is just the way things are. It is for us not to question but to obey. So it is with all despotisms in human history. They become so woven into the fabric of daily life that absurdities are no longer questioned. Only a handful of daring people are capable of thinking along completely different lines. But when they do, the earth beneath our feet moves.

Such is the case with *Against Intellectual Monopoly* (Cambridge University Press, 2008) by Michele Boldrin and David Levine, two daring professors of economics at Washington University in St. Louis. They have written a book that is likely to rock your world, as it has mine (it is also posted on their site with the permission of the publisher).



With piracy and struggles over intellectual property in the news daily, it is time to wonder about this issue, its relationship to freedom, property rights, and efficiency. You have to think seriously about where you stand.

This is not one of those no-brainer issues for libertarians, like minimum wage or price controls. The problem is complicated, and solving it requires careful thought. But it is essential that every person do the thinking, and there is no better tool for breaking the intellectual gridlock than this book.

The issue is impossible to escape, from the grave warnings you get from the FBI at the beginning of “your” DVD to the posters warning kids never to download a song to the outrageous settlements transferring billions from firm to firm. It even affects the outrageous prices you pay for medicine at the drug store. The issue of “intellectual property” is a ubiquitous part of modern life.

Some of the police-state tactics used to enforce IP have to make anyone with a conscience squeamish. You have surely wondered about the right and wrong of all this, but, if you are like most people, you figure that copyrights and patents are consistent with the justice that comes from giving the innovator his due. In principle they seem fine, even if the law might be in need of reform.

The first I’d ever thought critically about issues of intellectual property was in reading about it in the abstract many years ago. The Austrian position has traditionally favored copyrights on the same grounds it has favored property rights in general, but has tended to oppose patents on grounds that they are government grants of monopolistic privilege. Machlup, Mises, and Rothbard — as well as Stigler, Plant, and Penrose — have discussed the issue but not at great length and with varying levels of cautious skepticism.

That changed in 2001 with the publication of Stephan Kinsella’s article and now monograph “Against Intellectual Property”. He made a strongly theoretical argument that ideas are not scarce, do not require rationing, are not diminished by their dissemination, and so cannot really be called property. All IP is unjust, he wrote. It is inconsistent with libertarian ethics and contrary to a free market. He favors the complete repeal of all intellectual-property laws.

The argument initially struck me as crazy on its face. As I considered it further, my own view gradually changed: it’s not crazy, I thought, but it is still pie-in-the-sky theorizing that has nothing to do with reality. Kinsella’s article appeared just before the explosive public interest in this subject. The patent regime has in the meantime gone completely wild, with nearly 200,000 patents issued every year in the United States, and half a million more in other countries — with 6.1 million patents in effect worldwide — and large firms collecting stockpiles of them.

And the copyright issue has led to a massive struggle between generations: young people live by “pirating” music, movies, software, whereas the old consider this practice to presage the end of the capitalist system as we know it. The music industry has spent billions trying to contain the problem and only ended up engendering consumer embitterment and terrible public relations.

Kinsella's article continued to haunt me personally. It took about six years or so, but I finally worked through all the theoretical problems and came to embrace his view, so you might say that I was predisposed to hear what these authors have to say. What I hadn't realized until encountering the Boldrin/Levine book was just how far-reaching and radical the implications of a detailed look at IP really is.

It is not just a matter of deciding what you believe from a theoretical or political perspective. It is not just a matter of thinking that "pirates" are not really violating moral law. To fully absorb what these authors say changes the way you look at technology, at history, at the ebbs and flows of economic development, and even who the good guys and bad guys are in the history of civilization.

Kinsella deals expertly with the theoretical aspects, while *Against Intellectual Monopoly* doesn't really go into the theory at great length. What this amazing book deals with is the real-world practice of intellectual-property regulation now and in history. I can make a personal guarantee that not a single objection you think you have to their thesis goes unaddressed in these pages. Their case is like the sun that melts all snow for many miles in all directions.

The implications are utterly shattering, and every day I've turned the pages in the Boldrin/Levine book I've felt that sense of intellectual stimulation that comes along rarely in life — that sense that makes you want to grab anyone off the street and tell that person what this book says. It helps you understand many things that had previously been confusing. The emergent clarity that comes from having absorbed this work is akin to what it must feel like to hear or see for the first time. If they are right, the implications are astonishing.

Their main thesis is a seemingly simple one. Copyright and patents are not part of the natural competitive order. They are products of positive law and legislation, imposed at the behest of market winners as a means of excluding competition. They are government grants of monopolies, and, as neoclassical economists with a promarket disposition, the authors are against monopoly because it raises prices, generates economic stagnation, inhibits innovation, robs consumers, and rewards special interests.

What they have done is apply this conventional model of monopoly to one of the most long-lasting, old-world forms of mercantilist/monopolistic institutional privilege, a surviving form of mercantilist privilege of the 16th century. IP is like a dam in the river of development, or perhaps very large boulders that impede the flow.

They too favor its total repeal but their case goes far beyond the theoretical. They convince you that radical, far-reaching, uncompromising, revolutionary reform is essential to our social well-being now and in the future.

The results are dazzling and utterly persuasive. I personally dare anyone who thinks that he believes in patent or copyright to read this book and deal with it. For this reason, I'm thrilled that the Mises Institute is now carrying the book to give it the broadest possible exposure.

I'm not sure what aspect of their case is the most powerful. Here are just a few examples:

- They show that people like James Watt, Eli Whitney, and the Wright Brothers are not heroes of innovation, as legend has it, but rent-seeking mercantilists who dramatically set back the cause of technological development. These people spent vast resources prohibiting third parties from improving “their” product and making it available at a cheaper price. Instead of promoting innovation and profitability, they actually stopped it, even at the cost of their own business dreams.
- The authors show that every great period of innovation in human history has taken place in the absence of intellectual property, and that every thicket of IP has ended up stagnating the industries to which they apply. Think of the early years of the web, in which open-source technology inspired breakneck development, until patents and copyright were imposed with the resulting cartelization of operating systems. Even today, the greatest innovations in digital communications come from the highly profitable open-source movement.
- It is impossible to develop software without running into IP problems, and the largest players are living off IP and not innovation. Meanwhile, the most profitable and most innovative sector of the web, the porn sector, has no access to courts and IP enforcement because of the stigma associated with it. It is not an accident that absence of IP coincides with growth and innovation. The connection is causal.

And look at the industries that do not have IP access, such as clothing design and architecture and perfume. They are huge and fast moving and fabulous. First movers still make the big bucks, without coercing competition. Boldrin and Levine further speculate that IP is behind one of the great puzzles of the last millennium: stagnation in classical music. The sector is seriously burdened and tethered by IP.

- Other mysteries are answered. Why no musical composition of note in England after 1750? England had the world's most strict copyright laws. Why was English literature so popular in the United States in the 19th-century schoolrooms? It could be imported without copyright restriction — and therefore sold cheaply — whereas American authors used IP and limited their market. And consider the irony that Disney, which relies heavily on IP, got its start and makes its largest profits by retelling public-domain stories!

Examples like this abound. One wonders if the modern history of literature and art needs to be completely rewritten. Examples will occur to you that are not discussed in the book, such as fan fiction. It is technically illegal, so far as anyone

can tell, to take a copyrighted character and tell a story about him even if the story is original. And yet Harry Potter fan-fiction sites enjoy tens of millions of hits per month. One hosts 5,000 pieces of fan fiction, some as long as 1,000 pages. Enforcement has been spotty and unpredictable.

And yes, the book covers the poster child of the IP world: pharmaceuticals. They muster plenty of evidence that IP here does nothing to promote innovation and widespread availability and is largely responsible for the egregiously high prices of drugs that are driving the system toward socialization.

The authors explore the very strange tendency of capitalists to misdiagnose the source of their profits in a world of IP, spending far more on beating up pirates than they would have earned in a free market. They further demonstrate that IP is a form of exploitation and expropriation that is gravely dangerous for civilization itself.

In short, they have taken what might seem to be merely a geeky concern and moved it to the centre of discussion over economic development itself.

What about the far-flung conclusion that IP should be repealed? The authors take away your fears. The development of IP came about in the 16th century as a mechanism for governments to enforce political control and punish dissenters. The cause of this “property right” was then taken over by individuals in the 18th and 19th century as part of the liberal revolution for individual rights. In the 20th century, it was transferred again, to corporations who become the effective owners through copyright. The creators no longer own anything, and let themselves be beaten and abused by their own publishers and production companies.

Boldrin and Levine’s thesis really steps up this issue. It makes you wonder how long authors and creators will put up with the nonsense that some company has a state-enforced exclusive to use the work of others for longer than 100 years. Fortunately, the digital age is forcing the issue, and alternatives like Creative Commons (roughly akin to what would exist in a free market) are becoming increasingly popular. As the tyranny has grown more obvious, the free market is responding.

No, the authors are not really Austrian, and I’m not even sure that they can be called libertarians, but they understand the competitive process in ways that would make Hayek and Mises proud. As I’ve thought more about their book, it seems that it might suggest a revision in classical-liberal theory. We have traditionally thought that cooperation and competition were the two pillars of social order; a third could be added: emulation. In addition, there is surely work to do here that integrates Hayek’s theory of knowledge with the problem of IP.

If the book lacks for anything, it is precisely what Kinsella provides: a robust theory behind the practical analytics. But since Kinsella has already provided this, the value added of real-world application is enormous. I have a minor nit to pick with them on their passing comment on trademarks, which strikes me as wrong. Otherwise, this book moves mountains.

Against Intellectual Monopoly is a relatively small manifesto on economics that absolutely must be understood and absorbed by every thinking person without exception.

Cambridge University Press, 2008, 312 pages.

The Journal Of Peace, Prosperity & Freedom

REVIEWED BY ANDREW DAHDAL

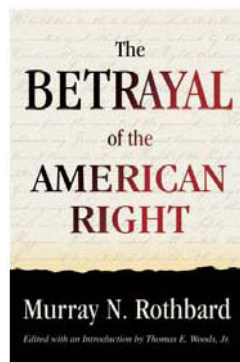
The Betrayal of the American Right

Murray N. Rothbard

First published in the early 1970s, *The Betrayal of the American Right* is a book that endures in relevance to this day as both a history of political thought in twentieth century America, and an embodiment of the intellectual honesty of Murray Rothbard. *The Betrayal* provides not only an intellectual autobiography of the substance of Murray Rothbard's views as they evolved, but also shows how Rothbard consciously thought about and re-evaluated his own thinking in response to the pressing issues of his day.

Rothbard tells the story of the 'Old' American Right which existed between the 1930s and 1950s. As part of this story, Rothbard also charts the intellectual trajectory that informed that movement. Rothbard locates the heritage of the Old Right in some surprising traditions. Rather than the austerity of the Irish politician Edmund Burke, for example, Rothbard points to the anti-authoritarian radical Jacobins and English Levelers as the true intellectual forefathers of the Old Right. The classical liberals of the nineteenth century who espoused an individualist *laissez faire* ideology carried the torch of the enlightenment forward into the hands of those that would eventually become the Old Right.

The Betrayal also explains how those who had sympathies with the Old Right were actually, prior to the New Deal, intellectual allies of the Left. At the turn of the twentieth century and throughout World War I the individualist — *laissez faire* movement had much in common with the emerging socialist politics of Europe. Both strands of political thought were anti-war and anti-Establishment. Both socialists and *laissez faire* liberals recognised the dangers of the new alliance of business and government that came into full focus during the First World



War. The difference between the socialists and the *laissez faire* liberals was not in their critiques of the prevailing power politics but in their aspirations and ultimate political visions. Rothbard explains how socialists wanted to tear down privilege and aristocracy to build an egalitarian utopia. Within this utopian world the individual could find meaning in the collective brotherhood of man. The *laissez faire* liberals, on the other hand, believed that individuals could find their own meaning and happiness in voluntary relations unencumbered by the burdens represented by the established systems of privilege and power.

The great split between those who held firm to the virtues of *laissez faire* classical liberalism and those that championed the socialist cause, according to Rothbard, came about as a result of Roosevelt's New Deal. Those who stood steadfast to their anti-authoritarian critiques of the political establishment, even as the New Deal was being rolled out, were castigated as 'extreme right wingers' despite the fact that their views had not changed one iota (p. 25). It was the *socialists* who shifted their loyalties. Rothbard details how socialist allies of the individualist liberals now scorned all those that criticized the New Deal and the corresponding expansion of government power. The shared criticism of the Establishment had brought socialists and *laissez faire* liberals together. These same individualist *laissez faire* liberals were now painted as reactionaries and labeled 'Tories'. The irony of this was that the original eighteenth century Tory position was identified with class, privilege and aristocratic authority. The use of the label to describe the radical individualists of the Left was a stinging insult that writers such as Nock and Mencken rejected.

Staying true to their core beliefs, these Left-wing *laissez faire* individualists could only find a political voice in the similarly anti-New Deal Republican party — and so the Old Right was born.

The Betrayal will challenge those readers who believe they know what Murray Rothbard stood for, or how he thought. Rothbard's view on McCarthyism is a case in point. McCarthyism was the use of state power to persecute communists or communist sympathisers. For an ardent individualist this conundrum forces an evaluation of what is the greater evil. Rothbard was not as contemptuous of the heavy-handedness of Senator McCarthy's methods as one might expect. In fact he expresses his delight at the 'populism' of the spectacle when the alternative to such populism was popular apathy at a narrowly circumscribed political discourse. Senator McCarthy's persecution of members of the public service and military on the grounds that they were communists or communist sympathisers was, according to Rothbard, just the government eating itself or imploding — and what is so bad about that? When McCarthy turned his attention to non-government quarters Rothbard finds this slightly more objectionable.

The narrative in *The Betrayal* is always grounded by Rothbard's intellectual transparency and honesty about his own views. The labyrinth of labels used to describe different political positions such as the 'Old' or 'New' 'Left' or 'Right' could easily confuse the uninitiated reader. Rothbard, however, allows the reader

to follow the locus of his own ideas as they related, responded and evolved to the issues of his time; and these were heavy issues indeed. Rothbard was not merely dealing with the privatization of garbage services or other regulatory issues, but rather fundamental issues of human survival in the midst of the Cold War and the ever-present threat of nuclear holocaust.

One of the most interesting and seldom considered aspects in libertarian literature is its focus on the role of women in libertarian thought. During the Second World War the Old Right's anti-war and isolationist platforms were demonised as un-American and mocked. The Old Right essentially collapsed as a mainstream political movement. Rothbard describes how in these dark times the light of liberty was kept lit by women such as Rose Wilder Lane and Isabel Paterson (pp 58-59). The publication of *The Fountainhead* by Ayn Rand is also placed in this category although Rothbard is later critical of Rand's glorification of big business especially her view that 'big business is the most persecuted minority in America'.

Having gone from being allied to the Left to then finding anti-New Deal allies on the Right in the 1930s, the intellectual tradition of individualist *laissez faire* capitalism was largely defunct in the US as a political force by the mid 1950s. The Second World War greatly undermined the foreign policy aspects of the libertarian position that was non-interventionist and anti-American imperialism. Rothbard's response to this challenge is nothing short of inspirational and a testament to the belief he held in the fundamental goodness and soundness of the underlying assumptions that underpinned his libertarian ideology. Rather than shift his position to accommodate the popular perception of global events and politics, Rothbard sought to reflect on his own political thinking and derivations without jettisoning his core starting assumptions on individual rights and political and economic freedom.

Although it is the penultimate chapter of the book, chapter thirteen is undoubtedly the climax of the story. Rothbard explains how he and his like-minded colleague, Leonard Liggio, locked themselves away at this critical time to study and examine where they might have gone wrong in their own political understanding of the world. If *The Betrayal* were ever made into a movie, chapter thirteen would be the Rocky-esque training montage scene. Rothbard and Liggio throw themselves into reading and re-reading history and dissecting the most authoritative accounts of the Cold War available at the time. Liggio lands the knockout punch by realising that the accepted "'Left Communist/total government ... Right/no government" continuum' (p182) was unable to accommodate the libertarian anti-war position. This political spectrum had its blind spots and the libertarian perspective fell into one of them.

The Right was just as authoritarian as the 'total government' Left although it was the authority of 'Throne and Altar' that the Right glorified (p 183). The discussion of Liggio's insights on the political spectrum on page 183 is quite likely the clearest and most concise discussion of its kind one is likely to find

in modern libertarian literature. Liggio's analysis explains how the first dominant political force from ancient times up until late medieval Europe was the 'Old Order' — the system based on the privilege of those with 'caste and frozen status'. In response to this oppressive regime arose the 'heroes' of seventeenth and eighteenth century Western Europe — the political revolutionaries and the enlightenment thinkers. This 'Old Order' represented the Right and the popular revolutionaries the Left. Within this analysis, 'the purer their libertarian vision the more "extreme" a Left they were'. Socialism fell into this analysis as a confused self-contradictory middle of the road position (p. 183):

From the individualist Left the socialists took the *goals* of freedom: the withering away of the State, the replacement of the governing of men with the administration of things...opposition to the ruling class and the search for its overthrow, the desire to establish international peace, and advanced industrial economy and a high standard of living for the mass of the people. From the conservative Right the socialists adopted the *means* to attempt to achieve these goals: collectivism, state planning, community control of the individual.

Having more in common with the emerging New Left in the early 1960s than the Republican establishment, Rothbard and other libertarians allied themselves with this new political force. As the New Left drifted away from its intellectual heritage of individual rights and individual political realisation and into the alternative beat culture and new-age philosophies of spiritual self-realisation, the promise represented by the New Left for libertarians such as Rothbard also disappeared.

The Betrayal is a modern classic in the genre of political thought. In the corpus of libertarian literature it is canon. Although in large parts it is an account of the people and publications that held and expressed libertarian ideas in the US in the first part of the twentieth century, the book could well have been entitled 'The Memoirs of a Political Refugee'. Even though *The Betrayal* represents a significant and authoritative account of the individualist *laissez faire* strand of political thought, it is also a record of Rothbard's political journey — or more accurately the story of shifting political tides around Rothbard's stalwart libertarian position. *The Betrayal* is very readable and immeasurably important to those who think they are Rothbardian libertarians. Many mainstream conservatives may balk at the extremism of the intellectual traditions identified by Rothbard as grounding the modern libertarian movement. Yet the honesty, sincerity and good will of Murray Rothbard the man as evidenced in this book will probably win over more political fence sitters than it will alienate.

Ludwig von Mises Institute, 2007, 231 pages.