To: University of Texas faculty

From: Andrew Koppelman

This workshop paper is the introduction and first chapter of a book in progress. It runs a little long. For those pressed for time, please focus on pp. 3-17, 46-47, and 52-61.
The Corruption of Libertarianism: How a Philosophy of Freedom was Betrayed by Delusion and Greed

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Introduction

So far as direct influence on current affairs is concerned, the influence of the political philosopher may be negligible. But when his ideas have become common property, through the work of historians and publicists, teachers and writers, and intellectuals generally, they effectively guide developments.

Friedrich Hayek

Libertarian political philosophy has produced astonishing cruelty

The fire department was run by idealists. That is why it ignored the homeowner’s pleas and watched his house burn down. He had neglected to pay his bill. What happened then tells us a lot about libertarianism, the increasingly influential philosophy of minimal government. Many libertarians took it to show the stern seriousness of their ideal. Their enemies on the left thought it revealed how repugnant it is to leave such important matters to the market. Both sides thought that it revealed the essence of the libertarian tradition. Both were wrong.

Libertarianism takes multiple forms. The kind that let the house burn is a mutant variety, corrupted from its original conception. When it dominates the imagination, the best libertarian ideas disappear from view. It once defended free markets, and the inequalities that they inevitably generate, without claiming that those inequalities are deserved, or that people’s needs count for nothing. Its commitments did not include letting houses burn.

The story of the corruption of libertarianism is a sad tale with a hopeful ending. It has pitted decent Americans against one another, the left suspecting the right of blind rapaciousness, the right suspecting the left of malicious envy. The encouraging news is that they are less far apart than they think. Libertarianism is most persuasive when it shares the commitments of the political left. The disagreement is not about ends. It concerns strategy. Too many on the left fail to grasp that the libertarian strategy has been massively

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vindicated. The capacity of markets to alleviate poverty has been so overwhelmingly demonstrated in recent decades that it is silly to keep denying it. Too many on the right fail to grasp that unregulated markets cannot deliver a livable world. The lost, moderate form of libertarianism can bridge some of the bitterest divisions of contemporary American politics.

Obion County, Tennessee uses the fire protection services of the nearby City of Fulton. But the county doesn’t contract with the city on behalf of all of its residents. It leaves them each to pay a $75 fee to the city. Fire protection in the county is essentially privatized: it is up to each individual homeowner to contract with the city fire department.

Gene Cranick, who lives in Obion County, had paid the fee for years. In 2010 he forgot. His grandson burned some trash in his backyard, and the fire got out of control and began to spread. Cranick called 911, but the operator told him the fire department would not come. His wife told the operator that she would pay “whatever the cost,” but that was not an option. The Department arrived several hours later when the fire threatened the house of a neighbor who had paid. It sprayed the neighbor’s land up to, but not across, Cranick’s property line. Three dogs and a cat died. Cranick’s son punched the fire chief and was arrested.

Glenn Beck, the conservative radio and television host, explained why the department had done the right thing. In America, "we are going to start to have to have these kinds of things." It would have been wrong to put out the fire. “If you don’t pay your $75, then that hurts the fire department. They can’t use those resources and you would be sponging off of your neighbor’s $75.” Soon there would be no fire protection: “as soon as they put out the fire of somebody who didn’t pay the 75 bucks, no one will pay the 75 bucks.”

Jonah Goldberg, writing in National Review Online, said that letting the home burn was "sad," but he thought that it would "probably save more houses over the long haul" since people will now have a strong incentive to pay their fees. Other conservative writers soon converged on the same view.

The fire chief was not, so far as is known, an ideologue or a philosopher. But he let the house burn because he embraced two key tenets of libertarianism: that people are appropriately

http://www.glennbeck.com/content/articles/article/198/46276/?utm_source=glennbeck&utm_medium=newsletter

understood to be on their own in the world, responsible for their own fate, and that need does not make a claim on others’ resources. Beck thought that the fire illustrated the importance of those principles, and that those principles had implications for the debate about Obamacare: its protection of people with preexisting medical conditions created the same perverse incentives that saving Cranick’s house would.

Within Obion County, there is disagreement about how the tax burden should be apportioned: farmers don’t want their taxes raised to protect homes from fire. It is a problem that obviously could be addressed by imposing an annual $75 tax on residences but not farms. Two years later, Fulton enacted a new law allowing the fire department to respond to all calls within a five-mile radius of the city. But homeowners who had not paid the fee will be charged $3,500 per call.

There is a persistent squeamishness about the tough discipline that was administered to Cranick. But there’s also a hesitation about compulsory taxation.

The individual firefighters were troubled. "Most everybody has been compassionate and neighborly," Cranick told a reporter. "I understood some of the firefighters went home and were sick. Some of them even cried over it." His wife, Paulette said, "You can't blame them if they have to do what the boss says to do. I've had firemen call and apologize." But perhaps those firefighters just didn’t understand that doing what’s right can be hard. Beck and Goldberg argued that letting the house burn would make America into a better, more self-reliant society.

Beck described Cranick as though he were deliberately "sponging." Kevin Williamson, in National Review Online, wrote: “The world is full of jerks, freeloaders, and ingrates – and the problems they create for themselves are their own.” Cranick, who is 67 years old, had however paid for fire protection for years. "I'm no freeloader, I've worked all my life for everything I've got." He remembers paying up every other year except one. "But humans forget. It seems like I do more than I used to. I just don't think they done right."

The implications

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5 https://www.aol.com/2010/10/07/tennessee-fire-ignites-national-debate-on-public-services/
of Beck’s views are harsher than he realizes. Suppose there were children in the house. If the firefighters rescued them, wouldn’t that also create perverse incentives, encouraging other parents to sponge?

Leftists sneer at Glenn Beck. But he is a smart man who is good at his job. Journalism is an intensely competitive business, and he has been a remarkable success. His ideas matter. They have a huge constituency. He knows how to mirror and shape the moral convictions of much of contemporary America.

But its best known form is a corrupted variant

Beck is self-consciously promoting the ideas of the most important libertarian thinkers. One of his most prominent interventions in American political discourse was his advocacy for the late economist Friedrich Hayek. Four months before the Cranick fire, Beck devoted a section of his show to Hayek’s 1944 book, The Road to Serfdom. Hayek’s book denounced socialism and argued that people should be made to rely on themselves rather than the state, that central government planning was wasteful and tyrannical. Beck’s endorsement catapulted the book to the top of Amazon’s best seller list. In the following month, it sold 100,000 copies.11

Beck is also an admirer of the novelist Ayn Rand, and made a cameo appearance in a 2014 film based on her didactic novel, Atlas Shrugged. Rand, too, worries about mooching by unproductive parasites.

What Beck takes from both is a deep suspicion of government as the enemy of individual freedom. He aims us to free us from those who would impose coercive taxation in order to provide guaranteed fire protection. (Or other guarantees. Obamacare similarly used tax dollars to protect people from nasty surprises.)

Contemporary libertarianism promises freedom from overbearing government and unproductive leeches. It categorically condemns regulation and redistribution. It has become the kind of idealism that, carried to its logical conclusion, leads firefighters to watch houses burn. The quest for a free society mustn’t be compromised by sentimental weakness.

The American left hates Beck and everything he stands for. But many leftists agreed with him about this much: what happened to Gene Cranick reveals the true face of libertarianism.12 More:

Libertarianism is the true face of capitalism. It shows where we are headed if we tolerate huge inequalities of wealth, abandon tariffs or rent control, or entertain claims that regulators of business are sometimes incompetent or corrupt. This is the future capitalists want: a pitiless world in which only the strong prosper, a world casually cruel to the old, the weak, the sick, and the poor. Cranick’s story was pounced upon as a paradigmatic illustration of capitalism’s moral bankruptcy. Even the most basic needs, such as help when one’s home is on fire, count for nothing unless the claimant pays. The lesson is that the ideology of the free market must be rejected wholesale. The state must aggressively redistribute and regulate to make sure that society’s resources are devoted to people and not profits.

Libertarian political philosophy thus looms large in the imaginations of both right and left. But both focus on a corrupted variant.

I use the term “corruption” in two related senses. It sometimes means an accidental transformation in which the original message is garbled, as with corrupted computer code. It also means, more invidiously, the abuse of authority for personal gain. Both meanings are relevant here. Malign interests have benefited by garbling the original meaning of libertarianism. The ideology of small government attracts two very different groups: principled ideologues like Beck, driven by philosophical commitment, and predators who want to hurt people without interference from the police. As libertarian rhetoric becomes more common, the second group increasingly likes to masquerade as the first.

Beck embraces both Hayek and Rand. The left demonizes both. But there are crucial differences. Libertarianism has deep fault lines.

Rand worships strength and despises vulnerability. Human weakness terrifies and repels her. Old people who forget to pay their bills deserve what happens to them. In this Beck is her faithful acolyte.

But modern American libertarianism began with Hayek, who starts with entirely different premises. He shares the left’s concern for the poorest members of society. It is unfair to lump him together with Beck and Rand. Hayek’s disagreement with the left is that he thinks that the way to attack poverty is not redistribution – there isn’t enough wealth in existence yet to give everyone a decent life – but the opportunities created by free markets. The state mustn’t block those opportunities. Any attempt to direct the economy will end in tyranny. But that doesn’t rule out protection from random accidents, such as fires.
More is at stake here than clarity. The right’s embrace of Rand – and there is a whole lot of embracing going on – reinforces the left’s suspicion that any libertarian argument based on concern for the poor is a lie, a mask for amoral greed and selfishness. These ideas have produced some awful behavior. The firefighters who let the house burn are not creations of socialists’ fevered imaginations. It really happened. Political philosophy matters.

_It began as a plea for freedom and prosperity_

The fundamental error of the left is focusing on inequality when its most pressing concern should be poverty. They are not the same thing. Effectively addressing poverty will require acceptance of substantial, undeserved inequality. Attacks on capitalism foolishly hurt the very people they are intended to help.

The fundamental error of the libertarian right is its proclivity for justifying inequality on the grounds that the winners in market competition are better, worthier people than the losers. Those on the bottom recognize the cruel stupidity of that claim and they will not endure it. With friends like the Randians, markets need no enemies. They praise capitalism in a way that makes it seem morally repellent.

There is a middle path, one that captures the best commitments of both. Unlike Beck, Hayek does not presume that those who cannot pay their way in a market are sponging off their betters. He acknowledges the arbitrariness and unfairness of markets, but supports them nonetheless. It is precisely their amoral tendency to maximize productivity, in unpredictable ways, that makes them the hope of the world. He brings to economics a tragic perspective that is entirely absent from Beck.

Hayek is a hero for Beck and other libertarians. On the left, he is the bad guy who invented the ideology that let Cranick’s house burn. Both sides have only the dimmest idea of what he actually wrote. He is better than either of them.

Hayek’s forgotten middle way shows that libertarianism need not, and originally did not, take the reprehensible form that looms so large in the imagination of the left, and that has captured the imaginations of so many on the right.

I’m writing this book for two audiences – audiences that, as it happens, fear and despise one another. I’m going to try to persuade leftists and libertarians that your ideals are not as far from one another as you believe, and that you need not be enemies.
Both positions, in their strongest forms, rely on contestable judgments that are sometimes false, and so each of the positions should be open to the possibility that the other is sometimes right. At the deepest philosophical level they agree. They hate poverty and they want to make people free and prosperous. A moderate libertarianism—libertarianism, as it happens, in its original Hayekian form—can accommodate both.

And now takes multiple forms

Let’s pause for a moment to clarify what we’re talking about. What is libertarianism?

Libertarians themselves like to say that their philosophy is centrally concerned with human freedom. “Libertarianism is the view that each person has the right to live his life in any way he chooses so long as he respects the equal rights of others.”¹³ “Libertarians believe that so long as we do not violate others’ rights, we should each be free to live as we choose.”¹⁴ The trouble with these definitions is that these specific beliefs are shared by many who find libertarianism repugnant. They leave out what’s distinctive about libertarianism. It’s like saying that what defines Protestantism is a belief in God.

Here’s a better description: “Government, if it has any purpose at all (and many libertarians doubt that it does), should be restricted to the protection of its citizens’ persons and property against direct violence and theft.”¹⁵ The freedom at which it aims is precisely freedom from government.

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¹⁵ Brian Doherty, Radicals for Capitalism: A Freewheeling History of the Modern American Libertarian Movement 3 (2007). It may be helpful to distinguish libertarianism from two similar philosophies, classical liberalism and neoliberalism. Classical liberalism was a nineteenth century doctrine opposed to feudalism and nationalism, which aimed at unimpeded free trade and careers open to talents. It had no deep commitments concerning regulation to prevent external harms. Most of the regulations it opposed had a different purpose, the protection of monopolies and of the privileges of the nobility. Neoliberalism, which developed in response to the collapse of the Austro-Hungarian Empire after World War I, aims to constrain state interference with markets in order to promote economic growth. Noneconomic questions, such as paternalistic legislation or antidiscrimination law, do not concern it. Neither of these embraces the absolute antistatism of libertarianism. Hayek was a variety of classical liberal, and was one of the founders of neoliberalism, but he is of interest here as an early precursor of libertarianism, as defined by Doherty. Libertarianism begins with one strand of Hayek’s thought and takes it to extremes that Hayek himself rejected.
Libertarianism is committed to free markets and private property. It aims to radically limit the scope and size of government. More and more people are drawn to it — on some accounts, as many as a third of voters. It is a powerful force in the Republican Party.

If you’re tempted by it, you need to know what you’re buying. If you’re not tempted, you still need to understand what your fellow citizens believe, whether those beliefs make sense, and how they are shaping American politics.

Libertarianism comes in different forms, with very different visions of human freedom. This book examines the most influential ones. One version imposes strict conditions on economic regulation and redistribution. The other, increasingly influential, rules them out categorically, and so threatens to turn America into an oppressive plutocracy in the name of liberty.

Political philosophy sounds abstract, but it is inescapable. If you have any political opinions, then you have a philosophy and are acting in accordance with it. Politics is not merely the pursuit of interests. Ideology matters. For example, Charles Koch, who has been funding libertarian causes for half a century, is often depicted as a greedy man hoping only to line his own pockets. This is a massive misunderstanding. Koch is an idealist. To understand and critique him, it is necessary to understand the creed to which he is committed. Similarly with House Speaker Paul Ryan’s efforts to privatize Social Security, or the antiregulatory efforts of President Donald Trump.

some of them not very nice

I became interested in libertarianism by accident. In 2010 I was invited to give a presentation about recent constitutional challenges to Obamacare. I teach constitutional law, but I hadn’t followed that litigation. So I prepared by reading the two district court cases that had recently declared part of the law unconstitutional.

I became upset. The reasoning was so flagrantly bad, so manifestly driven by the judges’ political views, that I was shocked to see such stuff coming out of the federal district

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17 For that reason, I cannot address them all. See Doherty. Wilfred Cantwell Smith’s observation, that no one can know enough to say that Buddhism or Hinduism is true or false and know what he is saying, is pertinent. Questions of Religious Truth 74 (1967).
More such decisions followed. With only a few exceptions, judges appointed by Republicans all accepted arguments that were inconsistent with nearly two hundred years of settled law.

I eventually became persuaded that the judges were in the grip of a philosophy that was no part of the Constitution, but which they found so compelling that they felt sure it had to be in there somewhere. It rested on a weird understanding of liberty, which conjured up a right previously unheard of: the right not to be compelled to pay for an unwanted service. If people wanted to go without insurance, it was tyrannical for government to force it upon them. Government, however, provides a huge range of services, paid for by taxes without asking whether the recipients want them. The proposed “right” repudiated sources of economic security that most Americans depend on, notably Social Security and Medicare. More broadly, the implication was anarchy. Why should anyone believe there was such a right?

As I learned more about the origins of this litigation—a story I eventually told in my book, The Tough Luck Constitution and the Assault on Health Care Reform—it became clear to me that its deepest source was libertarian political philosophy. There were two fundamental objections to Obamacare. One was that it expanded the size of government. The other was that, while it concededly provided health care to millions who were doing without, it did so by raising taxes on prosperous people who had not themselves done anything wrong.

I thought both objections repellent. How could people believe them? And they attracted unlikely fans. In a revealing moment during the March 2012 Supreme Court argument over the constitutionality of the law, Solicitor General Donald Verrilli argued that the state legitimately could compel Americans to purchase health insurance, because the country is obligated to pay for the uninsured when they get sick.

Justice Antonin Scalia responded: “Well, don’t obligate yourself to that.”

He was saying, in effect, that there is no real obligation to care for sick people who cannot afford to pay for their own medical care; that any assumed “obligation” is really a discretionary choice. You can choose to obligate yourself or not.

Verrilli replied that the Constitution did not “forbid Congress from taking into account this deeply embedded social

norm.” Scalia didn’t challenge that, but he still was not satisfied. A bit later, he suggested that under the Constitution, “the people were left to decide whether they want to buy insurance or not.”20 This would mean that any federally required insurance scheme was unconstitutional. Scalia clearly did not mean that. But then, why was he saying these things? I wanted to understand. Investigating philosophical debates in the law is what I do. I soon discovered that libertarianism comes in flavors, some more bitter than others. I was not reading libertarian writers in a generous spirit. I was predisposed for a fight. So I was surprised to discover that, while some of them were as callous as I expected, others were animated by a deep humanitarian impulse, tied to powerful and persuasive arguments about how capitalist economies work. And the thinker who most clearly reflected that impulse was Hayek, the founder of the movement. He changed my mind about some major issues: he made the case for tolerating substantial inequalities of wealth better than anyone I’d read before (and my embrace of that position here will make many of my friends on the left feel betrayed). So now I faced a puzzle: how did libertarianism come to take such different forms? That question led me to the story I’m about to tell you. I write from a peculiar political position. On the American political right, libertarianism competes with Christian fundamentalism and Trump’s racist, xenophobic nationalism. On the left, skepticism toward capitalism is growing, and concern about poverty is sometimes displaced by identity politics. I am a pro-capitalist leftist. That view is well represented among Democratic Party elites, less so in the party base. (As the triumph of Trump showed, when there is a large gap in a political party between the elites and the base, the position of the elites is insecure.) There exists no philosophical manifesto for moderation. My discomfort with abstract libertarian slogans isn’t new. In the field of legal studies, people are often motivated to develop new ideas when they perceive injustice in the world. When I was a law student, the Supreme Court casually dismissed as “at best, facetious” the idea that gay people had a right to privacy in their sexual relations.21 That made me angry. But I had a problem: I didn’t like the story that everyone on my side was telling. The standard defense of gay rights was simple: people should have a right to do whatever they want as long as they don’t violate anyone else’s rights. I thought it was too simple. The principle had two embarrassing implications. First, it meant that the law could impose no restrictions on

20 Tr. at 29.
self-destructive conduct: corner stores would have to be allowed to sell heroin and methamphetamine. Second, it undercut all of antidiscrimination law, which forces people into transactions that they would prefer to avoid. The world was just more complicated than that. That led me to defend gay rights on an entirely different basis. (I argued, and still think, that discrimination against gay people is a form of sex discrimination.\textsuperscript{22}) I’ve since concluded that libertarians have valid but overstated points about drugs and discrimination. I’ll explain in Chapters Four and Five.

Here is what I have learned in my investigation of modern libertarianism.

Two libertarian factions matter in modern American politics. The ideas of Hayek, who valued markets because they promised a better life for everyone, are today commonplace in the Democratic Party – a major ideological shift that almost no libertarians have noticed. Capitalism is embraced – it was not always thus on the left, and even today the socialists are full of passionate intensity – but it is tempered by regulation and redistribution. Democrats do not all agree with those ideas. Every Democratic president has. The Republicans once had a similar view, and some still do. But the Hayekians have lost ground to a different, more extreme libertarianism, which opposes nearly everything that government does. Its most important proponents have been the economist Murray Rothbard, the philosopher Robert Nozick, and Rand.

\textit{Hayek has something valuable to offer today’s debates about inequality}

Hayek defends capitalism because price mechanisms transmit more information than any central planner can possibly know, and thus can coordinate the activities of millions of people. Markets, he thought, can generate astonishing levels of prosperity, and thus offer more of that prosperity to the least advantaged members of society than socialism could.

Hayek’s views were scandalous when he first developed them in the 1930s. The Great Depression had produced a broad consensus in America and England that capitalism had failed and that central economic planning was necessary. Hayek’s courageous protest led him to be labeled a crank, and for many years he faced ridicule and indifference. In 1974, to the surprise of many (not least himself), he won the Nobel Prize in

\textsuperscript{22} See my The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 Yale L. J. 145 (1988). Many years later, the argument was accepted by several federal courts. Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018); Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017).
Economics. In the 1980s, his ideas triumphed when his admirers, Ronald Reagan and Margaret Thatcher, came to power.

It has turned out that Hayek was right. A huge range of policies that were once unquestioned – tariffs, subsidies for failing industries, wage and price controls, rent control, price supports for farm commodities – are now widely agreed to be counterproductive and wasteful (or at least, they were before Trump’s enthusiasm for protectionism).

His defense of inequality is particularly pertinent today. When businesses succeed, this signals unmet demand, and the surge in profits gives them the means to respond quickly to that demand. It’s very expensive to enter some markets, so monopolies will form unless some are wealthy and intrepid enough to take the risk. Even luxury consumption often benefits everyone: today’s new toys of the rich often will end up improving the lives of the masses.

In order for the economy to deliver maximal growth, some must be extraordinarily and undeservedly rich. Redistribution is fine, so long as it does not tax so severely as to destroy the accumulations of capital that a well-functioning market requires. What the poor need most, however, is not redistribution, but economic opportunity. Only that can produce enough wealth for everyone.

This argument is distinctive because it is coldly instrumental. Of course the rich do not deserve their good fortune. Markets do not consistently reward virtue. Businesses often prosper or fail for reasons that could not have been anticipated by anyone. But if you want more for the poor, you shouldn’t try to equalize. You should make the economy grow, and that means letting the rich keep quite a lot of what they have. (“Quite a lot” is not necessarily every penny the market gives them.)

Hayek’s strategy has been massively vindicated. After the collapse of Communism and the abandonment of socialism by such major powers as India, the proportion of the world population living in desperate poverty plunged. In 2013, 10.7 percent of the world’s population lived on less than US$1.90 a day, compared to 35 percent as recently as 1990. (Most of the remaining poor live in failed states.) It’s not the promised land – living on $5 a day is no joke – but it is better than the human race has ever seen. If these trends continue, the world may run out of poor people. It is one of the most spectacular

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23 Hayek was more skeptical of programs that go beyond a minimum income to maintain middle class status for some, like Social Security. This position was however inconsistent with his more basic commitments. See Chapter One.

developments in history. It has been even more impressive than Hayek anticipated.

Hayek’s view did not entail minimal government. It rather imposed strict conditions on intervention in the economy. He thought that regulation is appropriate to deal with what economists call “externalities,” side effects on third parties that aren’t reflected in prices, such as pollution. It should prohibit fraud and manipulation. It should fund public goods that the private sector will not adequately provide, such as roads, education, social services, and basic scientific research. But the state should act only on a clear showing of market failure.

Hayek’s libertarianism soberly assesses the advantages of a free market, including the inequalities that markets engender, and demands justification for any interference with the knowing choices of consenting adults. It views with suspicion proposals to regulate and subsidize. It is likewise suspicious of paternalism absent a clear showing of incompetence or deceit. It redistributes in ways that minimally impact markets. These presumptions can be overcome with evidence. (In 1960, Hayek proposed the outlines of Obamacare, requiring citizens to buy health insurance in the private market, with subsidies if they need them.)

Here again Hayek has triumphed, particularly on the moderate left: defenders of regulation typically assume that markets should be allowed to operate freely, and then try to show how markets fail in this or that sector of the economy and how intervention can help. This Hayekian view is evident in the policies of the Obama administration, which demanded (here expressly following Hayek’s acolyte Reagan) that proposals for regulations prove that the benefits exceed the costs.

Unlike the delusionary romanticism of Murray Rothbard, Robert Nozick, and Ayn Rand

Rothbard and Rand (and, in a complicated way, Nozick) were romantic individualists. No cold Hayekian calculations for them. Their vision of the individual breaking free from society’s stultifying constraints broadened libertarianism’s concerns from economics to ideas of personal liberation. Policy calculations were secondary. Their libertarianism was based on rights. Instead of Hayek’s presumption against interference with markets, they posited an absolute bar: property is sacrosanct, and anything that enfeebles the state is good for freedom. Any government action, beyond (perhaps!) the protection of property and enforcement of contracts, violates human rights. The consequences of minimal government don’t
matter. The penury of some, in an unregulated market, is merely justice.

Rothbard’s philosophy is the most influential of the three. Many who have never heard of him embrace his ideas in some detail. He was an anarchist. He thought that whatever government does, including police protection, can be provided better by private businesses. Markets reward those who look after themselves. Taxation is theft. He surrounded himself with young libertarian intellectuals, notably Nozick, who met Rothbard while he was still a student, and Randy Barnett, the mastermind of the legal challenge to Obamacare. He wrote for Rep. Ron Paul’s newsletter, and Senator Rand Paul writes that Rothbard “was a great influence on my thinking and when I was a young man I was lucky to meet him.”

In 1976 Rothbard persuaded Charles Koch to create new libertarian institutions, notably the Cato Institute. The state is not likely to disappear. But the platform of today’s Libertarian Party mirrors Rothbard’s views in many ways, and the Republican Party, increasingly under Koch’s sway, has been moving in his direction.

Nozick is the most prominent modern libertarian philosopher. He thought Rothbard’s anarchism could be rebutted. But the most that could be justified was a minimal, laissez-faire state, which would protect property, enforce contracts, and do nothing else.

Rand, a less sophisticated thinker, reached the same minimal-state conclusions, which she defended in apocalyptic terms. Any interference with markets operates to elevate “the weakling, the fool, the rotter, the liar, the failure, the coward, the fraud, and to exile from the human race the hero, the thinker, the producer, the inventor, the strong, the purposeful, the pure.” She is certainly the most widely read libertarian, and her influence is cited by Donald Trump, Paul Ryan, Gary Johnson, and many others. Her arguments matter less than her portrayals of good and evil in her novels: the magnificently self-sufficient heroes, Howard Roark in The Fountainhead and John Galt in Atlas Shrugged, and the despicable moochers and looters who try to suppress their genius.

All three thought that those who cannot prosper in an unregulated economy deserve their fate. All aimed to redistribute upward— to cut social services in order to ease the burden of taxation on the richest citizens. None of them understood markets as well as Hayek did, and all rely on philosophical premises that crumble under even brief scrutiny.

Externalities such as pollution create difficulties for all three. Rand never seriously addressed the problem. Rothbard

thought about it a lot, but his response is radically unstable, oscillating between opposite conclusions: either externalities must be tolerated wholesale because the state can’t price them, or most of modern industry must be prohibited because its effects trespass on property. Nozick, the most sensible of the three, thought that a society should “permit those polluting activities whose benefits are greater than their costs.” He thus approached agreement with Hayek, but he did not pause to consider that cost-benefit analysis, if it is to be done competently, requires a huge scientific bureaucracy, not a minimal state.

All of these philosophers, even Hayek, make the same mistake. They have an excessively crude understanding of their core concept: private property. All of them imagine it to be absolute dominion over some part of the world, unencumbered by affirmative duties or liability to taxation. Property rights have never been like this. They think they are defending existing property rights, but what they envision is an otherworldly fantasy. Moreover, if the value of property is that it gives individuals independence and autonomy, then this function is nicely performed by streams of government-generated income, such as Social Security and Medicare. Abolishing those, as many libertarians propose, would not only be a disaster for liberty. It would be a disaster for property, depriving millions of what they had worked for. Libertarian philosophy perversely threatens to destroy what it most cares about.

**Libertarianism is vulnerable to corruption**

Libertarianism is also susceptible to abuse by predators. Wealth in the United States is increasingly concentrated at the very top. Between 1979 and 2007, after-tax income grew by 275 percent for the top 1 percent of households; 65 percent for the next 19 percent; just under 40 percent for the next 60 percent; and 18 percent for the bottom 20 percent. During the same period, the share of total market income received by the top 1 percent of the population grew from about 10 percent to more than 20 percent. The share of the bottom 20 percent of the population fell from about 7 percent to about 5 percent. From 2002 to 2007, the top 1 percent received more than 65 percent of the gain in total national income. Income is also more

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unstable. Economic risk has been shifted from broad social insurance to workers and their families.\textsuperscript{30}

Some of the growth at the top is the legitimate effect of the new opportunities created by accelerating technological change and the expansion of the world economy into formerly socialist countries. The astounding wealth of Steve Jobs and Bill Gates is a small fraction of the value they created (though this fact should not immunize them from some redistributive taxation).\textsuperscript{31}

Much of the new inequality, however, is not the effect of competitive markets, but of a crony capitalism in which large corporations and banks have used their power to skew the rules in order to redistribute wealth upward, toward themselves. Liberals and libertarians ought to be able to join forces against this.\textsuperscript{32} That, however, demands that we not treat the present distribution of wealth as neutral and natural. Libertarian rhetoric has been deployed to justify artificial monopolies, and even to expand them. The most flagrant case is the law of copyright and patent, where the notion of “intellectual property” has produced an enormous expansion of monopoly and censorship under the guise of protecting property rights.\textsuperscript{33}

Large, sophisticated actors can exploit and hurt people in plenty of ways if the state doesn’t intervene. They can destroy the environment and heat up the planet, as the coal and petroleum industries do. They can parasitize sick people and drive up the cost of medical care, as the health care industry does. They can risk another bust on the scale of 2008, as the financial industry does. They can manipulate and deceive employees and consumers with exorbitant and deceptive home loan and credit card schemes, and contracts that nullify legal remedies. Such pests are likely to be hostile to regulation, and so they piously recite ideas of small government.

The most important of these bandits is the fossil fuel industry, which has deployed libertarian rhetoric to make the Republican Party the only major political party in the world


\textsuperscript{32}To some extent they already have. See Stiglitz, The Price of Inequality, 35-64; Brink Lindsey & Steven Teles, The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality (2017); Robert B. Reich, Saving Capitalism (2016); Luigi Zingales, A Capitalism for the People (2012).

\textsuperscript{33}Lindsey & Teles, The Captured Economy, 64-89; Neil Netanel, Copyright’s Paradox 54-80 (2010).
that denies climate change science. This license to profit by hurting people and destroying their property betrays the most basic commitments of even Randian libertarianism.

If the minimal prohibitions of force and fraud were enforced, inequality, to the extent that it is the product of this kind of robbery, would at least be ameliorated. That is, however, a reason for these leeches to try to make sure that these rules are not enforced, at least not against themselves.

Hostility to government also has crippled public services that capitalism needs. In the name of freedom, roads and bridges deteriorate, funding for medical research disappears, science is starved. This is stupid even from the selfish standpoint of business, which depends on functioning infrastructure.

It is curious that this philosophy has captured the imagination of so many billionaires, whom Koch has gathered into a powerful fundraising network. Once more, greed can’t explain its appeal for America’s super-rich. In most times and places, wealthy elites are conservative in the old-fashioned sense: they fear change, and want to keep society operating along traditional lines. Social welfare programs are a conservative strategy: they were invented by Otto von Bismarck in 19th century Germany to pacify the working classes. But in America, Bismarck would be on the marginalized centrist wing of the Republican Party, which has become the party of upheaval and revolution. Some billionaires are haunted by the thought that elderly retirees have too much food in their pantries. Their recklessness is evident in the crusade against Obamacare. You need to embrace a mighty tough libertarianism in order to cheerfully strive to take health care away from millions of people.34

If the hollowing out of the state allows economic behemoths to do whatever they like, then what libertarianism licenses, in the garb of liberty, is pollution, crass predation, and the creation of a new aristocracy. This is just a different kind of mooching and looting. It is a new road to serfdom. It reinforces the prejudices of those on the left who repudiate capitalism. The libertarians who embrace it, thinking that they are thereby promoting freedom, are useful idiots, like the idealistic leftists of the 1930s whose hatred of poverty and racism led them to embrace Stalin. John Galt is a sap.

34 See my The Tough Luck Constitution and the Assault on Health Care Reform (2013).
And even in its most attractive form, it is an inadequate political philosophy, and points beyond itself

Even in its most attractive form, libertarianism is an inadequate political philosophy. Rights depend on a culture, institutions, even individual personalities, that sustain them. In order to be free to live the lives they want, people need more than a minimal state. Libertarianism points beyond itself.

Freedom is not the absence of government. It is the capacity of people to shape their own lives. Libertarianism is at its core a protest against the massive apparatus of regulation and redistribution that arose in the twentieth century. That apparatus has done a lot of stupid things, but without it we would be less free.

The philosopher to whom modern libertarians are most deeply indebted is John Locke, who developed the classic defense of liberty and property in the seventeenth century, and whose views influenced the nation’s founders. Locke aims to bring about a world in which human effort is likely to be rewarded: “God gave the World . . . to the use of the Industrious and Rational, (and Labour was to be his Title to it;) not to the Fancy or Covetousness of the Quarrelsom and Contentious.” Libertarians misread Locke when they claim that America’s foundational commitments entail absolute property rights, which in turn limit or even bar taxation.

The twentieth century philosopher John Rawls, whom many libertarians regard as their bitterest adversary, argued persuasively that in a fair social contract, such as Locke contemplated, inequalities must somehow benefit the least advantaged members of society. If state authority is not to be mere brute force, those on the bottom need a reason to support the rules that put them there. Rawls did not fully appreciate the virtues of capitalism, but he was right that its systemic effects matter. Hayek had something important to add to this conversation: he showed that free markets with their attendant inequalities can satisfy Rawls’s principle. Economic growth will do more for the poor than redistribution can.

Of course there will always be people who cannot possibly provide for themselves in a market: the old, the sick, the orphans. Hayek saw no principled objection to a state-funded minimal income. That is one difference between him and the other libertarians. Rothbard regarded property rights as so absolute that one may have an obligation to die of starvation rather than violate them. Rawls’s powerful response is that no

35 John Locke, Two Treatises of Government, 2.34, 291 (Peter Laslett ed. 1988).
one could reasonably agree to such brutal terms of social cooperation.

The inadequacy of the libertarian account of freedom is revealed, in a different way, by two fields of regulation that it cannot account for, the ones that bothered me when I was a law student: addictive drugs and discrimination. An autonomous life requires a certain degree of self-control. Unrestricted availability of heroin, cocaine, and methamphetamine would destroy many people’s lives. Those people are freer today because the law has kept them from learning how much they would like those drugs. (This is not to endorse contemporary America’s brutal and counterproductive antidrug policies.)

Discrimination, when it is pervasive, frustrates the Lockean aspiration in a different way: effort is not rewarded when ambition is obstructed on the basis of race or sex or other arbitrary categories. People do not have a fair range of opportunities when the dominant culture consigns them to subordinate status the day they are born. This happens all over the world, wherever one tribe has conquered another: dalits in India, Catholics in Northern Ireland, on and on. Antidiscrimination law appears to be an unavoidable aspect of a functioning modern capitalist system. These two cases show that genuine freedom requires both internal and external preconditions. Neither is delivered by a minimal state.

The Lockean aspiration is also thwarted if the world is so open to upheaval by market forces that it is impossible to plan a life. Even Hayekian libertarianism, the most reasonable of the variants, calls into existence a world too unstable and destructive for most people to inhabit. Its operation will unleash, indeed is unleashing, forces that endanger both democracy and free markets. Libertarianism has no language to cope with those forces.

Libertarianism is an inadequate political philosophy, but it is a useful corrective to a political left that does not grasp the virtues of capitalism. Liberalism will be more attractive if it incorporates Hayek’s insights. A few academic political philosophers understand this, and have been developing an attractive synthesis of Rawls and Hayek. This book draws freely on their arguments. But their work is mostly unknown outside the universities. The result is that the moderate wing of the Democratic Party, instantiated by the presidencies of Bill Clinton and Barack Obama, does not know the best justification for what it has been doing.

I said at the outset that you probably have a political philosophy. Everyone with political opinions does. A philosophy is implicit in Donald Trump’s racism and nationalism.
You ought to be a libertarian – of a certain kind, and only up to a point. This book is not only a critical description of libertarianism. It aims to marry what is best about libertarianism with the agenda of the left. It proposes to harness the enormous productive energies of capitalism for the benefit of everyone, not just those who succeed in the market.

Chapter One explains Hayek’s libertarianism. Chapter Two turns to the question of rights, which Hayek neglected; it considers Locke’s philosophy and Rawls’s critique. Chapter Three critically examines Rothbard, Nozick, and Rand. Chapter Four examines the problem of paternalism, focusing on drug policy and consumer protection. Chapter Five takes up antidiscrimination law. Chapter Six assesses libertarianism’s impact on American politics, showing how Hayek’s thoughtful antisocialism has been corrupted into a tool of looters and moochers.
Chapter One: Prosperity

I think what is needed is a clear set of principles which enables us to distinguish between the legitimate fields of government activities and the illegitimate fields of government activity. You must cease to argue for and against government activity as such.

Friedrich Hayek

In the 1930s, almost everyone wanted central economic planning

In the late 1930s, the world’s most admired economic managers were Joseph Stalin and Adolf Hitler. The Great Depression had devastated most of the world’s economy. In the United States, for example, between 1929 and 1933, real output fell by 29 percent; unemployment rose from 3.2 percent to 21 percent (not counting 4 percent in government make-work programs). The Standard & Poor index of stock values dropped from an average of 26.02 in 1929 to 6.93 in 1932. Unemployment remained stubbornly high in the world’s other leading democracies, Great Britain and France. Meanwhile Russia, which had always been a rural backwater, was industrializing rapidly. Germany, which only a few years earlier had devastating inflation and unemployment, was booming, stimulated by huge military and public works spending.

There was a broad consensus among American and British politicians and intellectuals that the only way back to prosperity was a scientifically planned economy. Even those who were unhappy about the dictators’ methods agreed that capitalism had failed. They thought that, if there must be planning, it should be democratically controlled. It was, historian Angus Burgin reports, “a period of extraordinary isolation for academic opponents of government intervention.”

A dissenting view had developed among a small group of Austrian economists, who argued that central economic planning...

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could not work because it would not be possible to calculate where capital should be invested. In 1931 one of their students, Friedrich Hayek, was offered a job abroad that he could not refuse. "If you are at thirty-two a professor at the London School of Economics," he recalled, "you don't have any further ambitions."\textsuperscript{39}

As the consensus grew for a planned economy, Hayek felt impelled to respond. He thought that the arguments for planning had already been rebutted by his teachers, but "I found that certain new insights which were known on the Continent had not reached the English-speaking world."\textsuperscript{40} He produced a series of writings in the 1930s, arguing that efficient economic decisions could not be made without private property and competitive markets. But his objections went beyond efficiency. He argued that central planning would inevitably become tyrannical.

The question of planning became more urgent with the outbreak of World War II. In wartime, centralized planning really is unavoidable: the government commandeers factories for war production, diverts resources from capital investment and consumer goods, fixes prices to avoid inflation, and sets up systems of rationing.

Hayek desperately wanted Hitler to be defeated, but he was also worried about what would happen if the Allies won. Many thought that state control of the economy ought to be continued in peacetime. Thus, the National Executive Committee of the British Labour party declared in 1942:

There must be no return to the unplanned competitive world of the inter-War years, in which a privileged few were maintained at the expense of the common good . . . A planned society must replace the old competitive system . . . The basis for our democracy must be planned production for community use . . . As a necessary prerequisite to the reorganization of society, the main Wartime controls in industry and agriculture should be maintained to avoid the scramble for profits which followed the last war.\textsuperscript{41}

So Hayek, who until that time had only written academic studies in economics, decided to write a popular book making the case against socialism. \textit{The Road to Serfdom} was published in England in 1944. It was rejected by several American publishers before the University of Chicago Press produced a small run of 2,000 copies. It was an unexpected best seller.

There was already a coalition of businessmen opposing President Franklin Roosevelt's New Deal, sometimes in apocalyptic terms, but without much effect. The industrialist

\textsuperscript{39} Burgin, \textit{The Great Persuasion}, 24.
\textsuperscript{40} Quoted in Alan Ebenstein, \textit{Friedrich Hayek: A Biography} 91 (2003).
\textsuperscript{41} Quoted in Caldwell, \textit{Introduction to The Road to Serfdom}, 12.
du Pont brothers founded the American Liberty League to “combat radicalism, preserve property rights, uphold and preserve the Constitution.” It deemed the New Deal bureaucracy “a vast organism spreading its tentacles over the business and private life of the citizens of the country.” The chairman of the Illinois division said, “You can’t recover prosperity by seizing the accumulation of the thrifty and distributing it to the thriftless and unlucky.” The League provided a handy foil for Roosevelt, who denounced “economic royalists” in his 1936 reelection campaign— which he won with a crushing 60% of the vote, giving the Democrats huge majorities in both houses of Congress. The Democratic Party chairman said that it “ought to be called the American Cellophane League” because “first, it’s a Du Pont product, and second, you can see right through it.”

Hayek gave the movement a coherent basis for its views. The publication of *The Road to Serfdom* marks the beginning of libertarianism as a distinctive force in American intellectual life.

*Modern libertarianism was born with Hayek’s protest against that idea.*

Libertarianism is the philosophy that aims at freedom from government. In the context of the 1930s, the reason for focusing on that aspect of freedom was clear. The big threat to liberty was socialism—the Marxist socialism of Russia, and the National Socialism of Germany. There were plenty of defenders of laissez-faire in the nineteenth century, but they struggled against different adversaries. The labor and Populist movements aimed to raise wages and inflate the currency, but they did not propose central economic planning. The ideologists of free markets, such as Herbert Spencer and William Graham Sumner, were opposed to those movements, but they had no interest in restraining the state as such. The few pro-market anarchists, such as the abolitionist Lysander Spooner, were politically marginal.

The earlier defenses of property rights were also philosophically underdeveloped, leaving them vulnerable to the criticism that they assumed rather than defending the legitimacy of existing distributions of wealth and power. Intellectuals who supported Roosevelt hammered that criticism repeatedly. His opponents had no good answer until Hayek came along.

Libertarianism is a variety of liberalism, the political philosophy that holds the purpose of government to be, not the

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dominance of one king, race, or nation, nor the promotion of religious, moral, or martial virtue, but rather peace, prosperity, intellectual progress, and above all personal liberty. Each individual is to be autonomous within a certain sphere which government must not violate. The dimensions of that sphere have been understood differently at different times and by different people. Most modern American political ideologies are variations on liberalism.

Libertarianism is distinctive in insisting on very strong property rights and minimal government. It is suspicious of, and in some forms categorically prohibits, economic regulation and redistribution. It associates these with socialism. Other liberals think that government must take a larger role if people are actually going to be free to live as they choose.

This disagreement can get pretty bitter. But that should not keep us from seeing that this is a family quarrel. Practical philosophy, of which political philosophy is a subset, needs a starting point: if we are going to think together about better and worse ways to act and govern ourselves, then we need some initial consensus from which to begin. The answer to the ancient undergraduate question, “how do you argue with Hitler?”, is that you don’t. All you can do is kill him if you can.

Freedom’s value, on the other hand, is common ground between libertarians and their adversaries in contemporary American discourse, and to a large extent elsewhere in the world. Libertarians disagree with other liberals about strategy. We fight about what a free society should look like.

It’s sometimes said that libertarians differ from left liberals in their conception of freedom. Libertarians understand freedom in negative terms: as Hayek puts it, freedom is “[t]he state in which a man is not subject to coercion by the arbitrary will of another or others.”43 Left liberals have a broader conception, one that includes the capacity to do things in the world. Thus, for example, Franklin D. Roosevelt’s emphasis on “freedom from want.” They correctly observe that a person in desperate poverty is unable to have the life he wants. Hayek doesn’t deny that “the range of physical possibilities from which a person can choose at a given moment” is tremendously important.44 But, he argues, the way to deliver on that is to aim at freedom as he defines it. Central economic planning will deliver neither freedom from domination nor freedom from want. Almost all libertarians follow him in this: free markets and a small state are a powerful engine for generating wealth and thereby positive liberty. They also seek

44 Id. at 12.
freedom from want, and but offer a different and, they think, more reliable path to get there.

Hayek introduced the idea of markets as a way to cope with too much information – more than any planner could know

Hayek was born in 1899. By leaving his native Austria for the professorship at the London School of Economics, he inadvertently escaped Nazi rule. In 1950 he was appointed Professor of Social and Moral Sciences at the University of Chicago. He returned to Europe in 1962. For much of his life, his biographer observes, “Hayek was a subject of ridicule, contempt, or, even worse for a man of ideas, indifference.”

Over time his influence grew. In 1974 he won the Nobel Prize in Economics. He had claimed for decades that Keynesian stimulation of the economy would eventually produce inflation without growth. The stagflation of the 1970s seemed a vindication. Margaret Thatcher introduced him to Ronald Reagan; she once famously brandished a copy of his The Constitution of Liberty and declared, “This is what we believe.”

He died in 1992.

Modern libertarianism began with Hayek’s attempt to resuscitate the idea of free markets. The decline of faith in markets, he thought, created an opportunity for a clearer articulation of their virtues: economic liberty’s “underlying philosophy became stationary when it was most influential, as it had often progressed when on the defensive.”

Nineteenth century defenders of unregulated capitalism, such as Herbert Spencer and William Graham Sumner, did not have to worry about either socialism or the modern regulatory state. Hayek’s great innovation, along with his teacher, Ludwig Von Mises, was “to create a defense of the free market using the language of freedom and revolutionary change.”

Hayek thought that central planning would inevitably lead to tyranny and poverty, but he also rejected the nineteenth

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47 The Constitution of Liberty, 7.
century ideal of a laissez faire, minimal state. He sought to
delineate a middle path.

The Road to Serfdom got much of its readership through
publication of an abridged version by Readers Digest magazine,
which had more than eight million readers. More than a million
reprints of the abridgement were distributed (compared with
40,000 copies of the original). The abridgement however was
substantially different from the original, excluding many
qualifications and with some wholly new sentences added. It was
widely taken to be an endorsement of a minimal state. Hayek's
own views were more nuanced.49 So from the very beginning,
American libertarianism was bifurcated into crude and
sophisticated versions, with Hayek ironically the spokesman for
both.

Hayek continued for the rest of his life to argue against
government meddling in markets. In 1947 (with funding from some
of those same American businessmen), he founded the Mont Pelerin
Society, an annual conference of scholars who opposed socialist
planning. The society became an important school for
libertarians, notably the young Milton Friedman.

Hayek argued that socialist central planning must fail.
The basic problem is the immense amount of information that
undergirds the complex division of labor. "As decentralisation
has become necessary because nobody can consciously balance all
the considerations bearing on the decisions of so many
individuals, the co-ordination can clearly not be effected by
"conscious control," but only by arrangements which convey to
each agent the information he must possess in order effectively
to adjust his decisions to those of others."50

The irreplaceable virtue of free markets, Hayek thought, is
their capacity to take advantage of that flood of information.
Von Mises had argued, against socialism, that without a market,
one can't rationally calculate how to allocate capital. Hayek
argued, more radically, that the necessary knowledge could not
even be collected. Innovation often emerges from individuals'
tacit knowledge, inexplicit even to themselves. Its value is
not reflected in existing prices, because the innovation does
not yet exist. The problem is not the complexity of
calculation, but the lack of information. No central authority
can possibly know all the competing demands for resources.

49 Burgin, The Great Persuasion, 87-91. One key paragraph, approving of "an
extensive system of social services" and limits on "the smoke of factories,"
did however survive the abridgement, so careful readers should have
understood that Hayek was not advocating a minimal state. See The Reader's
Digest condensed version of The Road to Serfdom 38 (Institute of Economic
Individuals often can’t articulate their own reasons for wanting what they want. The general welfare “cannot consist of the sum of particular satisfactions of the several individuals for the simple reason that neither those nor the circumstances determining them can be known to government or anybody else.”

We are fundamentally mysterious and opaque, to ourselves and to one another. I never know what I want until I see what I do. What government should provide is not the direct satisfaction of needs, but the securing of conditions in which people have opportunities to provide for their own needs.

Markets respond to wants with admirable precision. If the demand for a commodity increases, consumers bid up its price. That raises the profits of producers, and induces them to increase production and others to start producing the same commodity. Once the new supply matches or exceeds demand, the price falls, and the stimulus to production disappears. No one is managing the process, but the market nonetheless coordinates the productive activities of millions who need not even be aware of one another’s existence.

Free markets played a crucial role in what Deirdre McCloskey has called The Great Enrichment: after scraping by in desperate poverty for about 100,000 years, the human race became spectacularly rich beginning around 1800. There is no single explanation for the Great Enrichment. The industrial revolution, the growth of trade, the consolidation of strong nonpredatory states, and the advance of science each played a role. The ingredient that Hayek emphasizes is the development and political entrenchment of ideas of liberty, equality, and property rights. People are a lot more likely to invest and cooperate if they get to keep what they produce.

Economic value is what people are willing to pay. People cannot be expected to agree on the purposes worth pursuing, not least because “new ends constantly arise with the satisfaction of old needs and with the appearance of new opportunities.” We can’t argue about ends, because we often can’t articulate our reasons for pursuing the ends we do. Each of us has a “unique combination of information, skills and capacities which nobody else can fully appreciate.” Yet somehow we must live together and cooperate. “What makes agreement and peace in such a society possible is that the individuals are not required to

52 Deirdre McCloskey, Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World xii (2016).
53 The Constitution of Liberty, 36.
agree on ends but only on means which are capable of serving a
great variety of purposes and which each hopes will assist him
in the pursuit of his own purposes.”

Today’s political left is less concerned with putting money
in the pockets of the working classes than with cultural
imperialism and the oppression of minority identity. The
concern with poverty persists but is part of a larger agenda.
That agenda inevitably has Hayekian resonances. A right to be
weird and different pushes toward localization of power and away
from central planning. Engagement with Hayek’s ideas thus
played a direct role in transforming the ideology of the British
Labour Party into Tony Blair’s more capitalism-friendly
version. Many on the left don’t grasp the antisocialist logic
of their present views.

There is, of course, a limit to this opacity. If society’s
welfare is simply the sum of revealed preferences in the market,
then we will count only the preferences of those who have money
to make purchases. If a rich family has a healthy baby, and a
poor family has a sickly one, then an efficient market will give
the healthy baby more visits to the pediatrician. That’s
silly. Hayek understood this, and so thought that
redistribution to provide basic needs was an appropriate
supplement to a free market. But such a supplement was not
central planning, because it left the recipients free to make
their own decisions.

Central planners must depend on a set of determinate goals.
Since they cannot know all the purposes that individuals are
pursuing, Hayek observed, they must impose their own.
Tyrannical power is thus inherent in socialism.

In short, Hayek argued that a centrally planned economy
must be both wasteful and dictatorial. It would deliver neither
prosperity nor freedom.

In retrospect, it is remarkable how right he was. There’s
a tendency on the left to sneer at The Road to Serfdom for its
exaggerated denunciation of government intervention in the
economy. Hayek would eventually make such excessive claims.
But they are not to be found in The Road to Serfdom. Its target
was not the likes of Obamacare – Hayek himself proposed the
basic scheme of Obamacare decades before it was enacted – but
socialism. If central economic planning has largely been
abandoned by the left, Hayek deserves much of the credit.

57 Timothy Stoltzfus Jost, Health Care at Risk: A Critique of the Consumer-
Driven Movement 114 (2007).
58 There is still “socialism” on the left, but the label now often signifies
capitalism with aggressive regulation and redistribution. The confusion
And thought that, if the human race was going to become less poor, undeserved inequality had to be accepted.

One of the most controversial aspects of the operation of a free market is the inequality that it engenders. As I noted in the Introduction, income and wealth in the United States are increasingly concentrated at the top. This has created controversy over what, if anything, to do about that.

During the 2008 presidential campaign, then-Senator Barack Obama was asked about his proposal to raise taxes on high-income households. His response: “It’s not that I want to punish your success. I just want to make sure that everybody who is behind you, that they’ve got a chance at success, too. I think when you spread the wealth around, it’s good for everybody.” This produced accusations of incipient socialism. Was Obama proposing the kind of dictatorial manipulation of the market that Hayek denounced?

Redistribution of wealth is one of the most divisive issues in American politics. Obamacare, as already noted, was controversial in large part because it did exactly what Obama the candidate proposed: it raised taxes on the rich to subsidize healthcare for people with low incomes. Most of the reductions in the 2017 Republican tax law, on the other hand, benefited the richest taxpayers. The disagreement about the law was precisely about the justice of the distribution of wealth. House minority leader Nancy Pelosi declared that the law would “rob from their future and ransack the middle class to reward the rich.” Senator Bernard Sanders called the law “the looting of the federal Treasury.” Defenders of the bill responded that the law merely permitted Americans to keep more of their own money.59 Since the rich paid so much more in taxes, it was only fair for them to get a bigger share of any cuts.

Hayek’s views of inequality are complex. He refuses to endorse the familiar claim that markets reward the industrious—an argument that was ubiquitous among American defenders of free markets before the 1930s.

Market distributions are efficient, Hayek thought, but they do not reliably reflect merit. Prices, including compensation for labor, signal what is demanded now, not whether producers made virtuous choices in the past. Claims about what’s deserved are backward-looking. Prices are forward-looking. They tell

about the term was promoted by Republicans’ habit of calling President Obama a socialist. See my A short guide to Obama and socialism, Balkinization, March 9, 2009.

people which of their efforts will be most valued by other people. John may have toiled selflessly for years to produce a product that he knew would greatly improve the lives of consumers, but if some lazy lout happens to stumble upon a better or cheaper substitute, John will be ruined. And he should be ruined. No one wants his product and it would be wasteful to keep producing it. In a free market, Hayek concluded, rewards “will of necessity be determined partly by skill and partly by luck.”\(^\text{60}\)

He was ambivalent about the sense of entitlement that is typical of those who have become rich in a commercial society: “It certainly is important . . . that the individuals believe that their well-being depends primarily on their own efforts and decisions. Indeed, few circumstances will do more to make a person energetic and efficient than the belief that it depends chiefly on him whether he will reach the goals he has set for himself.” But there is an element of delusion. It is unfortunate that free enterprise has been defended “on the ground that it regularly rewards the deserving, and it bodes ill for the future of the market order that this seems to have become the only defense of it which is understood by the general public. That it has largely become the basis of the self-esteem of the businessman often gives him an air of self-righteousness which does not make him more popular.” So there is a “real dilemma” whether to encourage those “with whom the over-confidence in the appropriate reward of the able and industrious is strong and who in consequence will do much that benefits the rest, and whether without such partly erroneous beliefs the large numbers will tolerate actual differences in rewards which will be based only partly on achievement and partly on mere chance.”\(^\text{61}\)

Some readers will object that Hayek underestimates the degree to which markets reward merit. In a free market, those who think ahead and work hard tend to be lucky. One of the deepest attractions of capitalism is that it realizes, imperfectly but as well as any economic system can, the idea that people deserve to be rewarded for their efforts. In many countries, people tend to support capitalism if they think that hard work, not luck, determines success. Among Americans, 69 percent agreed that “People are rewarded for intelligence and skill,” a much bigger proportion than any other country.\(^\text{62}\) Rough justice is not the same as injustice.

Hayek can respond that the constant upheavals of capitalism sometimes produce a lot of roughness: huge populations can

\(^{60}\) Hayek, Law, Legislation, and Liberty, v. 2, 71.

\(^{61}\) Id., 74.

\(^{62}\) Luigi Zingales, A Capitalism for the People 3, 17 (2012).
abruptly find that the skills they have relied upon for decades are suddenly worthless. Opportunities are inevitably unequal. One can only cultivate one’s native talents, which vary widely, are compensated on the basis of contingent market conditions, and are not themselves deserved. The opportunity to engage in such cultivation, and even awareness of one’s opportunities, depend on early education, the economic and social environment, and the values learned from parents and peers.

Hayek also observes that merit is not identical with the capacity to produce goods or services that others are willing to pay a lot for. There neither is nor should be any universal measure of merit. A free enterprise society should be “a pluralistic society which knows no single order of rank but has many different principles on which esteem is based; where worldly success is neither the only evidence nor regarded as certain proof of individual merit.”

He is clearly correct about this. There are virtues, including some that confer enormous benefits on others, that get no reward in a market, and which sometimes are even punished. Most people in infancy and senescence depend on unpaid care, usually from women, in a persistent, gendered pattern of custom and duty. The obligation to provide such care often tightly cabins women’s economic opportunities. (And of course some kinds of merit, such as courage in the face of suffering, are not even other-regarding.)

But because inequality was undeserved, redistribution was not unjust, although often imprudent.

So the winners in a market don’t deserve all of their gains. Hayek’s defense of private property thus doesn’t rule out (though it limits) redistributive taxation. One can take from the rich and give to the poor, and then the poor will be able to send their own price signals. The poor may have urgent needs, but unless they have money, a market won’t detect or respond to those needs.

So why not equalize wealth within a market system? Hayek had an answer. He thought that large inequalities of wealth enhance productivity and so should be undisturbed. In the long run, they operate to the benefit of the least advantaged members of society. What “has contributed most during the last two hundred years to increase not only the absolute but also the relative position of those in the lowest income groups has been

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63 The Moral Element in Free Enterprise, 234-35.
the general growth of wealth which has tended to raise the
income of the lowest groups more than the relatively higher
ones."\textsuperscript{65}

This, Hayek thought, meant that government should not try
to limit the inequality of wealth. Capital accumulation signals
unmet demand, drawing resources into markets. Any limit on
capital accumulation impairs the economy’s capacity to respond
to those signals.\textsuperscript{66}

Economic progress is not simply “an accumulation of ever
greater quantities of goods and equipment.” On the contrary,
“the growth of income . . . more probably depends on our
learning to use our resources more effectively and for new
purposes.”\textsuperscript{67} That progress depends on economic liberty.
“Nowhere is freedom more important than where our ignorance is
greatest – at the boundaries of knowledge, in other words, where
nobody can predict what lies a step ahead.”\textsuperscript{68}

Any substantial improvement over what is already on offer
will beget extraordinary profits – the hope of these is in large
part what drives the innovators – but any such gains are
inevitably temporary. The competition of imitators will soon
reduce returns to normal levels. In fact, producers only
capture about two percent of the social returns from
technological advances.\textsuperscript{69} And it is technological advance that
is primarily responsible for the Great Enrichment.\textsuperscript{70}

The creation of new enterprises “is still and probably
always will be done mainly by individuals controlling
considerable resources.”\textsuperscript{71} Established corporations or
institutional investors are likely to be cautious and
bureaucratic.\textsuperscript{72} Progressive taxation can frustrate this source
of growth:

The large gains of the successful innovator meant in the
past that, having shown the capacity for profitably
employing capital in new ventures, he would soon be able to
back his judgment with larger means. Much of the individual

\textsuperscript{65} Hayek, Law, Legislation, and Liberty, v. 2, 131. Today this claim is of
course anachronistic, as the gains from growth increasingly concentrate at
the top.
\textsuperscript{66} Kevin Vallier, A moral and economic critique of the new property-owning
\textsuperscript{67} The Constitution of Liberty, 42-43.
\textsuperscript{68} Id., 394.
\textsuperscript{69} William D. Nordhaus, Schumpeterian Profits in the American Economy: Theory
\textsuperscript{70} Deirdre McCloskey, Bourgeois Equality: How Ideas, Not Capital or
Institutions, Enriched the World (2016); Deirdre McCloskey, Bourgeois
\textsuperscript{71} The Constitution of Liberty, 320.
\textsuperscript{72} This is likewise anachronistic, as modern colossi like Apple and Samsung
race to outdo each other in the speed of innovation.
formation of new capital, since it is offset by capital losses of others, should be realistically seen as part of a continuous process of redistribution of capital among the entrepreneurs. The taxation of such profits, at more or less confiscatory rates, amounts to a heavy tax on that turnover of capital which is part of the driving force of a progressive society.  

Thwarting such new formations of capital is likely to “strengthen the position of the established corporations against newcomers,” and thus to “create quasi-monopolistic situations.”

A class of wealthy investors limits corporate power: “what will control the power of large aggregations of capital are other large aggregations of capital.”

These arguments justify inequality on the assumption that the rich reinvest their wealth and try to become even richer. When this happens, one can even reasonably ask in what sense the property is theirs. They are in effect holding it in trust for future generations, not only their own heirs, but all those who will be able to consume more in the future because investments are being made now. The common claim that wealth has diminishing marginal utility – that redistribution is good because a dollar is more valuable to a poor person than to a rich one – is false if the redistribution would lead to underinvestment in long-range production. Some resources should be directed, not to those who would benefit most from consuming them, but to those who will make the most productive use of them.

But of course the rich consume a lot as well, sometimes profligately and wastefully. Can that be justified?

Society needs a class of independent thinkers, and the universities had better not be the only place they can be found. The academic class “have their own professional bias which on some essential points is contrary to the requirements of a free society and which needs to be countered, or at least modified, by an approach from a different position, by the outlook of men who are not members of an organized hierarchy, whose position in life is independent of the popularity of the views which they express, and who can mix on equal terms with the wealthy and powerful.” Hayek uses his most famous rival economist as an illustration:

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73 Id.
74 Id.
As his biographer tells us, at the age of thirty-six, Keynes "was determined not to relapse into salaried drudgery. He must be financially independent. He felt that he had that in him which would justify such independence. He had many things to tell the nation. And he wanted a sufficiency." Thus he went deeply into speculation and, starting with practically nothing, made half a million pounds in twelve years.  

Frivolous expenditures by the idle rich contribute in their own way to progress: "even the successful use of leisure needs pioneering and . . . many of the toys and tools of sport that later became the instruments of recreation for the masses were invented by playboys." Many new creations will initially be expensive, and therefore will begin as amusements of the wealthy: "the ambitions of the many will always be determined by what is as yet accessible only to the few." Luxury consumption "serves to defray the cost of the experimentation with the new things that, as a result, can later be made available to the poor." (Think of tennis, or the bicycle.) Inequality is the price of progress. "If all had to wait for better things until they could be provided for all, that day would in many instances never come."

If there is to be inequality, it is better that it be random than that society try to tie it to virtue or aptitude – an attempt necessarily doomed: "no man or group of men possesses the capacity to determine conclusively the potentialities of other human beings," and "we should certainly never trust anyone invariably to exercise such a capacity." The good fortune of an independent income, then, is best distributed with no attention at all to what anyone deserves: "We can only hope that this rare advantage is not meted out by human will but will fall by accident on a few lucky ones."

Finally, Hayek thought that bequest by inheritance was the least socially destructive channel for parents' partiality for their children. Absent this, parents will try to use their influence to place them in advantageous jobs, which is even more wasteful and unjust. "Such is the case with all societies in which inheritance of property does not exist, including the Communist." Even the unequal opportunities of children are useful. Everyone benefits from "socially valuable qualities

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78 Id., 447.  
79 Id., 129.  
80 Id., 42.  
81 Id., 44.  
82 Id.  
83 Id., 88.  
84 Id., 448.  
85 Id., 91.
which will be rarely acquired in a single generation but which will generally be formed only by the continuous efforts of two or three” – efforts that will give those families’ children “the chance to benefit from the better education and material environment which their parents may be able to provide.”

(Hayek himself was able to pursue an academic career in Vienna only because he could afford to serve first as an unpaid lecturer.)

Hayek thinks it is somewhat arbitrary that the rich are the ones who are rich and the poor are the ones who are poor. He admits, indeed insists, that neither deserves their position. Nonetheless, he argues that those at the bottom will have the best prospects if they accept this rather than using the state to equalize wealth.

In short, Hayek endorsed the inequality engendered by markets, not because markets give each of us what we deserve, but because they produce growing wealth, which is good for everyone. Their distributional effects are somewhat arbitrary, but no human agency is wise enough to do better.

These arguments largely succeed in justifying some inequality. What they don’t do, however – what they don’t try to do – is show that the existing distribution of property is sacrosanct, or make a case for a minimal state. It is possible to have an expensive system of social insurance while continuing to concentrate wealth. In Finland in 2000 – a prosperous country with an unusually robust welfare state – the top 0.5 percent of the population owned 71.6 percent of all investment wealth in the capital market, compared with 41.4 percent for the same cohort in the United States.

Redistribution need not crush growth. From 1950 to 1964, the top marginal tax rate in the United States exceeded 90%. During the 1950s, the U.S. economy grew by 37%. It has been difficult to establish any clear relation between the top tax rate and economic growth. Reductions in the top tax rate historically have been more clearly associated with concentration of wealth at the top of

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86 Id., 90.
87 Ebenstein, Friedrich Hayek: A Biography, 45.
88 It is thus a misunderstanding to say that Hayek’s defense of inequality posits a “heroic legislator of value,” or “the notion that the freedom of some is worth more than the freedom of others.” Corey Robin, The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump 158-59 (2d ed. 2018).
the distribution.\textsuperscript{91} (Given the extraordinary economic opportunities created by the modern world economy, it is however unlikely that any progressive taxation short of confiscation would prevent, rather than slow, the growth in the number of billionaires.)

Hayek worried about abuses of government power, but some programs that scared him, such as Social Security, have turned out better than he expected

Hayek’s qualms about redistribution did not prevent him from supporting any welfare provision whatsoever. He saw no “reason why the state should not assist the individual in providing for those common hazards of life against which, because of their uncertainty, few individuals can make adequate provision,” such as “sickness and accident.”\textsuperscript{92} The preservation of competition is consistent with “an extensive system of social services – so long as the organization of these services is not designed in such a way as to make competition ineffective over wide fields.”\textsuperscript{93} Even if we can’t know what people deserve, we can detect misfortunes that they don’t deserve, and we can remedy them. Hayek’s social minimum, it has been observed, entails “more universal healthcare than the Affordable Health Care Act now provides.”\textsuperscript{94} And of course he would have let the state use compulsory taxation to extinguish Gene Cranick’s fire.

The solution he embraced was “a certain minimum standard, dependent upon the average level of wealth of [the] country.”\textsuperscript{95} In a country as rich as the United States, that minimum could be pretty generous. “It can hardly be denied that, as we grow richer, that minimum of sustenance which the community has always provided for those not able to look after themselves, and which can be provided outside the market, will gradually rise . . . “\textsuperscript{96} He left unresolved, and therefore open to political

\textsuperscript{92} The Road to Serfdom, 120-21.
\textsuperscript{93} Id., 37.
\textsuperscript{94} Bernard Harcourt, How Paul Ryan enslaves Friedrich Hayek's The Road to Serfdom, The Guardian, Sept. 12, 2012. Hayek spent considerable effort attacking the idea of “social justice,” but what he meant by the term was intervention in the operation of the economy to ensure just outcomes, not a social minimum. For clarification, see John Tomasi, Free Market Fairness 123-161 (2012).
\textsuperscript{95} Law, Legislation, and Liberty, v. 3, 55.
\textsuperscript{96} The Constitution of Liberty, 257.
contestation, the question of where to draw the line, as Keynes immediately noticed.\footnote{Nicholas Wapshott, Keynes Hayek: The Clash That Defined Modern Economics 200 (2011).} He opposed price controls, subsidies, a minimum wage, and other efforts to tinker with the operation of the market. A social minimum would not prevent markets from performing their informational function.\footnote{Friedrich Hayek, Law, Legislation, and Liberty, v. 1: Rules and Order 142 (1973).} It remained unsatisfactory from the standpoint of justice, since “to confine to the citizens of particular countries provisions for a minimum standard higher than that universally applied makes it a privilege and necessitates certain limitations on the free movement of men across frontiers.”\footnote{Law, Legislation, and Liberty, v. 3, 56.} What could raise wealth across national borders was not redistribution, but trade.

This led him to reject those aspects of the welfare state that go beyond a social minimum, notably Social Security. That program’s benefits are tied to one’s level of earnings: those who have earned more before retirement collect more after retirement. Social Security provides more than subsistence. It protects many retirees’ middle class status.

Hayek rejected all state efforts “to direct private activity towards particular ends and to the benefit of particular groups.”\footnote{Law, Legislation, and Liberty, v. 1, 142.} He thought that there could be no principled basis for any system of social insurance beyond “a limited security which can be achieved for all and which is, therefore, no privilege.”\footnote{The Constitution of Liberty, 259.} Once one goes beyond that minimum, “there is no limit to the demands that will be pressed for.”\footnote{Id., 297.} Pension payments would exceed prior contributions, imposing an unfair burden on the young. The required contribution also paternalizes the present generation of workers, who “would be better off if the money were handed over to them and they were free to buy their insurance from private concerns.”\footnote{Id., 294.}

Unhappily, this issue made him hysterical: “concentration camps for the aged unable to maintain themselves are likely to be the fate of an old generation whose income is entirely dependent on coercing the young.”\footnote{Id., 297.} He wrote that in 1960, after Social Security had been in place for decades. In 1976, he declared that “the extensive redistribution of incomes through taxation and the institutions of the welfare state”
would lead “slowly, indirectly, and imperfectly” to “central economic planning.”  

His terror of a slippery slope is perhaps understandable after experiencing the Nazis, but this is silly. Elizabeth Anderson observes that Social Security in fact has the virtues that that Hayek emphasizes about property: the benefits are distributed “on an impersonal, nondiscretionary basis, independent of anyone’s judgment of what a particular individual needs or deserves.” Recipients need not justify their financial choices to anyone. Means tested benefits, on the other hand, such as Supplemental Security Income, Temporary Assistance for Needy Families, Medicaid, and food stamps, demand that people spend down their assets, and punish them for saving or even receiving gifts. Hayek thought that social insurance “would not make the private citizen in any way the object of administration; he would still be free to use his knowledge for his purposes and not have to serve the purposes of an organization.” Means testing in practice betrays this promise.

Hayek doesn’t fully understand the concept of property. In an influential 1964 essay that Hayek seems never to have read, Charles Reich observed that one function of property is “maintaining independence, dignity, and pluralism in society by creating zones within which the majority has to yield to the owner.” An income from government sources will accomplish this so long as it is effectively guaranteed: “There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely.” Social Security accomplishes this.

In so doing, Anderson observes, it also benefits the young: First, by keeping up with rising standards and hence costs of living, it enables many parents to live in independent households, so they don’t have to move in with their children—the overwhelming preference of both generations in the modern day. Second, it helps liberate women, primarily, from the need to drop out of the wage labor market so they can provide direct care to their parents or in-laws at home. Third, it helps spare the young from the burden of having to deal personally with the financial demands their parents would otherwise make on them, along with accompanying resentment, humiliation, guilt, needling, and

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105 Hayek, The Road to Serfdom, xx.
supplication. The emotional costs of elder provision are dramatically lower when such provision is mediated by an impersonal entitlement system.\footnote{Anderson, Common Property. On the corrosive effects of intergenerational dependency before Social Security, see Hendrik Hartog, Someday All This Will Be Yours: A History of Inheritance and Old Age (2012).}

Compare David Boaz’s libertarian complaint that Social Security has “weakened family bonds by reducing parents’ reliance on their children.”\footnote{The Libertarian Mind, 186. Milton and Rose Friedman make the same claim. Free to Choose: A Personal Statement 106 (1980).}

Hayek’s critique of Social Security thus inverts his fundamental commitments. Within the terms of his philosophy, it is an error. Yet, as we shall see in Chapter Four, it is an influential one, generating endless schemes to privatize the program and cut its benefits.

In short, Hayek defends inequality, but he is vague about just how much inequality is necessary. He does not categorically rule out redistribution, and he may tolerate quite a lot of redistribution. It all depends on the likely consequences.

He didn’t categorically oppose regulation. He thought it was sometimes imperative.

What about regulatory interference with markets? A lot of modern libertarians are uncomfortable with state regulation of the economy, but the standard justification for the regulation we have now is Hayekian.

Market transactions generally make both parties better off. Trade makes the world richer. We can understand the value of trade even if we have no idea why or what people are trading. That is Hayek’s core insight: the parties have information that we don’t. Deliberate, consensual transactions are the building blocks of a free market. They spontaneously combine into a vast web of mutual cooperation. They have been an indispensable part of the Great Enrichment.

As we have seen, in order for there to be a lot of trade, the parties need to be sure that it’s safe to become richer, that bandits (including those in police uniforms) won’t appear and carry off their gains. Adam Smith observed that those whose property is not secure “in this defenceless state naturally content themselves with their necessary subsistence; because to acquire more might only tempt the injustice of their oppressors.”\footnote{Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, III.iii.12, 405 (1776; R.H. Campbell & A.S. Skinner eds. 1976).}
The consent of all the parties is how we know that the transactions are in fact making the world richer. If third parties are affected, then we don’t know that. An indispensable condition of “the usefulness of the system of competition and private property,” Hayek wrote, is “that the owner benefits from all the useful services rendered by his property and suffers for all the damages caused to others by its use.”

If A produces goods to sell to B, but his factory produces pollution that injures C and D more than the widget benefits B, then the world isn’t richer after all. A and B have merely conspired to injure C and D. They are a new sort of bandit. (Chapter Six will show that bandits of this kind sometimes deploy libertarian rhetoric.)

Markets often produce effects on people who aren’t buying or selling. Economists call these “externalities.” The parties to any transaction have no incentive to take externalities into account. If they ignore them, market prices won’t reflect the real costs or benefits created by the transaction, and prices won’t perform their Hayekian information-encapsulating function.

That’s the argument for regulation. When the market can’t be trusted to get it right, government interference can be a gain for human freedom.

Externalities can be positive as well as negative. Education, for example, benefits not only the student who pays for it, but the society as a whole: educated people are more productive, less likely to commit crimes, better democratic citizens. If education is left to the market, there won’t be enough investment in it. Similarly with basic science: it can’t be patented, so there’s not enough incentive to produce it. Even with respect to technology, which can be patented, government-funded research or contracts have produced “semiconductors, integrated circuits, nuclear power, satellite communications, GPS, radar, the microwave (used in communication as well as cooking), jet engines, the radio (and its sister technology, television), and a dazzling range of high-tech materials and innovative methods for making them, from titanium to powder metallurgy.” And that’s just the nonmedical technologies. The iPhone is a triumph of modern capitalism, but its major components – GPS, lithium-ion batteries, cellular technology, LCD and touch screen displays, connectivity to the

113 The Road to Serfdom, 38.
115 Jacob S. Hacker and Paul Pierson, American Amnesia: How the War on Government Led Us to Forget What Made America Prosper 65-66 (2016). Public funding of research has another attraction: because the discoveries are not patented, competing businesses can instantly take advantage of them.
internet - were created by research that was either funded or
directly conducted by the government.\textsuperscript{116} Infrastructure,
transportation, sewers, reliable police and courts are all
likely to be undersupplied by markets, but it’s doubtful that
the Great Enrichment could have happened without them.

Hayek understood that, where there are externalities, law
may need to intervene:

Where, for example, it is impracticable to make the
enjoyment of certain services dependent on the payment of a
price, competition will not produce the services; and the
price system becomes similarly ineffective when the damage
caused to others by certain uses of property cannot be
effectively charged to the owner of that property. . . .
Thus neither the provision of signposts on the roads nor,
in most circumstances, that of the roads themselves can be
paid for by every individual user. Nor can certain harmful
effects of deforestation, of some methods of farming, or of
the smoke and noise of factories be confined to the owner
of the property in question or to those who are willing to
submit to the damage for an agreed compensation.\textsuperscript{117}

This argument will not, however, necessarily justify the
regulations that actually exist. Another ubiquitous theme in
libertarian thought is the incompetence and venality of
regulators. All transactions have some externalities. They
have not prevented the Great Enrichment. It is an open question
whether intervention in any particular case will improve or
worsen matters.\textsuperscript{118} In any specific area of policy, imperfect
markets need to be compared with imperfect government.\textsuperscript{119}

In a democracy, small, well-organized groups often are more
likely to get their way than diffuse, unorganized groups.
Legislators and administrators sometimes dole out political
goodies to unworthy special interests. The “public choice”
hypothesis is that such organized interests are likely to
advance their policy goals even when their gains involve greater
losses for others who are unorganized. The consequence is
legislation and regulation that stifles competition, pointlessly
burdens economic activity, and is likely to benefit wealthy
stakeholders who know how to work the system. This is a central
theme of the scholarship of James Buchanan, whose influence on
modern libertarianism is however exaggerated (and whose views

\textsuperscript{116} Id., 3.
\textsuperscript{117} The Road to Serfdom, 38-39; see also Law, Legislation, and Liberty, v. 3,
41-46.
\textsuperscript{118} Deirdre McCloskey, The Two Movements in Economic Thought, 1700-2000: Empty
\textsuperscript{119} Harold Demsetz, Information and Efficiency: Another Viewpoint, 12 J. L. &
Econ. 1 (1969).
are misrepresented) in Nancy MacLean’s book, *Democracy in Chains*. The success of this unreliable book, which was nominated for a National Book Award, has done much to distort the left’s understanding of libertarianism.\(^{120}\)

Sometimes Buchanan is right. For instance, large farming interests spend a lot of money to keep their subsidies, artificially cheap high fructose corn syrup finds its way into most processed foods, and the mass of citizens endure obesity, diabetes, tooth decay, and inflated food prices. Regulation sometimes is captured by established economic actors and used by them to stifle competition. So, whatever the defects of an unregulated market, the effects of regulation are sometimes worse. Hayek worried about that,\(^{121}\) and the struggle against this kind of pork is one of the most valuable things that modern libertarians do. This undeniable pathology has led many libertarians to conclude that the regulatory state is irredeemable.

Fortunately, the public choice hypothesis is testable. It is falsified whenever the state delivers broad benefits to unorganized citizens at the expense of organized groups. And it is in fact constantly being falsified.

Consider the fact that the air you’re breathing and the water you’re drinking are both cleaner than they were when the Environmental Protection Agency was created in 1970. The administrative process insulates regulators from political pressure in numerous ways, and beneficial regulations have been enacted over the protests of both the President and Congress.\(^{122}\)

Even libertarians – at least, the ones who are not anarchists – concede that some state actors, such as police and judges, often are immune to bribery. They have to believe that, or their minimal state couldn’t be trusted to do its job. If those officials can develop an internal culture that insulates them from capture, it is hard to see why, in principle, it is impossible for other agencies, agencies with far more expertise at detecting market failures, to do the same thing.

Culture matters. Hayek understood that. He observed that some people pursue ends other than economic gain; morality itself, which he though motivated by the desire to be esteemed


\(^{121}\) Law, Legislation, and Liberty, v. 3 is an extended treatment of the problem.

\(^{122}\) An invaluable corrective here is Steven Croley’s careful delineation of the political dynamics of federal administration (and devastating critique of the public choice theory) in *Regulation and Public Interests* (2008).
by one’s fellows, can be a powerful motivating force.\textsuperscript{123} The abuse of state power, he thought, was prevented in successful democracies by a “background of unwritten traditions and beliefs.”\textsuperscript{124}

State actors may be cozy with established business interests. On the other hand, they may be coldly distant from them and dedicated to their missions. Cass Sunstein, Obama’s first head of the Office of Information and Regulatory Affairs, which oversaw the entire federal regulatory state, recalls that whenever the views of interest groups were pointed out to him, he would respond, “Get your mind out of the gutter.”\textsuperscript{125} Deeply immersed in Hayekian economics during the many years he taught at the University of Chicago, he was fairly obsessed with refuting the capture hypothesis by insisting (here expressly following a policy laid down in the Reagan Administration) that the benefits of any regulation demonstrably outweigh its costs.\textsuperscript{126} His insistence on quantification does give him a basis for saying with reasonable confidence that the first three years of regulation under Obama produced net annual benefits of $91.3 billion.\textsuperscript{127}

Of course, even idealistic regulators can make mistakes, and these are not disciplined by the market. Cost-benefit analysis necessarily involves a certain amount of guesswork.\textsuperscript{128} But making mistakes is not the same as being captured by special interests. Externalities must be addressed, and the market won’t address them.

Although anti-New Deal businessmen embraced Hayek, he wasn’t really their ally. Government’s share of Gross Domestic Product (GDP) rose precipitously in the twentieth century. In 1900, government spending was 6.9 percent of GDP. It has risen continuously, with a few spikes in wartime, and is now about 36 percent.\textsuperscript{129} The businessmen longed to reduce the size of government. They felt betrayed when Eisenhower, the first

\textsuperscript{123} Law, Legislation, and Liberty, v. 3, 170-71.
\textsuperscript{124} Id., 108.
\textsuperscript{126} It is arguable that, even within a Hayekian framework, cost-benefit analysis is biased against regulation, because many benefits resist quantification, particularly the prevention of injuries to people. On the other hand, so do costs.
\textsuperscript{127} Id. at 34. He later observed that the Trump Administration confirmed that the aggregate benefits of Obama era regulations vastly exceeded their costs. The Sense Behind the Noise on Trump’s Regulation Policy, Bloomberg, Mar. 1, 2018.
\textsuperscript{128} Sunstein cites Hayek’s claim about the limitations of planning to explain why it is important to solicit public comment before finalizing rules. Id., 81. This “check on mistakes” is far less precise than prices.
\textsuperscript{129} US Government Spending History from 1900, \url{http://www.usgovernmentspending.com/past_spending}. 
Republican President in 20 years, embraced big government and even expanded it, with massive military spending and the Interstate Highway program. And there was also an impressive increase in the volume of government regulation.

But most of the spending and regulation can be justified in Hayekian terms. The most expensive programs, Social Security and Medicare, function as a variant of the social minimum that Hayek endorsed, since most of their beneficiaries lack significant other income. (Social Security benefits are more than half of pension income for all but the top fifth of retirees, and it is 31 percent even for them.\textsuperscript{130}) There are elements of flagrant waste and rent-seeking. But even if you cleaned all that up, government spending wouldn’t be much less than it is now.

“Regulation” is really too crude a category to rely on for any purpose, because it isn’t analytically distinct from law in general. Law can be good or oppressive, but one needs to get into the specific case for any regulation before one can tell.

\textit{Hayek was right. Libertarian suspicion of government can empower predators}

Hayekian suspicion of government has its uses. It is the source of the most valuable contributions that libertarians have made. But it also shows their limitations.

When scientists test hypotheses, they use standardized terms to refer to their mistakes. A type I error is the (false) detection of an effect that has not in fact occurred. A type II error is the failure to detect an effect that has in fact occurred. When a doctor mistakenly diagnoses a disease that you haven’t actually got, and orders unnecessary surgery, that is a type I error. Of course, it’s just as bad if she commits a type II error – declaring that you’re not sick when you really are, or that you’ll get better without treatment. Good doctors are constantly alert to both kinds of mistake.

Now imagine a doctor – let’s call him Dr. Pangloss – who worries obsessively about unnecessary treatment, to the point where he’s agonizingly reluctant to interfere with the body’s capacity to heal itself. He will become dangerous if he routinely remains passive when medical intervention is necessary. If he’s almost never willing to risk type I error, he should not be a doctor.

Libertarianism presents that kind of danger. In the context of regulation and redistribution, unnecessary government

\textsuperscript{130} George A. Akerlof and Robert J. Shiller, Phishing for Phools: The Economics of Manipulation and Deception 154 (2015).
intervention is type I error, and the failure to intervene is type II error. Libertarianism focuses on type I error and is oblivious to type II. In practice, then, just like Dr. Pangloss, it produces a lot of type II error. It is biased against intervention, either because it is excessively optimistic about the virtues of unregulated markets (Milton Friedman), because it is excessively pessimistic about honest competent regulation (Richard Epstein), or because it regards regulation as a violation of rights (Rothbard, Nozick, Rand). Hayek is often taken to have the same bias, but as we have seen, he is carefully agnostic on the question of when intervention is warranted.

The focus on type I error can be valuable. If you make it your mission in life to find it, you sometimes will find it. You will then have made an important contribution to our knowledge. Dr. Pangloss shouldn’t be treating patients, but he could be a fabulous medical researcher, saving lives by showing that some treatments are useless or harmful. Libertarians who are confident that the state can do nothing right have produced first rate scholarship about abuses of regulatory power. That doesn’t mean they ought to be in charge of government.\footnote{The same bias would be formalized by John Tomasi’s proposal that interferences with economic liberty should “have to pass a high degree of judicial scrutiny.” Free Market Fairness, 241. Many administrative law scholars worry about “ossification,” the accumulation of legal constraints that make prompt and efficient rulemaking impossible. Any proposal for a heightened judicial role should be assessed in light of its likely impact on both types of error.}

One area where intervention is urgently needed is antitrust. In a well-functioning market, competition tends to drive down profits. Yet some firms are managing to maintain abnormally high profits. Among firms that were making returns on invested capital above 25 percent in 2003, 85 percent still had returns at that level in 2013.\footnote{Lindsey & Teles, The Captured Economy, 19.} Meanwhile there is “higher concentration in industries as diverse as banking, agribusiness, hospitals, wireless providers, and railroads.”\footnote{Id., 20.} The rate of new business formation, the size of new firms, and the share of American workers employed at young firms have all both fallen since the 1980s.\footnote{Id., 22.} All this suggests that something is suppressing the competition that Hayek placed his faith in.

Part of the answer is a libertarian one: the largest actors have manipulated government for their own benefit.\footnote{See id., 35-89; see also Reich, Saving Capitalism 3-86.} But another is the abuse of market power, which fits less comfortably into the libertarian narrative.
The United States has some of the highest broadband prices, and the slowest speeds, among advanced nations: its average peak Internet connection speed is nearly 40 percent slower than in Hong Kong or South Korea, and many Americans have no access because they can’t afford it. Once cable is laid, no one else has an incentive to lay new cables. Some countries have stimulated competition by building fiber lines with public funds and then leasing them to private operators. In America, cable companies have spent millions to block similar efforts.136

Monsanto’s genetically modified seeds are used in 90 percent of soybeans and 80 percent of corn planted in the United States. The seeds are modified to resist Monsanto’s herbicides, but they don’t produce seeds of their own and so farmers have to buy new seeds each season. Monsanto has bought up most of its competitors, and seed dealers who carry its products are contractually barred from stocking competitors’ seeds. Since 2001, it has more than doubled the price of its seeds. It has managed to obtain favorable legislative treatment with expanded patent protection, sued other companies for patent infringement, and even prevented independent scientists from studying its seeds. Its former and future employees hold top posts at the Food and Drug Administration and the Agriculture Department, and staff congressional committees dealing with agricultural policy. It managed to end a two-year Justice Department antitrust investigation.137

Hayek was ambivalent about antitrust law. In some moods, he was Panglossian: no one will be able to maintain a monopoly for long, so no intervention is necessary. But he was too keen an economic observer to believe that this was always the case. Deeply suspicious of administrative discretion, he was troubled by the fact that no clear set of rules could delineate how much market power is too much. It is thus easy for later Hayekian students of antitrust to lapse into uncritical Panglossianism.138

The big difference between Dr. Pangloss and libertarian politics is that no one’s interests are served by type II medical error. Dr. Pangloss is confused, but he isn’t corrupt. But sometimes, when the state fails to intervene when it should, someone gets rich. Libertarian rhetoric can thus be abused in the service of mooching and looting.139

136 Reich, Saving Capitalism 31-34.
137 Id., 34-36.
139 Thomas O. McGarity, Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival (2013), shows that libertarian rhetoric is often deployed to defeat regulation, but he says too little about type I error to show that these are abuses. He is skeptical of cost-benefit analysis, which is deployed “no matter how resistant the benefits are to quantitative assessment
The pathologies interact. Some of the very complexities that libertarians complain about can generate opportunities for capture, leading to type I error. But those complexities arise in response to real failings of the market, so a response that cripples the government generates type II error.

To show how this is so, I’ll consider one pathology of big government. And I’ll show that the only way to counter it is with another aspect of big government.

A chronic defect of complexity in the modern administrative state is what Steven Teles calls “kludgeocracy.” The term, Teles explains, comes out of the world of computer programming, where a kludge is an inelegant patch put in place to solve an unexpected problem and designed to be backward-compatible with the rest of an existing system. When you add up enough kludges, you get a very complicated program that has no clear organizing principle, is exceedingly difficult to understand, and is subject to crashes. Any user of Microsoft Windows will immediately grasp the concept.140 Much of policy is like that: an uncoordinated accumulation of legislation enacted to solve particular problems, producing an incoherent patchwork.

An example is poverty programs. Each of them made sense as a way to address a problem, but taken together they are an incoherent mess. In some cases, they trap people in poverty by imposing marginal tax rates in excess of 100%: for every dollar you earn by working, you lose more than a dollar in eligibility for payments from various, unconnected welfare programs.

Kludges make the system more susceptible to capture. The harder it is to understand the system, the more any policy area is necessarily dominated by specialists. Those specialists increasingly are the lobbyists of interested groups. It’s often claimed that government’s capture by rich special interests is the consequence of unlimited campaign spending. But the more potent source of their power is the state’s dependence on them for information. Brink Lindsey and Steven Teles observe that because most policymakers “are consumers, rather than producers, of information . . . those in a position to produce information that is taken as credible by policymakers have a profound advantage in politics.”141 Lobbyists have influence, not only

and no matter how susceptible the costs are to manipulation by the regulated industries.” Id., 270. How then to avoid type I error is not explained.

140 Steven Teles, Kludgeocracy in America, National Affairs, Fall 2013.
because they can threaten to spend or withhold campaign money, but because they provide specialized information. The information that is provided is biased in favor of organized interests, and so tends to promote upward redistribution.

Policymakers can resist this, Lindsey and Teles write, only if they become less dependent on lobbyists for expertise and information. But at the same time as the number of lobbyists in Washington has soared, Congress’s capacity to process information has been enfeebled.

Starting around 1980, Congress stopped hiring, then began cutting. House committee staff plunged by almost 40 percent between 1979 and 2005. Today, the Government Accountability Office employs 40 percent fewer staffers than it did in 1979, while staffing at the Congressional Research Service, which provides nonpartisan policy and program analysis to lawmakers, is down 20 percent.142

The only way to resist the biased information flowing from lobbyists, they conclude, is “staff with a great deal of sector-specific knowledge and a high level of technical capacity.”143 Given the tendency toward kludge, Congress will periodically need to overhaul and streamline this or that area of policy. Either it will have the independent analytic capacity to do that or it will produce a Christmas tree of special favors for the politically connected.

Notice how this conclusion cuts against libertarian orthodoxy. It’s commonly claimed that the cure for capture is to reduce the number of government regulations and government employees. It turns out, however, that an informationally weak state is chronically susceptible to capture. Information requires money and personnel. Simultaneously avoiding type I and type II errors is a complicated business, demanding an expensive army of specialists. To realize the Hayekian aspiration, we need a bigger state.

Hayek understood that free markets don’t suppose that everyone is self-seeking, but depend on shared traditions and ideals in order to operate. Police and courts at least must be trustworthy. Similarly with other regulators

The possibility of a noncorrupt state brings us to a major theme of Hayek’s thought, overlooked by many of his followers: the importance of ideals in explaining behavior. Markets work because of evolved rules of conduct, “especially those dealing with several property, honesty, contract, exchange, trade,

142 Id., 160-61.
143 Id., 161.
competition, gain, and privacy.”144 Fear of the law is not why people generally respect property rights. They do that even when the cops aren’t watching, because they’ve been socialized to think that this is the right thing to do. So have most of the cops.

Socialization constitutes us. “It is not only in his knowledge, but also in his aims and values, that man is the creature of civilization.”145 People act on the basis of learned rules and norms, and these are necessary to a peaceful society. “[C]oercion can probably only be kept to a minimum in a society where convention and tradition have made the behavior of man to a large extent predictable.”146 And to a complex economy: “Living as members of society and dependent for the satisfaction of most of our needs on various forms of co-operation with others, we depend for the effective pursuit of our aims clearly on the correspondence of the expectations concerning the actions of others on which our plans are based with what they will really do.”147

Ethics and aesthetics are as important as economic arrangements:
Which individuals and which groups succeed and continue to exist depends as much on the goals that they pursue, the values that govern their action, as on the tools and capacities at their command. Whether a group will prosper or be extinguished depends as much on the ethical code it obeys, or the ideas of beauty or well-being that guide it, as on the degree to which it has learned or not learned to satisfy its material needs.148

Knowledge is not only intellectual. It includes “habits and skills, our emotional attitudes, our tools, and our institutions.” All of these are “adaptations to past experience which have grown up by selective elimination of less suitable conduct.”149

His defense of markets is not predicated on the notion that everyone is self-seeking.
If we put it concisely by saying that people are and ought to be guided in their actions by their interests and desires, this will at once be misunderstood or distorted into the false contention that they are or ought to be exclusively guided by their personal needs or selfish

145 The Constitution of Liberty, 36.
148 The Constitution of Liberty, 36.
149 Id., 26.
interest, while what we mean is that they ought to be allowed to strive for whatever they think desirable.\textsuperscript{150} Some of the pertinent non-selfish norms will be traditions that are in tension with the market. These encode knowledge, perhaps indispensable knowledge, that people may not consciously understand.

*There are deep tensions between Hayek’s embrace of tradition and his commitment to progress, and between ordinary people’s need for stability and the demands of a dynamic economy. The task of navigating these tensions can’t be reduced to mechanical rules.*

“The innermost contradiction in Hayek’s system of ideas,” John Gray observes, “is between a conservative attachment to inherited social forms and a liberal commitment to unending progress.”\textsuperscript{151} Hayek never resolved this tension, which remains with us. Joseph Schumpeter famously wrote that capitalism is characterized by “creative destruction,” driven by “the new consumers’ goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.” This process “incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one.”\textsuperscript{152} Whole industries disappear: there are no more jobs for watchmakers, carriage and harness makers, blacksmiths, or wheelwrights.

The process of creative destruction continues to revolutionize the American economy, notably by making the lives of working people far more stressful and precarious. To take one dramatic example, driverless trucks will soon eliminate 3.5 million jobs.\textsuperscript{153} Manufacturing jobs in the United States are likewise disappearing forever, not because of foreign competition – American manufacturing output is higher than it has ever been – but because automated factories need far fewer workers.\textsuperscript{154}

The competition of foreign laborers has also played a role in depressing wages, though it’s less important than automation. Libertarianism’s greatest victory, the collapse of socialism, wasn’t good for everyone. “Absent China, India, and the ex-

\textsuperscript{150} Individualism: True and False, 140.
\textsuperscript{151} John Gray, Hayek on Liberty 148 (3d ed. 1998).
\textsuperscript{152} Capitalism, Socialism, and Democracy 83 (3d ed. 1942), footnote omitted.
Soviet bloc, there would have been about 1.46 billion workers in the global economy in 2000. The entry of those countries into the global economy raised the number of workers to 2.93 billion. As already noted, this is great news for much of the human race. But it’s terrible for American workers, particularly those without advanced education. Increase the supply of anything that much and its price will inevitably drop. The modern economy offers rich rewards to those with the right knowledge and skills, but those are unevenly distributed, and those without them are in trouble.

In America it now takes two working parents to provide the standard of living that one could once manage, and their situation is far less secure. “In 1970, the typical American family had a 7 percent chance of experiencing a 50 percent drop in their income in a given year; since then . . . the risk of such a drop has more than doubled, to 16 percent. The number of households filing for bankruptcy multiplied sevenfold between 1980 and 2005; the mortgage foreclosure rate has multiplied fivefold.” Millions have dropped out of the workforce.

From the standpoint of market rationality, this is all a routine adjustment of prices: globalization of the economy increased the supply of labor, robots have depressed the demand, and so the price has fallen. The economy may just be able to do without all those workers, just as, after the invention of the automobile, it no longer needed all those horses. But the economic system did not purport to be for the benefit of the horses, and the horses did not vote.

These upheavals have generated a lot of angry people, who signaled their displeasure by voting for Brexit and Trump. There has been a lot of growth, but they are not better off. Creative destruction has usually meant that new jobs are created that paid better than the old ones – the wages of a wheelwright weren’t that great – but that hasn’t been happening. Part of the promise of capitalism is that it will create opportunities. In 1998, 74 percent of Americans agreed that “Most people who want to get ahead can make it if they are willing to work hard.” By 2011, that had fallen to 58 percent.

All Hayek can say to those whose lives have been disrupted by the operation of markets is that this is the price of growth. He faces a dilemma. “The necessity of adaptation to unforeseen events will always mean that someone is going to be hurt, that

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155 Freeman, America Works, 129.
156 Brink Lindsey, Human Capitalism (2013).
157 Ross Douthat & Reihan Salam, Grand New Party: How Republicans Can Win the Working Class and Save the American Dream 147 (2008). This was written before the 2008 meltdown of the mortgage market.
158 Zingales, A Capitalism for the People, 115.
someone's expectations will be disappointed or his efforts frustrated.”\textsuperscript{159} These effects must, for the sake of opportunity for everyone, be disregarded by the state: “The known and concentrated harm to those who lose part or all of the customary source of income must . . . not be allowed to count against the diffused (and, from the point of view of policy, usually unknown and therefore indiscriminate) benefits to many.”\textsuperscript{160} But at the same time, too much disappointment and frustration is politically dangerous: “The one thing modern democracy will not bear without cracking is the necessity of a substantial lowering of the standards of living in peace time or even prolonged stationariness of its economic conditions.”\textsuperscript{161}

Karl Polanyi thought that capitalism has always been persistently characterized by a “double movement”: the expansion of markets elicits political efforts to blunt their disruptive effects.\textsuperscript{162} Hayek thought that such political efforts tended to create fields of tyrannical bureaucratic discretion and rent-seeking (but he did support subsidy of public goods).\textsuperscript{163}

The double movement is unavoidable, because there is a limit to how much creative destruction voters will endure. Populations whose ways of life have been smashed may threaten the stability of the entire system. The danger of populist revolt is exacerbated if there is a weak social safety net, as in the United States.\textsuperscript{164} Intervention to protect those ways of life can help to preserve the system of free trade, but Hayek feared such intervention, because it empowered the state, unconstrained by rules, to pick economic winners and losers.

The favoritism that Hayek so despised does not always stymie the economic growth he hoped for. South Korea is a spectacular success story of economic development. In 1960, it was poorer than North Korea, which had pursued Soviet-style forced industrialization. Today it is the eleventh largest economy in the world. Its boom took place under a massively corrupt government promoting crony capitalism. It has even been suggested that, given weak institutions, the corruption

\textsuperscript{159} Hayek, Law, Legislation, and Liberty, v. 1, 142.
\textsuperscript{160} Hayek, Law, Legislation, and Liberty, v. 2, 122.
\textsuperscript{161} Hayek, The Road to Serfdom, 210.
\textsuperscript{162} Karl Polanyi, The Great Transformation 130-34 (1944).
\textsuperscript{163} The core difficulty, one that plagues subsequent libertarians as well, is that there is no good general theory of what can count as a public good. See Daniel D. Polsby, What If This Is As Good As It Gets?, 2 Green Bag 2d. 115 (1998).
facilitated South Korean growth by lowering transaction costs and encouraging long-term investments among elites.\textsuperscript{165}

One of Hayek’s triumphs was the development of an international trade regime that cabined the discretion of individual nations to interfere with markets.\textsuperscript{166} One of his most influential disciples cited his “conclusion that a free system is possible only by renunciation of discretionary policy and by binding all action of the state to general, constitutionally guaranteed legal principles.”\textsuperscript{167} (Some libertarians carry the point even further, demanding a return to the gold standard.)

Market incentives are not always benign. The prospect of capital flight can dissuade governments from confiscating property or corrupting their legal system. But capital may also be drawn to places with weak environmental and labor rules, where investors can, with state connivance, impose costs on local populations out of all proportion to the benefits. Cheap products will find markets even if they are the result of massive human rights abuses. American antebellum slavery prospered within early nineteenth century capitalism. A nation’s otherwise well-functioning economy can also be devastated by capital flight when interest rates spike on the other side of the planet.

The mechanical application of market rules, and elimination of government-induced distortions, can produce catastrophe. In 1997, a wave of financial crises hit Asia, eventually spreading worldwide. In Indonesia, the unemployment rate rose tenfold, and by 1998 GDP fell by 13.1 percent. The International Monetary Fund came to the rescue, but its price was elimination of some of the government-induced market distortions that so troubled Hayek: subsidies for food and kerosene. Riots followed, with revenge killings and attacks on property directed at the capitalist classes, mainly ethnic Chinese. The government pounced on the opportunity to nationalize industrial assets worth billions, and capital fled the country.\textsuperscript{168}

The task of the Hayekian statesman is much like the task of foreign policy. When the liberal order faces chaotic contingencies that threaten its continuing existence, rules are unhelpful. Improvisation is necessary.

\textsuperscript{165} David C. Kang, Crony Capitalism: Corruption and Development in South Korea and the Philippines 3 (2002).

\textsuperscript{166} See Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism (2018).

\textsuperscript{167} Ernst-Joachim Mestmäcker, cited in id., 209.

Hayek’s views have been restated, in a crude antistatist form, by Milton Friedman

Categorical opposition to big government is Hayekian only if one either assumes that the pertinent market imperfections do not exist or that the state is too corrupt or incompetent to deal with them. As we have seen, those claims are unsustainable. Yet they are widely believed.

Milton Friedman supplied precisely this optimism. He wrote a column for Newsweek magazine from 1966 to 1984, which “pushed reasonably hard-core libertarianism on matters both economic and personal to the largest audience of American readers that would ever see them.”169 His basic framework was Hayekian. But he was far more skeptical than Hayek of the existence of market failure, or of the government’s capacity to respond appropriately to such failure. He argued sweepingly that “on the whole, market competition, when it is permitted to work, protects the consumer better than do the alternative government mechanisms that have been increasingly superimposed on the market.”170

The persistent theme of his popular work is rosy scenarios of what will happen if we privatize everything. In 1962, a couple of years before the passage of the federal Civil Rights Act produced a massive increase in black incomes, he argued that such legislation was neither necessary nor wise.171 The “appropriate recourse” for those who reject racism “is to persuade our fellows to be of like mind, not to use the coercive power of the state to force them to act in accordance with our principles.”172 That strategy had been attempted for nearly a century without success. “It’s extremely hard,” Paul Krugman observes, “to find cases in which Friedman acknowledged the possibility that markets could go wrong, or that government intervention could serve a useful purpose.”173

Hayek acknowledged that markets produced losers as well as winners. Not Friedman. Angus Burgin’s history of modern free market economics observes that Friedman’s “was not a Spencerian or Sumnerian world in which free markets dealt crushing blows to some in order to contribute to the greater advancement of humanity. Rather, it was one in which incontrovertible benefits redounded, in a display of spectacular beauty, to people of all

169 Doherty, Radicals for Capitalism, 308-09.
170 Milton & Rose Friedman, Free to Choose: A Personal Statement 222 (1980).
172 Id., 115.
kinds and in all situations. He represented markets as an unremitting good.”174

In his valedictory book, Free to Choose, Friedman does, in one brief passage, acknowledge that markets can fail, notably because they do not take account of externalities such as pollution. But he immediately shifts his focus to regulatory failure, concluding weakly that regulation should be adopted only if the benefits clearly exceed the costs.175 He then devotes the rest of the book to cataloguing misbegotten economic interventions, many of which concededly were pretty bad. The possibility that any significant regulatory structure could be vindicated by cost-benefit analysis is barely mentioned, and the nonspecialist, at whom the book is aimed, would likely conclude that it never happens.

What Friedman offered, Burgin writes, was far more categorical than his predecessors such as Hayek. “In contrast to their deliberate moderation and rhetorical restraint, he expressed an uncompromising belief that markets would engender better social outcomes than programs administered by the government.”176 The result was ironic. “The rise of Milton Friedman represents both the realization of Hayek’s dream of inspiring broad popular support for the benefits free markets have to offer, and the final failure of his ambition to create a new social philosophy that would moderate the excesses of prior modes of market advocacy.”177

When libertarianism demands a minimal state because that will produce better consequences, it relies on something like Friedman’s story, building categorical prescriptions on highly contingent, often false foundations.

And, more subtly, by Richard Epstein

175 Free to Choose, 31-32.
177 Id., 185. Deirdre McCloskey is sometimes susceptible to the same immoderation, conflating modest welfare state measures with socialism. Compare her treatment of Bismarck’s welfarism near the end of Bourgeois Equality with the grudging concession of a legitimate role for the welfare state at Bourgeois Dignity, 445, and the quotations on p. 606 of Bourgeois Equality, which make clear that Bismarck meant to protect the status quo by giving marginal people a stake in the system and so forestalling revolution. McCloskey’s account of the rise of capitalism is a marvelous overview of the role of ideas in transforming economic life, but she sometimes seems to contemplate the problem of poverty from twenty thousand feet, so that if it’s improving in the aggregate, details like Social Security don’t matter. But in fact lots of people depend on it, and would be in pretty bad shape without it.
The same is true of Richard Epstein, probably the most sophisticated modern Hayekian. He demonstrates what Hayek does not, that certain understandings of rights – preeminently, the security of persons and property and the enforcement of contracts – are indispensable if the virtues of free markets are to be realized. (Hayek doesn’t know how to think about rights.) Epstein elegantly shows that those understandings are necessarily reflected in existing legal systems, from ancient Rome to the English common law. As with Hayek, those rights do not preclude regulation, but only lay down strict conditions for them. (He occasionally shows how the anarcho-libertarians, whom I consider in Chapter Three, misunderstand how markets work.)

Much of Epstein’s work exposes dysfunctional state interventions in the economy, with breathtaking mastery of a huge range of policy issues. He shows, for example, that the ban on organ sales has stupidly killed thousands of people. He proposes radical revisions of constitutional doctrine in order to forestall such clumsy interferences with markets.

He is less categorically hostile to regulation than Friedman. The state may “adopt programs that aid in the effective enforcement of private rights when the high costs of private actions make them insufficient to deter or eliminate wrongful behavior,” for example when pollution has “multiple sources and/or multiple victims.” In such cases, he is willing to let the state regulate aggressively. (His

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180 He acknowledges that his views “have evolved in ways that turn out to be more sympathetic to government administration than I had once supposed.” Design for Liberty 6 (2011).
185 The Classical Liberal Constitution, 353.
skepticism toward antidiscrimination law will be taken up in Chapter Five.) Some libertarians want the state to protect persons and property, but reject administrative regulation. Epstein understands that sometimes administrative regulation is the best way to protect persons and property.

But he would block one crucial aspect of modern regulation. A lot of modern law diminishes the value of property by restricting its uses, for example by prohibiting landowners from draining swamps in order to build upon them. He would allow such restrictions, without compensation to the owners, only if the prohibited behavior would be a nuisance at common law.\textsuperscript{187} Otherwise, the restriction would be unconstitutional unless the owner were paid for the reduced value of the land. This restriction makes sense, Epstein argues, because “the major political risk is that the government will overclaim private resources that have far less value in public hands than they do in private ones.”\textsuperscript{188} Judicial toleration of rules that protect wetlands or animal habitat “lets the government operate as if there were no budget or scarcity restraints on their behavior.”\textsuperscript{189} It is impossible to predict the environmental consequences of his proposed rule, which would require government to raise billions in order to purchase easements from landowners and allow unrestricted development if the money is not forthcoming. It might be less happy than he predicts.

He is even more suspicious of state-mandated redistribution than Hayek or Friedman (who supported a negative income tax): any notion of “a positive right to life and to the wherewithal that everyone needs to survive . . . imposes impossible correlative duties of support on everyone for the benefit of everyone else, which explains why systems of positive rights to life, housing, food, education, and the like degrade and even bankrupt any society in which they are relentlessly applied.”\textsuperscript{190} The danger is there, but he overstates it. For instance, he condemns Social Security for pitting the old against the young, who will inevitably be betrayed when the system collapses.\textsuperscript{191} Hayek made the same confident prediction in 1960. What do you suppose happened to all those people who were young in 1960?

The most promising remedy for poverty, he insists, is not redistribution, but economic and technological growth, which

\textsuperscript{188} The Classical Liberal Constitution, 356.
\textsuperscript{189} Id.
\textsuperscript{191} Design for Liberty, 146; Principles for a Free Society, 130-31, 151-53.
misguided state intervention might stifle. Given the ineradicable public support for such programs, he knows he can’t get rid of them, but proposes “redistribution last”: so long as economic productivity is maximized, “the scope of redistributive policies can be accordingly reduced, given that a large resource base is coupled with a lower level of need.”

All this is fundamentally right. It is the crucial point that the redistributionist, anticapitalist left fails to grasp. Growth, not redistribution, has ameliorated both domestic and world poverty, and will continue to do so if markets are allowed to continue functioning.

But at any given time, needs are what they are. And how much redistribution will be necessary to address them depends on unpredictable complexities of labor markets, with the contingencies of automation and globalization that we have already discussed.

Like Hayek, Epstein does not attempt to defend free markets as giving people what they deserve. He acknowledges that there is a lot of moral arbitrariness in the system. He even agrees with Hayek that wealth ought to be redistributed, so that everyone’s basic needs are attended to. He believes, however, that the redistribution will be more effective if it is voluntary, and that the voluntary contributions will be forthcoming. Private charity can handle even the fantastically expensive cost of health care. An attractive feature of this proposal is that it out-Hayeks Hayek, by decentralizing decisions about the size and availability of the social minimum. It relies, however, on the speculative prediction that charitable provision will emerge on a scale never before seen in history. The confidence with which that prediction is delivered is remarkable.

Epstein’s reliance on charity does raise a question that should always be asked about state intervention. The fact that there is not a sufficient economic incentive to supply a public good does not necessarily mean that the good will not be supplied. Sometimes norms of voluntary cooperation will fill that gap, and will do so better than the government could. But whether this is so in any particular case cannot be resolved without attention to the local evidence.

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192 Richard A. Epstein, Decentralized Responses to Good Fortune and Bad Luck, 9 Theoretical Inq. in Law 309 (2008).
193 Design for Liberty, 148.
His narrative of the American economy is one of steady decline: before the New Deal, constitutional constraints on government "fueled the rise of the mightiest nation on the globe;"\(^{196}\) the "intolerable expansion of government power"\(^{197}\) since then "is disastrous in its relentless efforts to cartelize industry after industry through a set of legal devices that have only served to stymie the economic prosperity and social stability of the United States."\(^{198}\) Here, too, he is right a lot of the time. There is no excuse for farm subsidies. But he overstates the level of dysfunction. From 1991 to 2012, net of inflation, the U.S. economy grew 63 percent, compared with France, 35 percent; Germany, 28 percent; and Japan, 16 percent.\(^{199}\) Some disaster.

Hayek’s framework provides the right field of battle between the libertarian right, suspicious of government intervention, and the social democratic left, concerned about the immediate needs of the least well off. Both will sometimes be right.

A Hayekian framework provides a promising field of battle between the libertarian right and a social democratic left that is reconciled to regulated capitalism. The right will focus on the need for capital to support growth, which may entail reducing taxation especially for those rich enough to invest rather than consume.\(^{200}\) The left will focus on supporting the immediate needs of the least well off. The right will be drawn to the hypothesis that any government intervention can be replaced by some market-driven solution. The left will sometimes be blind to the needs of business, the value of multiple sites of concentrated wealth, and the virtues of markets. Focused on the needs of the least well off, it may approach public policy with a stultifying degree of risk aversion. Each side will sometimes be correct, and there will be no way to tell which is correct without burrowing deep into the specifics of the policy at issue. (The temperature of political debate might be lowered if it were recognized that each position rests on hunches in the face of uncertainty.) Hayek, as we have seen, provides some support for both sides. He is open to all of these possibilities, because his philosophy

\(^{196}\) The Classical Liberal Constitution, 167.
\(^{197}\) Id., 571.
\(^{198}\) Id., 168.
\(^{199}\) Edward Conard, Unintended Consequences: Why Everything You’ve Been Told About the Economy is Wrong 23 (2012).
\(^{200}\) The modern Hayekian Edward Conard is thus so obsessed with growth that he denounces charitable contributions and liberal arts majors because they divert resources from production. See id., passim.
is sensitive to facts in the world. A Hayekian politics is the most appropriate kind of politics for an advanced capitalist society.

If a government restrains economic freedom, it may sacrifice some productivity. (Or, as the case of South Korea shows, it may not.) “That consideration,” Gray observes, “will scarcely be conclusive for any ethical theory or political philosophy that is not already committed, as Hayek was, to the strange ideal of maximal productivity.”

That strange ideal has become a dominant theme of neoliberalism. The triumph of Hayekian free market ideology has generated a discourse in which all political ends—democracy, equality, liberty, inclusion, constitutionalism, an educated citizenry—are understood as means to economic growth. Historian Daniel Rodgers observes that the image of the market has “moved out of the economic departments to become the new standard currency of the social sciences. . . . To imagine the market now was to imagine a socially-detached array of economic actors, free to choose and optimize, unconstrained by the power of inequalities, governed not by their common deliberative action but only by the impersonal laws of the market.”

That was not Hayek’s view. “Strictly speaking, no final ends are economic, and the so-called economic goals which we pursue are at most intermediate goals which tell us how to serve others for ends which are ultimately non-economic.” It is clear what he would have thought of a philosophy of education that regards its sole purpose as making the student a more valuable factor of production. He denounced “the permissive education which fails to pass on the burden of culture.”

Hayek is, however, correct that productivity is indeed morally urgent “at this moment, when the greater part of mankind has only just awakened to the possibility of abolishing starvation, filth, and disease; when it has just been touched by the expanding wave of modern technology after centuries or millennia of relative stability . . . .” When Jesus of Nazareth remarked that you will always have the poor with you, he was making a sound inference from the data then available. Free markets beget economic growth. Economic growth is a moral imperative.

201 Hayek on Liberty, 152.
204 Law, Legislation, and Liberty, v. 3, 168; similarly The Road to Serfdom, 90–92.
206 The Constitution of Liberty, 53.
Hayek’s reasoning thus yields a moderate, pro-capitalism, pro-free trade philosophy that embraces the modern regulatory state so long as it does its job properly.

Hayek however has no coherent conception of rights, and rights are the moral center of libertarianism. For such a conception, we must turn to other authors.

Recall that Hayek’s appeal, for American conservatives, was that he offered a principled basis for resisting the emergence of the modern big state. If that’s his attraction, though, you’ll find him disappointing. His condemnation of big government is selective and nuanced, and some of his arguments, we have seen, entail a substantial regulatory apparatus.

There is another, deeper problem with Hayek. He’s a bit of a mess as a political philosopher. On the fundamental question of the criterion for a good government, he is pulled in several different directions. Not only does he never resolve these tensions, he never even seems to be aware of them. People who value liberty have good reason to be dissatisfied with him: he has no good account of what our rights are, or why we have rights in the first place.

One claim to which he is often drawn (relying on Kant’s moral philosophy) is that the test of the justice of a law is that it apply to everyone equally. He was particularly worried about administrative discretion, the power of bureaucrats to make arbitrary decisions about people’s lives. Individuals are only free to make their own plans in a context of fixed rules. The rule of law aims “merely to prevent as much as possible, by drawing boundaries, the actions of different individuals from interfering with each other.”\textsuperscript{207}

Universalizability may be necessary to the rule of law, but it can’t be sufficient. Rothbard pounced on this claim, accurately observing that it would be satisfied “if everyone knew in advance that he would be tortured and enslaved one year out of every three.”\textsuperscript{208}

Hayek also sometimes sounds like a conservative. He argues that social orders aren’t intentionally created, but emerge spontaneously, and he distrusts those who would remake society in the name of some ideal of social justice. What makes cooperation possible is traditions of behavior whose rationale may not be articulable. This attachment to tradition can lead, and for many conservatives has led, to quietism and stagnation.

\textsuperscript{207} Hayek, Law, Legislation, and Liberty, v. 2, 108.
\textsuperscript{208} Murray N. Rothbard vs. the Philosophers: Unpublished Writings on Hayek, Mises, Strauss, and Polanyi 65 (Roberta A. Modugno ed. 2009).
Rothbard complained, again reasonably, that Hayek “believes we must blindly follow traditions even if we can’t defend them.”

Hayek declared that he was not a conservative, because he thought it important to ask not only “how fast or how far we should move, but where we should move.” The spontaneous forces of society should be deliberately unleashed to promote progress:

There is, in particular, all the difference between deliberately creating a system within which competition will work as beneficially as possible, and passively accepting institutions as they are. Probably nothing has done so much harm to the liberal cause as the wooden insistence of some liberals on certain rough rules of thumb, above all the principle of laissez-faire.

The progress he envisions is, of course, one that produces constant upheaval. So he simultaneously embraces tradition and radical change. He would need some account of how to address the inevitable, frequent conflicts between them. He provides no such account.

Finally, his emphasis on consequences has led some readers to regard him as a utilitarian — one who regards the appropriate aim of policy as the greatest happiness of the greatest number. But Hayek rejects utilitarianism, because he doesn’t think one can rationally compare states of affairs.

There’s not much to like about this unstable hodgepodge. Most importantly, Hayek has no clear account of rights. That may be the main reason why he has been displaced by a more uncompromising, rights-based libertarianism. America was founded on a philosophy of individual rights. Most modern libertarians claim to be following that philosophy to its logical conclusions. Are they?

To answer that question, we must look back to a philosopher who wrote hundreds of years before Hayek.

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209 Id., 67.
210 The Constitution of Liberty, 398.
211 The Road to Serfdom, 13.
213 See id., 130-65.