formulations

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Sixteen Discuss Systems of Law at FNF Forum

We held our second Forum on Saturday, 30 April 1994, at Days Inn near the Raleigh-Durham airport. The topic was Systems of Law, a topic chosen by the FNF Directors because it seemed appropriate for this stage of our learning. Sixteen attended, including the three Directors. Two attendees traveled from out of state. Each FNF Director presented a paper, summarized below. The pictures in this issue were taken at the Forum.

Richard Hammer built his presentation around basic questions. In each case he read the question, presented some of his own tentative answers, and then opened the floor for discussion. the first question was: *How big is law? To adequately describe it, would we need ten words, ten commandments, ten pages, ten volumes, or ten lifetimes?* This question, Mr. Hammer noted, opens up several other questions. For instance, should law include practices which are wise, as well as practices which are punishable?

Also Mr. Hammer recalled the well-known scanrio of the tragedy of the commons, and noted that most irresponsible behavior, most trashing of spaces, takes place in public spaces where private law is not allowed to operate. In public spaces government-written law seems to be needed, and appropriate, to avoid tragedies of the commons. But government law is not so needed in private spaces where other incentives and mechanisms regulate behavior. So the amount of government law needed would depend upon the amount of public space in the society in question. A libertarian country with little if any public space could get by with little if any government-written law.

The second question was: *What aspect of human nature or human culture drives government law to supplant voluntary legal systems, as it has done throughout much of the world in recent history?* (This question is borrowed from correspondence of Bruce Benson.)

While Mr. Hammer offered no definite answer, he did offer a few ideas that might be part of an answer: a) In the genre of the tragedy of the commons, notice that the public forum is itself a commons; the space of public debate gets littered with all kinds of trash ideas, and the people who spread this trash do not have to pay directly for their irresponsible behavior; b) On the surface government law seems economical; a person supporting a proposed government law imagines himself relieved of private responsibility; c) People want protection, insurance to cover possible calamities, and government looks like insurance.

The third question was: *Assume we found ourselves empowered to dismantle a system of government law. Assume for instance that we had purchased from the citizens of a small country their consent to implement our constitution. How would we dismantle the government system of law? In what sequence? What problems could we expect to encounter?*

Mr. Hammer described the scandal in the American savings and loan industry as an example of the sort of thing that can go wrong if government laws are dismantled in the wrong order. When acts of government create a public space, as federal insurance of deposits created a public space in which managers of savings institutions could invest recklessly, then probably other acts of government are needed to regulate behavior in that public space. Probably it was asking for trouble to dismantle the regulation before dismantling the act which created the

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Inside

FNF Directors Review Programs, Schedule Next Forum

On the afternoon of 19 May 1994, the FNF Board of Directors held a meeting to which all FNF members were invited. In the living room of his home, FNF President Richard Hammer led an open-ended discussion about the current programs of the Foundation. These programs include: quarterly publication of *Formulations*; semi-annual Forums; and a minor program of ads and promotional mailings. Ongoing practices were reviewed in light of both the goals of the Foundation and the results achieved so far.

The Directors set the date for the **next FNF Forum, 15 October 1994.** In this Forum we will study insurance. We will try to understand how, and to what extent, the inhabitants of a free country, with no government regulation (strangulation) of insurance, might be able to rely upon private institutions of insurance to satisfy their needs for security, both domestic and national. (Readers will receive more information on this Forum in the upcoming Autumn issue of *Formulations.*)

This meeting of the Board of Directors was the first "regular" meeting as outlined in the FNF Bylaws. "Regular" meetings, which must be held at least once per year, differ from "special" meetings in that: members of the Foundation are invited to attend; notice of the meeting is mailed to all members and Directors; and the major act of amending the Bylaws can be done only in a regular meeting. Notice of this meeting was mailed to all FNF members (who now number thirty). In addition to the three Directors, the meeting was attended by one member and one volunteer. Δ

Copyright Information

formulations

Editor: Roderick T. Long

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Statement of Purpose

The purpose of the Free Nation Foundation is to advance the day when coercive institutions of government can be replaced by voluntary institutions of civil mutual consent, by developing clear and believable descriptions of those voluntary institutions, and by building a community of people who share confidence in these descriptions.

Formulations is published quarterly, on the first of March, June, September, and December.

Subscriptions to *Formulations* may be purchased for $10 for four issues (one year). Membership in the Free Nation Foundation may be purchased for $30 per year. Members receive: a subscription to *Formulations,* 20% discount on conference registration fees, invitation to attend regular meetings of the Board of Directors, copies of the Bylaws and Annual Report. Additional contributions are welcome.

An application has been filed with the IRS for 501(c)(3) tax-exempt status.

Information for Authors

We seek columns, articles, and art, within the range of our work plan. We also welcome letters to the editor which contribute to our debate and process of self-education.

Our work plan is to work within the community of people who already think of themselves as libertarian, to develop clear and believable descriptions of the critical institutions (such as those that provide security, both domestic and national) with which we libertarians would propose to replace the coercive institutions of government.

As a first priority we seek formulations on the nature of these institutions. These formulations could well be historical accounts of institutions that served in earlier societies, or accounts of present institutions now serving in other societies.

As a second priority we seek material of general interest to libertarians, subject to this caveat: We are not complaining, we are building. We do not seek criticism of existing political institutions or persons unless the author uses that criticism to enlighten formulation of an improved institution.

All submissions are subject to editing.

Submissions will be considered for publication if received by the 15th of the month preceding month of publication. Thus, the deadlines for writers are: February 15, May 15, August 15, and November 15.

We consider material in *Formulations* to be the property of its author. If you want your material copyrighted, tell us. Then we will print it with a copyright notice. Otherwise our default policy will apply: that the material may be reproduced freely with credit.

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public space.

This observation might suggest that the first act rescinded should be the one which created the public space in the first place. But these public-space-creating acts sometimes fill real needs (for instance the need for insurance on deposits) and it may beg disaster of another sort to repeal these acts without first seeing that private means of filling the needs (private insurance for deposits) are given an opportunity to start growing in the niche to be vacated by government. Mr. Hammer concluded that dismantling a government system of law may require not only fortitude, but also planning and compassion.

Roderick Long gave a talk on "Implementing Private Law in a World of States." Dr. Long began by offering what he saw as the two principal advantages of private legal systems over public, centrally administered and enforced legal systems. Private law's *ethical* advantage derives from the Lockean principle that all human beings are naturally equal in authority. And since (contra Locke) there is no reason to suppose that we have surrendered, or even can surrender, such authority voluntarily, we must assume that everyone (not just a government monopoly) has an equal right to enforce the requirements of justice.

Private law's *economic* advantage derives from the fact that since government law is a monopoly and thus faces no competition for customers, it is insulated from the market incentives that punish inefficiency, restrain abuses of power, and promote accountability to clients. Appealing to historical examples, Dr. Long argued that John Locke's celebrated objections to private law are in fact much more effective objections to public law. (For an elaboration of this last point, see "The Nature of Law, Part II: The Three Functions of Law" elsewhere in this issue.)

Having made these points, Dr. Long went on to raise some problems for private law. One problems is the need, within the context of the Free Nation Foundation's work, to build a *consensus* among libertarians on political institutions; Dr. Long, though himself a free-market anarchist, suggested that his "virtual canton" system, a compromise between anarchism and limited government, might be better able to attract such a libertarian consensus.

The problem of consensus aside, Dr. Long focused on the three main threats a newly formed Free Nation would face if it attempted to implement a purely private legal system. Taking a cue from Dickens combined with Hobbes, Dr. Long labeled these the Threat from Leviathan Past (the existing government the Free Nation intends to supplant), the Threat from Leviathan Present (other governments outside the Free Nation), and the Threat from Leviathan Yet to Come (the government that might emerge within the Free Nation). Appealing to the classical liberal theory of class analysis (which, unlike the Marxist version, sees the power of a ruling class as parasitic on the

state and doomed without it), Dr. Long suggested that the Threat from Leviathan Yet to Come could be successfully resisted; but he argued that the Threats from Leviathan Past and Leviathan Present were much more serious, since, in the current world situation, an anarchist nation would have much more trouble in achieving and maintaining sovereignty than a minarchist nation would. Dr. Long concluded that, at least in its initial stages, a Free Nation would need some sort of central administration to interface with other governments and thus gain legitimacy in the eyes of world opinion (so as, *e.g.*, to avoid being invaded by countries seeking to "restore order"). But such a regime should incorporate as many aspects of private law as possible, consistent with this central administration.

Bobby Emory presented "Notes on the History of Legal Systems." Pointing out that our attempts to describe a better system of law could benefit from knowledge of the history of legal systems, Mr. Emory presented these notes which were abstracted, for the most part, from *Ancient Law* by Sir Henry Sumner Maine.

If we look at history we can discern an evolution of law which seems to follow the same sequence in many societies. Mr. Emory noted six common steps: First, people live in family units with rule by the patriarch. Second, a patriarchal sovereign, who is usually heroic, issues rulings in individual cases after the fact. Third, customs grow up from the sovereign's rulings. Fourth, a code is created. This code bears on the relation-

Thanks to Bobby Emory for the photos in this issue.

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ships between families or between the patriarchs of families. Fifth, this code begins to bear on individuals rather than families. Sixth, more relationships are defined by contracts, *i.e.*, "a movement from Status to Contract."

Mr. Emory told about methods of legal improvement which can be observed in history. When law needs to evolve, to satisfy new needs in society, the improvements usually come in three ways, and they usually develop in this order: First, legal fictions bridge over problems. For example, adoption of an individual into a family allows that individual legal status as a family member. Second, equity courts provide means of relief. These judge on a basis of fairness, rather than on a rigid legal code. Third, legislation eventually brings the law nearer the needed social condition.

After the three papers had been presented, the Forum ended with a long exchange of ideas around the horseshoe-shaped seating arrangement. Later several participants continued the discussion over dinner. As before we will publish and distribute proceedings of the Forum. Δ

Tax-Exempt Application Moves, and Pauses

We have received two communications from the IRS regarding our application for 501(c)(3) tax-exempt status. The first said that our application had been referred to the National Office, in Washington DC, and that future communications regarding the application would be with that office. The second, dated 20 April 1994, from the Chief, Exempt Organizations, in the Washington Office, Rulings Branch 4, acknowledged receipt of our application from the key district office, and said that, in view of the current backlog, they may not be able to begin processing our case for approximately 60-90 days. Δ

Reading Group to Study Hayek This Summer

This summer a group will discuss the lessons to be learned in Volume I of *Law, Legislation and Liberty*, by Friedrich Hayek. The group will meet six times, at 7:30 p.m. on Monday evenings, each time to discuss one of the six chapters in the book. The first meeting will be on 27 June 1994. The meetings will continue on consecutive Mondays except that 4 July will be skipped; the last meeting will be on 8 August.

The group, led by Richard Hammer, will meet in the living room of his home at 111 W. Corbin St., Hillsborough, NC. There is no charge. All are welcome who would like to discuss this material. For more information call 919-732-8366. Δ

A Limited-Government Framework for Courts

by Richard Hammer

In our recent Forum, at the conclusion of my presentation, I suggested a structure for a system of law which might satisfy most libertarians. Here I will restate that formulation, and elaborate somewhat. Briefly, I propose that the state, in our hypothetical free nation, establish a system of courts, but not legislate the law as enforced in those courts.

One participant at the Forum insisted that we need to define what we mean by "law" if we intend to have any idea what we are talking about. Yes, law has many meanings. In the broad sense it can mean not only rules regulating actions but also guidelines for action — or even for thought ("Thou shalt not covet ...."); while in a narrower sense understood by most Americans, law often means the particular set of rules enforced by government police. But for our purposes, since we as libertarians are particularly sensitive to government, I will single out government law, and define *government law* as that which is written by or for the state. Government law might be written either in the constitution of the state or by the legislative authorities of the state.

Now notice that there is another kind of law which never gets written down as legislation. For example, we all know that murder is against the law. But, as I understand it, in most societies this law has never been written down as government law. It has not been necessary to write it down as government law; indeed, it might seem silly. In properly functioning societies, citizens trust that murderers will be confronted, by whatever mechanism their particular society employs. More generally, Anglo-Saxon common law has satisfied the needs of citizens for a secure and predictable legal environment; without ever being written down as government law, a body of law was created by judgments and carried forward by tradition and precedent. Thus we libertarians can trust, I propose, that law vital to our security will be created and maintained by courts. Now, completing my definitions, I call *court law* the law made by judgments within courts.

So, to repeat my skeletal formulation, government would establish a set of courts. This establishment of courts would be written

Richard Hammer

as government law. But government would not attempt to regulate the judgments rendered within courts. Court law would be guided by the invisible hand. This invisible hand should regulate the marketplace for justice just as surely as it regulates other marketplaces — provided incentives in the market are not masked or distorted by acts of the state.

The amount of government law required by this formulation would, I expect, be limited to a few pages: just enough language to establish courts, and no more. Thus we see a severely limited role for the state. The amount of court law, on the other hand, would have no legislated bounds. It could fill law libraries. Indeed, court law is pretty much what does fill law libraries. But the amount of court law which had any power would be limited by practical, economic considerations. The desire to limit legal expenses, working in the more flexible framework in which rulings are not regulated by government, would influence courts and litigants to economize, to circumvent complexity in any way which could satisfy all parties.

Thus it might seem that we need to concern ourselves only with the contents of the few pages of government law which establish the system of courts. And this I believe is our first task. But I can imagine a pretty bumpy start for judgments rendered in these courts if these courts start from zero, with no imported tradition or precedent. To the extent that we embrace this formulation we also need to concern ourselves with this other subject: any new establishment of courts needs, I believe, some tradition to guide its early judgments. Furthermore, to be accepted by inhabitants so governed, the tradition adopted must be familiar or plausible.

Also you may notice that my formulation here does not address policing, or executive functions. It approaches only the functions of law-making and judging. But these are books I hope to open on another day. Δ

Richard O. Hammer owns a small business building houses in Hillsborough, North Carolina. On a local level he writes columns interpreting political events in a libertarian frame. He participates in the Republican Party and currently is candidate for County Commissioner in Orange County, NC. In the past he worked as an engineer and management scientist.

The Nature of Law Part II: The Three Functions of Law

by Roderick T. Long

Why Three Functions?

The purpose of a legal system is to provide a systematic, orderly, and predictable mechanism for resolving disagreements. In order to do its job, any such system must perform three closely connected, but nevertheless distinct, functions: adjudication, legislation, and execution.

The **judicial** function is the core of any legal system. In its judicial function, a legal system adjudicates disputes, issuing a decision as to how the disagreement should be settled. The other two functions are merely adjuncts to this central function.

The purpose of the **legislative** function is to determine the rules that will govern the process of adjudication. Legislation tells judicial function *how* to adjudicate. The legislative process may be distinct from the judicial process, as when the Congress passes laws and the Supreme Court then applies them; or the two processes may coincide, as when a common-law body of legislation arises through a series of judicial precedents.

Finally, the purpose of the **executive** function is to ensure, first, that the disputing parties submit to adjudication in the first place, and second, that they actually comply with the settlement eventually reached through the judicial process. In its executive function the legal system may rely on coercive force, voluntary social sanctions, or some combination of the two. The executive function gives a legal system its "teeth," providing incentives for peaceful behavior; both domestic law enforcement and national defense fall under the executive function.

Should Law Be Monopolized?

With regard to these various functions, there are three primary ways in which a legal system may be constituted:

- **Absolutism:** The three functions of law are concentrated in the hands of a single group of decision-makers.
- **Constitutionalism:** The three functions of law are monopolized by a single agency, but distributed among distinct groups of decision-makers within that agency.
- **Anarchism:** The three functions of law are not monopolized.

Various combinations of these are possible, since there are legal systems under which some functions are monopolised while others are not. For example, in the Icelandic Free Commonwealth, the legislative function was monopolized by the All-Thing (*althingi*), or General Assembly; the judicial function was shared between the Thing courts and the private sector; and the executive function was privatized entirely. [For

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Roderick Long

more information on the Icelandic system, see my "Virtual Cantons: A New Path to Freedom?" (*Formulations* Vol. I, No. 1), "The Decline and Fall of Private Law in Iceland" (last issue), and Wayne Dawson's review of David Friedman's *The Machinery of Freedom* (this issue).] This is why the legal system of the Icelandic Free Commonwealth cannot easily be classified either as a pure government or as a pure anarchy.

Most of us have been taught to regard Constitutionalism as the best of the three options. Concentrating the three functions in a single agency avoids the chaos allegedly endemic to Anarchism; while assigning the three functions to distinct sub-agencies within the monopoly agency allows the three branches (legislative, executive, and judicial) to serve as checks on one another's excesses, thus avoiding the potential for abuse and tyranny inherent in Absolutism. This is the "separation of powers" doctrine built into the U. S. Constitution.

In practice, however, Constitutionalism has proved only marginally better than Absolutism, because there has been sufficient convergence of interests among the three branches that, despite occasional squabbles over details, each branch has been complicit with the others in expanding the power of the central government. Separation of powers, like federalism and elective democracy, merely *simulates* market competition, within a fundamentally monopolistic context.

Locke's Case for Monocentric Law

In his libertarian classic *Two Treatises of Government,* the 17th-century English philosopher John Locke offered one of the most famous cases ever made for the monopolization of the three functions of government. Locke believes that all human beings are naturally equal, so that in their natural state each person has as much right as any other to exercise the various functions of law:

> "Man, being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the Law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property — that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves .... each being, where there is no other, judge for himself and executioner ...."
> (II. vii. 87.)

This egalitarian distribution of political authority, Locke argues, is required by justice *unless individuals voluntarily relinquish their authority to a government.* However, Locke thinks that people living in a state of anarchy *will* find it rational to set up a government in order to gain greater security:

> "If man in the State of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of an other power? To which it is obvious to answer, that though in the State of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name — property.
> The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the State of Nature there are many things wanting."
> (II. ix. 123-124.)

Locke then goes on to list what he sees as the three principal defects of the state of natural anarchy. Although he does not point this out explicitly, the three defects appear to correspond to the three functions of law that I have been discussing, and I have labeled them accordingly:

> **[The Legislative Defect.]** "Firstly, there wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the Law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding them in the application of it to their particular cases.
> **[The Judicial Defect.]** Secondly, in the State of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For every one in that state being both judge and executioner of the Law of Nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too

much heat in their own cases, as well as negligence and unconcernedness, make them too remiss in other men's.

[The Executive Defect.] Thirdly, in the State of Nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended will seldom fail where they are able by force to make good their injustice. Such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it."

(II. ix. 124-126.)

Locke concludes that these three defects may be remedied by centralizing the legislative, judicial, and executive functions in a constitutional government.

The Lockean Case Against Locke

I think Locke's arguments for a monocentric legal system contain a serious confusion: the confusion between the absence of *government* and the absence of *law*. Locke's arguments are good arguments for a formal, organized legal system; but Locke mistakenly assumes that such a system requires a governmental monopoly. The majority of legal systems throughout history, however, have been polycentric rather than monocentric. Locke did not have the benefit of our historical knowledge however; nor, despite his brilliance, was he able to imagine on his own a legal system that was not a government. The actual history of stateless legal orders shows that they do not noticeably suffer from any of the three defects Locke lists; on the contrary, those defects are far more prevalent under *governmental* law.

Consider first the judicial defect: the worry that, in the absence of common authority, each individual would have to act as a judge in his or her own case, with all the problems of bias and partiality that entails. Locke is correct in thinking that submitting disputes to impartial third-party arbitration is generally preferable to acting as one's own judge and jury (except, of course, in emergency cases in which one must act quickly and no such impartial judge is available). But such third-party judges will always be *available*, whether or not there is a government. There is a widespread tendency to suppose that if something is not supplied by the government, it cannot be supplied at all; I call this "the invisibility of the market." (The problem with invisible hands is that you need libertarian lenses in order to see them — whereas everyone can see the visible hand of government.) Polycentric legal systems have always had plenty of third-party judges, from the relatively formal Moots of early Anglo-Saxon law (in which disputants were judged by their peers on the basis of local custom) to the relatively informal arrangements of the American frontier (in which each disputant would pick an arbiter, the two arbiters together would pick a third, and the judgment of the three together would be binding). History shows that stateless legal orders tend to create powerful incentives for people to submit their disputes to arbitration wherever possible, in order to avoid the appearance of being an aggressor (and thus the target of defensive coercion oneself). Anarchy does not suffer from Locke's judicial defect.

But government does. In any dispute between a citizen and the state, the state must by necessity act as a judge in its own case — since, as a monopoly, it can recognize no judicial authority but its own. Hence governments by their nature *must* be subject to the judicial defect. Constitutionalism is supposed to remedy this defect by separating the judicial branch from the executive and legislative branches, so as to prevent the judging agency from being a party to the dispute. But what if the citizen's quarrel is with the judicial branch itself? In any case, even if the quarrel is solely with the legislative or executive branch, it would be naive to assume that the judicial branch of a monopoly will be unsullied by the interests of the other branches. No one with a complaint against the marketing division of General Motors would be satisfied to have the case adjudicated by the legal division of General Motors! The solution to the judicial defect, then, is not a monocentric judiciary, but a polycentric one.

Next, consider the legislative defect: the worry that without government there will be no generally known and agreed-upon body of law. Why not? We should rather expect markets to converge on a relatively uniform set of laws for the same reason that they tend to converge on a single currency: customer demand. The late-mediæval private system of mercantile law known as the Law Merchant (*lex mercatoria*), for example, offered a *more* unified body of law than did the governmental systems with which it competed.

This should be no surprise. Why are there no triangular credit cards? The reason is not government regulation, but rather that — given our current system that relies on rectangular cards — no one would accept it (unless the government *made* them accept it, thus preventing the market drive toward uniformity). Similar reasons explain why the market no longer carries both VHS and Betamax video cartridges, but only VHS; the market creates uniformity when customers need it, and diversity when they need that instead. It's a good thing that video cassettes come with lots of different kinds of movies, and so the market ensures this; it would be a bad thing if video cassettes came in fifty different shapes and sizes, and so the market prevents this.

Indeed, it is not polycentric legal systems, but rather monocentric ones, that suffer from the legislative defect, since a mountain of bureaucratic regulations that no one can read is in effect equivalent to an absence of generally known law. Under a private legal system, changes in law occur as a response to customer needs, and so the body of law is less likely to metastasize to such unwieldy proportions. The solution to the legislative defect is not to monopolize legislation, but rather to privatize it.

Finally, consider the executive defect: the worry that without government there would be insufficient power on the part of private individuals to enforce the law. It is true that under anarchy each individual has the *right* to exercise the executive function on his or her own, but it does not follow that law enforcers will in practice be solitary and unaided. On the contrary, voluntary associations of enforcers typically emerge — as in the case of the thief-takers' associations of early 19th-century England, or the vigilance committees of the old American frontier. Hollywood movies have accustomed us to think of the latter associations as unruly lynch mobs, and have depicted the frontier as nightmarishly violent; in historical fact, the level of criminal violence in frontier society was far lower than in our own, and the protective associations were, for the most part, reliable organizations that gave their defendants fair trials (at which defendants were often *acquitted* — not the mark of a kangaroo court). Indeed, the whole notion of an organized police force is a relatively modern concept; police were

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extremely rare throughout ancient, mediæval, and modern history, until about the mid-19th century. (Indeed, even the notion of a distinct governmental *military* is fairly unusual historically; in most societies, both law enforcement and national defense have been the job of the armed citizenry.)

If there is an executive defect, it applies not to private law but to *public* law, in which individuals typically lack the power to withstand the arbitrary caprice of the state. Against one marauding band one can form one's defensive band; but who can resist the overwhelming force of an organized government? Let the victims of Warsaw, Tiananmen, or Waco judge whether the centralization of law enforcement enhanced the security of their lives, liberties, and estates.

Abuse of power by law enforcers is in fact much easier to keep in check under the discipline of a competitive market system. The LAPD would have gone bankrupt overnight after the Rodney King beating if it had been a private security force with competitors in the same territory; but as matters stood, despite the public outcry, the LAPD's "clients" had nowhere else to go, and so the LAPD's incentive to reform its behavior is much weaker.

In short, then, the three defects Locke cites as objections to anarchy are in fact much more effective objections to government. None of the three functions of government — executive, legislative, or judicial — should be assigned to an exclusive monopoly. In the words of F. A. Hayek: "Law is too important a matter to be left in the hands of government." Δ

For more information about the stateless legal systems described in this installment, see the bibliographic essays "Polycentric Law" by Tom Bell and "Institutional Bases of the Spontaneous Order: Surety and Assurance" by Albert Loan, both in *Humane Studies Review*, Vol. 7, No. 1, 1991/92, published by the Institute for Humane Studies at George Mason University, 4084 University Drive, Fairfax VA 22030.

Next installment: Law *vs.* Legislation.

Roderick T. Long is Assistant Professor of Philosophy at the University of North Carolina at Chapel Hill. He is currently completing a book on the free will problem in Aristotle.

Agreed Ground
Version 0
by Bobby Yates Emory

I. Introduction

As libertarians, we understand that most of life's necessities and luxuries can best be provided by the free market. But as new people encounter us, they may feel that our plan is incomplete because we have not covered some area they feel is essential. To prevent this we need to outline the areas that

Bobby Emory

we agree will not need to be solved by government. This is our agreed common ground.

You will notice that this is labeled as version 0, my suggestion for a starting point for developing what will be an important document when we start explaining our ideas to non-libertarians. Please give me your suggestions for the next version.

II. Most Goods and Services

Of the astounding array of goods and services required for what we consider normal life, people in most societies are accustomed to most being provided by the free market.

A. Basic Needs

Our basic needs — food, clothing, and shelter — are produced in most societies by the free market and, in a libertarian society, would continue to be, but with less interference from government.

1. Food

Food will continue to be grown, processed, distributed, and retailed by the free market. The FDA and FTC would no longer be regulating production. Lack of sugar quotas and milk marketing boards would mean lower food costs.

2. Clothing

Clothing would continue to be grown or spun, woven, and tailored by the free market. The CPSC would no longer control the design of children's pajamas. Since there would no longer be import quotas, some prices would be lower.

3. Shelter

Shelter will continue to be built, sold, rented, and financed by private providers. Like a few cities today, we would enjoy faster construction at lower costs because building inspectors would not be interfering in construction. Lack of government guarantees would cause mortgage rates to go up relative to other interest rates, but interest rates in general will go back to traditional rates without government absorbing so much of the available money to loan.

4. Assurance

Where consumers need greater assurance that standards are being met, private organizations such as UL for electrical equipment and the Snell Foundation for helmets will provide this service.

B. Other Goods and Services

Likewise, most goods and services will be provided by the free market but with lower prices, more flexibility, and more rapid innovation because there will be no government interference.

III. "Governmental Services"

We are accustomed to the government providing some goods and many services. Often many of these services are provided in part by the free market, but this section considers those that are usually thought of as being provided by the government. These vary by country. In Europe, telephone services and television broadcasts are provided by the government, and statists there probably think that we must have government if we are to have broadcast TV, whereas USA resident statists would be comfortable with competitively provided telephone service (but they would probably want to regulate

it). Likewise, European statists probably could not see how competing long distance telephone companies would work, but USA statists use them routinely.

A. Courts

We are accustomed to most of our court service being provided by the government, with only a small amount being provided by mediation and arbitration services. In a libertarian society, much, if not all, of this service would be provided by the free market. And since the list of criminal laws would be greatly reduced, the case load of the courts would be drastically reduced. This is an area where we have not yet agreed on the extent to which government is needed.

B. Police

We tend to think of the police services as being provided by the government. Actually, in the USA there are more private police, security guards, *etc.*, than there are governmental police. In a libertarian society, this trend would be accentuated. There is no agreement yet on whether a vestigial police force is necessary.

C. Parks

Today, many parks are provided by the government. Others are provided by homeowners' associations, non-profit organizations, and for-profit companies. In a libertarian society, the government would not be involved. All parks would be provided by free market and voluntary alternatives.

D. Roads

In a libertarian society, roads will be provided by private toll roads, shopping centers, developers, and others interested in a particular road being built. Without the government, costs will be lower and services better matched to users' needs. Current technologies make it convenient to meter usage of toll roads and would allow time-of-day based billing.

E. Fire Fighting

Fire fighting would be done by private companies and voluntary associations. This has been shown to provide the highest level of safety while significantly lowering costs.

F. Professional Licensing

Professionals would be licensed by professional associations and private inspection organizations.

G. Product Safety

Products would be certified for safety by private testing labs such as UL.

H. Others

Most other products and services that we normally think of as government produced (*e.g.*, mail delivery) would be provided by the free market. See "Unagreed Ground" below for possible exceptions.

IV. Mixed Provision

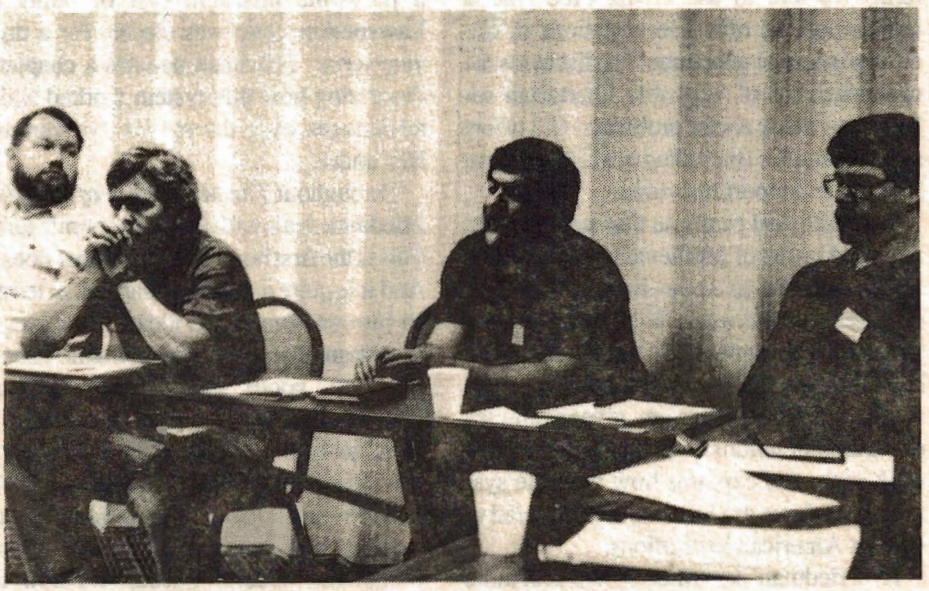
Some services are provided currently by both government and free market mechanisms.

A. Charity

While there are many private charities serving different needs, government provides welfare, the dole, AFDC, WIC, Medicare, Medicaid, Social Security, and many others. In a libertarian society, all of these would be provided by investment plans, banks, and voluntary charities.

B. Medical

Most markets are served by urgent care facilities, for-profit hospitals, and non-profit hospitals. But there are also usually government-run facilities. In a libertarian society, the other facilities would provide all services.



C. Mental Health

There are private mental health centers in addition to the government mental hospitals. In a libertarian society, the private facilities would provide services for all.

D. Standards and Safety

While the National Bureau of Standards provides some standards, American National Standards Institute (ANSI) could take over all standards. DOT and CPSC provide some safety standards, but UL, Snell Foundation, and others would take over all safety standards.

V. Unagreed Ground

We have not yet agreed on how a few areas would be handled in a libertarian society. Atempting to discover solutions to these problems is part of the work of the Free Nation Foundation.

A. Courts

Will courts be provided totally by the free market, or will there be courts provided by governments?

B. Police

Will all protective services be free market, or will there be governmental police?

C. Making Law

Will custom or "laws merchant" specify the law, or will the legislature?

D. National Defense

Will protective agencies, insurance companies, or a government agency defend the nation?

E. International Relations

How will the nation deal with other nations? Δ

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Review

The Machinery of Freedom: Guide to a Radical Capitalism Second Edition

by David Friedman
Open Court, La Salle, 1989

reviewed by Wayne Dawson

The purpose of this book is to persuade you that a libertarian society would be both free and attractive, that the ***institutions of private property are the machinery of freedom,*** *making it possible, in a complicated and interdependent world, for each person to pursue his life as he sees fit.*

— from the introduction
(emphasis added)

Wayne Dawson

In order to achieve his stated purpose, David Friedman discusses in some detail what the institutions of private property would be like in a libertarian society. Or in terms we like to use in the Free Nation Foundation, he offers formulations of libertarian societal structures. He discusses the characteristics of workable libertarian solutions to many social problems, and offers many examples (including at least one from history) to support his views.

The historical example that stands out in my mind is that of Medieval Iceland, which Friedman uses to show how private law enforcement can work. He briefly sets out the historical context in which Icelandic legal institutions were developed, describes the form of the legal system, gives examples of various situations and how they would be dealt with, and explains how possible systemic problems are handled as compared to current American institutions.

As Friedman describes it, the Icelandic legal system in effect from 930 AD to 1263 AD was centered around the Godhi. A Godhi was a person who owned a set of rights called a godhordh. Mainly the Godhi was the link between those he represented and the judicial and legislative functions of the government. A godhordh was considered private property, and could be sold, lent, and inherited. Also, which Godhi any given person was associated with was not determined by geographic monopoly. Individuals could be associated with any Godhi that was willing to have them. Thus we see that the system was largely based on voluntary relationships. Also the "government" was quite minimal, with a total of one employee for all of Iceland — and that was only a part-time position, that of being the Lawspeaker, who was elected for a three-year term. Friedman devotes a chapter to discussing how this system worked and its advantages over the system we currently live under.

Throughout *The Machinery of Freedom,* Friedman deals with law in economic terms. This is the first book I have read that does so. And it is quite a through analysis, at least as an introduction to the idea. For example, Friedman deals with the economic concept of "public goods" extensively. The book also has a chapter on the "economics of theft," and deals directly with what Friedman calls "the hard problem" (national defense) as an exmaple of a "public good" in our society. He clearly explains that "public goods" are underproduced, and how this relates to the inefficiencies of government-supplied defense, police, and courts.

Throughout the book Friedman takes a utilitarian approach, because of some implications of the "natural rights" approach. Friedman is not afraid to admit when there are implications of libertarian principles that he is uncomfortable with. He gives an example of using a rifle, the owner of which does not wish to lend it to anyone (even if it would save lives), to shoot a madman who is about to kill several people in a crowd. Whereas libertarian rights theory would suggest that it is not acceptable for someone to take the gun, Friedman would prefer that someone take the gun rather than letting the madman kill lots of people. (Personally I hold the same preference in this hypothetical situation.)

The book is quite thorough, although an easy read. In its current revised edition it has 48 short chapters, 2 appendices, and an index. Friedman wrote this book with a witty style: "I have described the legislative and judicial branch of the government established by the Icelandic settlers but have omitted the executive. So did they."

The Machinery of Freedom deals with libertarianism in a manner that is helpful in visualizing and developing libertarian institutions. Moreover, much of the book is devoted specifically to the nature of such institutions, with very enlightening examples thrown in. I highly recommend it. Δ

Wayne Dawson, an electronics engineer and computer programmer, lives in Virginia Beach, VA.

Imagineering Freedom: A Constitution of Liberty Part I: Between Anarchy and Limited Government

by Roderick T. Long

This article begins a new series explaining the reasoning behind the various detailed provisions of my Virtual-Canton Constitution. At Disneyland the term "imagineering" is used for the creative process of designing a new Disneyland attraction. I've borrowed the term to describe the process of designing a libertarian political system.

When I first started working in the Free Nation Foundation, I began jotting down ideas for what a libertarian constitution should look like. I eventually ended up with the draft of a constitution, which I called "A Virtual-Canton Constitution." I wrote up the basic ideas behind the constitution in "Virtual Cantons: A New Path to Freedom?," an article that appeared in the first issue of *Formulations.* The constitution itself was presented at the first FNF Forum in October 1993, along with a further elaboration of its rationale.

With this new series of articles I hope to provoke discussion, comments, sugges-

tions, and other input from the libertarian community; I am by no means wedded to the particular provisions of this Constitution, and I hope that we can improve it together.

The Virtual-Canton Constitution is a kind of hybrid of limited government and free-market anarchism. There are two reasons for this.

First, a central aim of the Free Nation Foundation is to build a libertarian consensus on some set of political institutions, as a first step toward actually being able to implement those institutions somewhere. But the debate between anarchist libertarians and minarchist libertarians is a longstanding one, and although I hope the anarchists will eventually convert the minarchists, in the meantime it would be pointless to delay cooperation between the two factions until such time as agreement has been reached. Let us by all means continue to debate the issue; but while we are doing so, let's see if we cannot at the same time devise some set of institutions that both sides can live with in the meanwhile. The Virtual-Canton Constitution is designed with the intention (whether successful or not is yet to be seen) of being anarchistic enough to suit the anarchists and minarchistic enough to satisfy the minarchists. I hope the minarchists will be willing to call my federation of virtual cantons a "government"; I hope the anarchists will be able to call it an "anarchy."

Second, it seems to me that a compromise between minarchism and anarchism is needed for a different reason: the anarchistic elements are needed in order for the system both to work well and to be justifiable (for, in my view, a competitive system is both more efficient and more just than a monopoly), while the minarchistic elements are needed in order for the nation to be able to turn a governmental face toward other countries. I fear that a libertarian country without a superpower-sized defense force will not be able to maintain its sovereignty for long unless it can assume in the eyes of world opinion the "legitimacy" of a state, at least in the initial stages of its existence.

In writing up the Virtual-Canton Constitution, I drew freely on a number of sources, including the U. S. Constitution, the Libertarian Party Platform, Frances Kendall and Leon Louw's *After Apartheid,* Isabel Paterson's *God of the Machine,* Bernard Siegan's *Drafting a Constitution for a Nation or Republic Emerging Into Freedom,* and the mediæval Icelandic constitution.

An outline follows. This article reviews the sections marked by the sidebar:

Discussion is based on Version 5 of the Constitution.

Preamble

We the Citizens of the Free Nation, in order to establish justice, insure domestic tranquility, provide for the common defense, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the Free Nation as its supreme law, deriving its just authority from the law of nature and the consent of the governed.

This is pretty self-explanatory. The language is basically lifted from the Preamble to the U. S. Constitution, with the following significant differences.

We the Citizens — The U. S. Constitution begins "We the People," purporting to speak for all its inhabitants. The Virtual-canton Constitution speaks only for those who have become Citizens by signing it.

of the Free Nation — I use "the Free Nation" as a placeholder for whatever the libertarian country's name might be.

in order to form a more perfect union OMITTED — The original language referred to the transition from a looser to a tighter federation of states, and is not relevant here.

promote the general welfare OMITTED — Whatever may have been the Framers' intentions, the general welfare clause in the Preamble has been interpreted as a license for various sorts of socalistic legislation; it seemed safer to leave it out.

as its supreme law — This signifies that the Constitution overrides any other laws the Free Nation might pass. I refer to "its" (the Free Nation's) supreme law, rather than using the more familiar phrase "supreme law of the land," because "land" is ambiguous as between the nation itself and the territory on which it exists, and the Free Nation does not claim a territorial monopoly.

deriving its just authority from the law of nature and the consent of the governed — This language is based on the Declaration of Independence. The point of this passage is to indicate that any authority this Constitution has is *derivative,* not inherent. The reference to the law of nature is to indicate that this Constitution simply recognizes rights people already have, rather than creating new rights. The reference to the consent of the governed is to indicate that the Constitution is not binding on non-consenters.

Part One
Provisions Subject to Amendment

1.1 The Government of the Free Nation

1.1.1 The Government of the Free Nation shall consist of a Federal Administration and a number of Virtual Cantons.

I call the political structure of the Free Nation a "government" for foreign relations purposes; as we shall see, it is questionable whether it really counts as a government. Like Switzerland and the United States, the Free Nation's political structure is divided between a number of semi-autonomous local jurisdictions and a federal government linking them. The cantons in my model, however, are merely "virtual"; that is, they are not territorially defined entities, but voluntary associations. "Local," in this context, is a structural concept, not a geographical one. The point is to drastically lower the costs of switching Canton membership, thus increasing competition.

Why both a Federal Administration and

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Virtual Cantons? Why not just one or the other? I think a purely competitive system of Virtual Cantons would work well. But a Federal Administration is needed for two things: to interface with other nations as a genuine government (so the world community can't cry "Anarchy!" and invade to "restore order," and to act as a kind of cantralized framework to satisfy the minarchists.

Given the Federal Administration, there's a special reason to have Virtual Cantons. The Federal Administration is going to have to be severely restricted in its powers — crippled, really — if it is to satisfy libertarians of either the anarchist or minarchist varieties. But if a constitution is too rigid, it will simply be ignored; the structure will break as political forces seek new channels. The solution is to take the political pressures impinging on the Federal Administration and, rather than simply standing firm and being battered by them, *channel them downward* into the Virtual Canton system, whose comeptitive nature will dissipate their force.

1.1.2 If the territory of the Free Nation is held on a long-term lease from another nation, the contracting lessee shall be the Federal Administration.

This is fairly self-explanatory — and represents another reason for rejecting a purely decentralized system.

1.1.3 The Citizens of the Free Nation shall be any persons who, being competent, shall have signed and assented to this Constitution.

This Constitution represents a genuine social contract, unlike the U. S. Constitution. (For a critique of the social-contract theory of the U. S. Constitution, see Lysander Spooner's classic essay *No Treason No. VI: The Constitution of No Authority.*) The criteria for "competence" will be explained at 2.2.1.

Citizenship carries with it the right to vote and eligibility for public office, which are denied to non-Citizens; it carries with it also the liability to taxation by the Federal Administration and by the Citizen's Virtual Canton, from which liability non-Citizens are exempt. Thus the Government of the Free Nation is a voluntary cooperative association, with free exit and entry, and taxation is thus likewise voluntary, being conditional on Citizenship. Citizens may renounce their Citizenship at any time, and reclaim it later as they choose.

This form of "taxation" is consistent with libertarian scruples, amounting to no more than a fee to which one is liable only so long as one remains a member of the group.

Given that Citizenship brings taxation in its wake, why would any resident choose to become a Citizen? Well, as the foreign policy interface (and holder of the lease, if any) among other things, the Federal Administration has the potential for signficant impact, positive or negative, on the lives of the Free Nation's residents. Those residents will have an incentive to influence the Federal Administration's policies through voting or seeking public office, and so will be willing to become Citizens. Thus the Free Nation is assured a source of revenue.

And if it should happen that the market supplies all the functions of law so effectively that no one sees any need to become a Citizen, and so the Free Nation goes bankrupt — well, why keep it around if it's no longer needed?

Since the "Government" of the Free Nation is a purely voluntary association, not a government in the usual sense, it might be argued that no further constraints on its powers are necessary. But I'm paranoid about anything that looks as much like a government as this agency does. There will be more restrictions. Lots of them.

No competent person shall be barred from Citizenship. Criminal conviction shall not remove the rights, nor public office the responsibilities, of Citizenship.

In other words, convicted criminals will still be able to vote and run for office, and public officials will still have to pay taxes and so forth.

The Atlantis Project's "Constitution of Oceania" denies to convicted prisoners the right to vote or to run for political office, in order to avoid giving excessive political influence to organized crime. This is a worthy goal; a libertarian nation's laissez-faire policies are likely to attract a fair number of offshore operations from organized crime, and we need to think about ways of counteracting this tendency. But the Oceania Constitution rather optimistically assumes that most of these criminals will be in jail! In any case, the crucial argument for allowing prisoners to vote and run for office is that this measure prevents those in power from automatically disenfranchizing their opponents simply by incarcerating them. We should not let our justifiable fear of organized crime distract us from our equal fear of unrestrained government.

1.1.4 Every Citizen shall have the right to launch a popular initiative calling for a national referendum to recall the President of the Free Nation or any member of the Negative Council, or to repeal any law, practice, or policy of the Government, exclusive of the provisions of this Constitution, by majority vote; a petition by not fewer than n_1 citizens shall be sufficient to establish the referendum.

This provision serves as a democratic restraint on government power. The ability to recall officials by popular vote is restricted to the President of the Free Nation and to Councillors, and does not extend to Members of Parliament. This is because the President of Free Nation and the Negative Councillors are representatives of the people (and so may be recalled by the people), while members of Parliament are representatives of the Virtual Cantons and may be recalled only by them.

Wherever the Constitution calls for a specific number or amount of something, I have simply written the variable "n," plus a subscript in order to keep the various occurrences of "n" distinct. The actual value of any particular n will depend on such factors as population size.

1.1.5 The Federal Administration shall consist of a Legislature, an Executive, and a Judiciary.

This follows the separation-of-powers pattern of the U. S. Constitution, and in fact embodies the distinction among the three functions of law explained elsewhere in this issue. The Federal Executive, however, is limited almost exclusively to foreign policy; the domestic aspects of the executive function are left to the Virtual Cantons. This mirrors the old Anglo-Saxon (pre-Norman-

Conquest) system in which the King dealt with foreign policy only, leaving domestic policy to the Moots (local courts) and Borhs (mutual-protection insurance organization).

1.2 The Federal Legislature

1.2.1 The Legislature shall be composed of two houses: the Parliament, and the Negative Council.

This provision imitates the original unamended U. S. Constitution, which divided the Congress into one "elite" body (the Senate) and one "popular" body (the House of Representatives). Originally Senators were chosen by the state legislatures rather than by the people. This system has since been abolished, thus effectively annulling any intelligible difference between the Senate and the House, and making the entire bicameral system otiose.

As Isabel Paterson writes:

> "The final and formal stroke in disestablishing the states was the Seventeenth Amendment, which took the election of Senators out of the State Legislature and gave it to the popular vote. Since then the states have had no connection with the Federal government ...."
> (*God of the Machine* (New Brunswick: Transaction Books, 1993), p. 161.)

Since I wish to preserve the Virtual Cantons as vigorous political entities to serve as a check on Federal power, I have chosen an analogue of the pre-17th-Amendment U. S. system: Members of Parliament chosen by the Virtual Cantons, and Negative Councillors chosen by the people at large.

1.2.2 The Parliament shall be composed of Citizens representing the Virtual Cantons. Each Virtual Canton, regardless of size, shall send exactly one representative to the Parliament. These Members of Parliament are to be chosen in accordance with the laws of the respective Virtual Cantons. Each Member of Parliament shall serve a seven-year term; no Member of Parliament may serve more than one term consecutively or three terms non-consecutively. Members of Parliament may be recalled in accordance with the laws of the relevant Canton.

I have included severe term limits for Members of Parliament (and indeed for Negative Councillors and Presidents as well). Frequent rotation in office, with politicians periodiclaly returned to the status of ordinary citizens, lessens the likelihood that government officials will form a political class with interests opposed to those of their constituents.

I have placed no age restrictions on any political office; running for office strikes me as a form of self-defense, to which the young are no less entitled than the old. Virtual Cantons are free to place age restrictions on Members of Parliament if they so desire.

1.2.3 The Negative Council shall be composed of Citizens representing the Citizens of the Free Nation. There shall be one Councillor for every n_2 Citizens. Half of these Councillors, the Councillors by Election, are to be chosen by majority (or plurality) vote of the Citizens. The other half, the Councillors by Lot, are to be selected randomly from a pool of all Citizens willing to serve. These two kinds of Councillor shall have identical voting rights. Each Councillor shall serve a seven-year term; no Councillor may serve more than one term consecutively or three terms non-consecutively. Councillors of either sort may be recalled by national referendum as detailed in 1.1.4.

As a general rule, one has to be relatively famous already in order to be elected to national office. Choosing some Councillors by lot allows less famous people their shot at office. This system worked quite well in ancient Athens, where all seats on the Council were assigned by lot. Selection by lot also serves as a check on majority tyranny. If a population is 2/3 Turk and 1/3 Transylvanian, then a majoritarian popular vote will deliver an all-Turk legislature. Random selection will guarantee a more representative selection — a kind of proportional representation. And if you've ever thought "The average person has more sense than these politicians!" why not adopt a system that guarantees that the average person will *replace* the politicians?

If selection by lot is so great, why have any Councillors by Election at all? Well, there's some point in allowing the general populace to elect specific people it considers worthy. And since neither group of Councillors will have a voting majority, each can serve as a check on the other.

1.2.4 The Parliament shall have the power to initiate legislation by a two-thirds vote; such legislation must then be approved by a two-thirds vote of the Negative Council. Every bill which shall have passed the Parliament and the Negative Council shall, before it become a law, be presented to the Executive; if at least two of the Presidents approve it they shall sign it and it shall become law, but if not the Executive shall return it with their objections to the Parliament, which shall proceed to reconsider it. If after such reconsideration four-fifths of the Parliament shall agree to pass the bill, it shall be sent, together with the objections, to the Negative Council, by which it shall likewise be reconsidered, and if approved by four-fifths of the Negative Council, it shall become a law.

This basically requires supermajorities in order to do anything — thus ensuring that no Federal action will be taken except on matters where there is an overwhelming consensus. If this prevents the Federal Administration from taking action on matters of importance, the Virtual Cantons will handle the matter.

Any bill, before it may become a law, must embrace no more than one subject, which shall be expressed in its title; appropriation bills shall concern only spending of monies and shall not mandate any other action or conduct, nor shall any bill except a general budget bill contain more than one item of appropriation, and that for one expressed purpose.

This language is lifted, with minor changes, from the model constitution at the back of Bernard Siegan's book *Drafting a Constitution for a Nation or Republic Emerging Into Freedom* (Fairfax: Locke Institute, 1992). Its point is fairly self-explanatory.

In the case of bills that contain spending appropriations, the Executive may exercise a line-item veto, signing some provisions into law and sending back others with objections to the Parliament.

The reason for a line-item veto is that the

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Executive might hesitate to veto an unnecessary appropriation if it were bundled together with some other legislation of great importance. The reason for restricting the line-item veto to appropriation bills is that otherwise the Executive could distort the intent of a piece of legislation by selectively vetoing certain parts. (For example, suppose the U. S. Congress passed a bill to simultaneously deregulate the Savings & Loan industry and abolish Federal deposit insurance, and the President vetoed the second provision while passing the first!)

If any bill shall not be returned by the Executive within fourteen days after it shall have been presented to them, the same shall be a law, in like manner as if they had signed it, unless the Legislature by their adjournment prevent its return, in which case it shall not be a law.

This provision, lifted from the U. S. Constitution, is to prevent the Executive from holding up legislation by sitting on it, thus effectively vetoing it without having the guts to say so.

The Parliament shall also have power to propose Amendments to this Constitution as detailed in Section 2.1.

Discussion of this provision will be postponed until we get to Section 2.1.

1.2.5 The Negative Council shall have no power to initiate legislation, but shall have, in addition to the power of vetoing proposed Federal legislation, the power to repeal any already existing Federal legislation. A one-third-plus-one vote in favor of repeal shall be sufficient to repeal the legislation; no executive review is required. The Negative Council shall also have power to pass judgment on proposed Amendments to this Constitution as detailed in Section 2.1.

This provision comes straight from Robert Heinlein's novel *The Moon is a Harsh Mistress,* where he suggests a bicameral legislature: one house requiring a two-thirds vote to pass laws, the other only a one-third vote to repeal! This makes sure old laws won't stay around on the books unless supported by an impressive consensus.

I have a reason for assigning this repeal function to the popular representative body rather than to the Parliament. One lesson I have learned from Isabel Paterson, that supreme student of political structure, is that any stable political regime must provide an official conduit for the "masses" to exercise a veto power:

> "The property of mass is inertia. In politics, inertia is the veto. A function or factor can only be found where it is. No plan or edict can establish it where it is not. ... [In the Roman Republic] the tribunes of the people [were] invested with the formal veto power. ... At one time, the tribunes of the people 'stopped the whole machine of government' for a number of years, refusing to approve and thus permit any act of government whatever ... until their grievances were redressed. They were able to do so because the power they exercised did inhere in the body they represented. It was there. If the people will not move the government cannot. Though laws are passed and orders given, if mass inertia is found opposed, the laws and orders will not be carried out. ... the function of mass, which is taken for granted by mechanical engineers, and usually ignored by political theorists, was understood by the Romans. They used it where it belongs for stability, by attaching to it directly that part of the mechanism proper to the factor of inertia, the device to 'cut' the motor when necessary.
>
> The same function has been rightly expressed in modern government by placing with the representatives elected by the people on short tenure the power of the purse .... The effective veto [operates] by negation, withholding supplies. When unlimited supplies are voted automatically in unapportioned lump sums, it is obvious that the function of mass, the stabilizing element, is no longer included in government; the connection has broken somewhere. The citizens as such, the people, *have no representatives at all.* Their presumed delegates actually represent the spenders of supplies, as must be the case when the elections are carried by such expenditure. Then the inherent veto power can register its weight only by informal devices, indicating imminent danger that the overcharged motor, being out of control, will tear loose from the base and be smashed. ... the final expression of the intrinsic mass-inertia veto when it is deprived of legitimate representation consists of men quitting their tools and throwing down their arms. The crowning folly of governments is to suppress the signal."
>
> (*God of the Machine,* pp. 46-48.)

The function of a representative body should correspond, at least roughly, to the power it represents if power is to flow through constituional channels rather than around them or over them. Thus, the veto power should be placed in a body whose constituents can actually back up that veto — the Negative Council. (The provision for referenda in Section 1.1.4 serves a similar function.) And on the other hand, assigning the positive side of legislation to the representatives of the Virtual Cantons — that is, to the Members of Parliament — helps to ensure maximum participation of various interest groups in the legislative process.

The Continental Congress chided George III for "prostituting his negative." Here's hoping the Negative Council will prove a Whore of Babylon in this regard.

1.2.6 Each of the two houses of the Legislature shall regulate its own affairs, determine its own rules of procedure, and choose its own officers, including its President.

I couldn't see any harm in this provision. Maybe I've missed something!

1.2.7 The powers of the Legislature shall be restricted to the following provisions:

- **a) to protect the rights of the people to their persons and property;**
- **b) to conduct the financial affairs of the Federal Administration;**
- **c) to lay and collect taxes on Citizens of the Free Nation, for the purpose of paying the debts and providing for the common defense of the Free Nation, and likewise to solicit voluntary contributions to the Treasury, or to provide services such as lotteries to that end;**

These are pretty self-explanatory. With regard to (c), recall that taxation depends on voluntary Citizenship. If revenues from this

source prove insufficient, service fees and voluntary donations should fill the gap. Remember, the residents of the Free Nation (Citizens or otherwise) are going to be making money hand over fist, and the Federal Administration should benefit from their charity.

Note that revenue may be applied only to national defense. I really conceive of the Federal Administration as being analogous to a consortium of private protective agencies formed for national defense purposes. (The salaries of Federal officers will also come out of the Treasury, since this, being mandated by 1.2.11, will count as a legitimate debt.)

d) to declare war in defense of the Free Nation, and to make peace, and to raise and support a military force;

e) to provide for calling forth a militia to execute the laws of the nation, suppress insurrections, and repel invasions;

f) to vest the appointment of such officers whose appointments are not herein otherwise provided for, and which shall be established by Federal law, in the Executive or in the Judiciary, as the Legislature deems proper;

g) to impeach any Federal officer;

These likewise seem pretty self-explanatory.

h) to exercise an extraordinary power, for a period of no more than n_3 years immediately following the adoption of this Constitution, to regulate or prohibit the importation or exportation of mind-altering drugs, or the manufacture, importation, and exportation of large-scale chemical, biological, or nuclear weapons, but only insofar as and solely to the extent that such regulation or prohibition is necessary in order to avert a severe risk to the Free Nation of suffering foreign invasion.

This provision was inspired by a similar provision in the Oceania Constitution. I really hate this one; but on practical grounds, in light of the fact that powerful established nations pose the single greatest threat to any newly-established Free Nation, and are likely to seize any pretext to flex their muscles, I grudgingly admit that we need to allow for the possibility of prohibiting nuclear weapons and international drug trafficking, on grounds of national security.

As an anarchistic rights-fanatic, I'm naturally uncomfortable with such prohibitions. But I believe they can be justified on libertarian principles, as follows:

Suppose there were powerful magnetic bombs floating above the Free Nation. Then anyone who erected powerful magnets on his property, thus attracting these bombs down to earth and causing them to explode — thus destroying not only his own property but that of his neighbors — would have violated his neighbors' rights. And just as powerful magnets can be predicted to attract floating magnetic bombs, so nuclear weapons and drug trafficking can be predicted to attract the equally destructive attention of national powers, to the equal detriment of innocent third parties. Hence these activities too may legitimately be restricted in order to protect the rights of those third parties.

I have inserted a "sunset clause" so that this provision will self-destruct after enough time has passed for the Free Nation to gain legitmacy in the eyes of the world community. Notice also that no restriction on *domestic* manufacture, use, or sale of drugs is authorized.

i) to make such laws as shall be necessary for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Federal Administration, or in any department or officer thereof, provided that no law imposing greater restrictions on the people than needed for the attainment of this end shall be regarded as necessary.

The analogous provision in the U. S. Constitution reads: "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Over the years this grant of power has been interpreted *very* broadly. My version is worded so as to make a broad interpretation much more difficult.

1.2.8 The privilege of the writ of habeas corpus shall not be suspended; no bill of attainder or ex post facto law shall be passed.

This provision is lifted from the U. S. Constitution, except that with regard to the guarantee of habeas corpus the phrase "unless when in cases of rebellion or invasion the public safety may require it" has been removed.

Most Americans probably do not remember what a bill of attainder is. *Webster's New World Dictionary* defines it as follows:

> "Bill of Attainder. A legislative enactment against a person, pronouncing him guilty, without trial, of an alleged crime (esp. treason) and inflicting the punishment of death and attainder upon him.
> Attainder. Forfeiture of property and loss of civil rights of a person sentenced to death or outlawed."

This is clearly something we would want to prohibit.

Incidentally, nothing counts as "treason" under this Constitution.

1.2.9 No money shall be drawn from the Treasury, but in consequence of appropriations made by Federal law; and statements and accounts of the receipts and expenditures of the Federal Administration shall regularly be made public.

This is borrowed from the U. S. Constitution, and is self-explanatory.

1.2.10 The average Federal tax burden shall rise no higher than n_4 percent of the average Citizen's income, this figure to be determined or approximated by statistical methods involving no compulsory disclosure of information on the part of Citizens.

I wanted to place a cap on taxes (even voluntary ones, since I'm worried about the Federal Administration's trying to become a government), but naming a precise dollar amount would fail to allow for inflation or deflation; hence this provision. Δ

To be continued

On Patriotism

I do not go into rhapsodies about "my country," its rocks and rills, its super highways and wooded hills .... This whole world is almost unbearably beautiful; why should I love Oak Creek Canyon or California's beaches or Washington's Sea Island counties any more than the Bocca di Cattaro or Delphi or the Bosphorus? Because *I,* me, the great RWL, was born in Dakota Territory? The logic seems weak, somehow, don't you feel?

My attachment to these USA is wholly, entirely, absolutely to The Revolution, the real world revolution, which men began here and which has — so to speak — a foothold on earth here. If reactionaries succeed in destroying the revolutionary structure of social and political human life here, I care no more about this continent than about any other. If I lived long enough I would find and join the revival of the Revolution wherever it might be in Africa or Asia or Europe, the Arctic or Antarctic. And let this country go with all the other regimes that collectivism has wrecked and eliminated since history began. So much for patriotism, mine.

— Rose Wilder Lane, 1961

(Roger Lea MacBride, ed., *The Lady and the Tycoon: Letters of Rose Wilder Lane and Jasper Crane* (Caldwell: Caxton Printers, 1973), p. 267.)

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