

COMMIT. STRUCTURES
- 12.

[Revised--10/6/97]

ATLAS AND THE WORLD, THEN AND NOW

Remarks by David N. Mayer,
Professor of Law and History,
Capital University, Columbus, Ohio

At *Atlas and the World*, a Cato Institute/Institute for Objectivist Studies conference in celebration of the 40th anniversary of the publication of Ayn Rand's *Atlas Shrugged*, Washington, D.C. October 4, 1997

It is a great pleasure, and an honor, to have the opportunity to address the significance of Ayn Rand's great novel, *Atlas Shrugged*, a work which (as I tell my students) I regard as the most important book ever written. I'm here today to discuss the significance of the book in historical context, and to do so briefly--in about 15 minutes--to be sure, a daunting task. But my overall point is actually quite simple: *Atlas Shrugged* is significant because, through the novel, Rand shows us what we must do to complete the American Revolution, to complete the unfinished work of 1776, and the hope that it represents to the world.

To paraphrase a late-18th-century English radical Whig¹: America's Founding Fathers were provident, but not provident enough. They established--for the first time in the history of the world--a society whose government was founded on recognition of the inherent, natural, and

¹James Burgh observed, "[o]ur ancestors were provident; but not provident enough. They set up parliaments, as a curb on *kings* and *ministers*; but they neglected to reserve to themselves a regular and constitutional method of exerting their power in curbing *parliaments*, when necessary." Burgh, *Political Disquisitions* 1:6 (2 vols., London, 1774) (emphasis in original). Burgh was an English radical Whig writer whose treatise was widely influential among American Revolutionary leaders and whose observations anticipated the American constitutions. See David N. Mayer, "The English Radical Whig Origins of American Constitutionalism," 70 *Washington University Law Quarterly* 131 (1992).

inalienable rights of the individual.² They established written constitutions, founded on "the consent of the governed," and containing various institutional checks on the power of government designed to prevent it from being abused³--for the Founders understood that, paradoxically, it was government--which was created to protect, or "secure," individual rights that poses the greatest danger to them. The reason is the unique nature of political power: that government, alone of all institutions in society, may legitimately use *force* to achieve its ends.⁴ A *good* society, the Founders believed, would have *few* laws--laws that were clear to, and respected by, the people.⁵ Accordingly, they sought to create a "new science of politics" that not only checked the power of government, through constitutions, but also minimized the role

²The Founders' system of government, one might add, was established on the "self-evident" truths that Thomas Jefferson had stated in the Declaration of Independence: that all men are created equal and independent; that from that equal creation they derive the natural, inalienable rights of life, liberty, and the pursuit of happiness; that to safeguard these rights, governments are instituted among men, deriving their just powers from the consent of the governed; and that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it.

³These included federalism (the division of powers between the national government and the states), the principle of separation of powers (at each level of government, separating its powers among three distinct and independent functional branches, legislative, executive, and judicial), frequent elections and "rotation in office" (what we call "term limits"), explicit rights guarantees in bills of rights, and the power of the people to amend the constitution. D

⁴Thomas Paine succinctly expressed this idea in *Common Sense* (1776) when he drew a basic distinction between *society* and *government*: "Society is produced by our wants, and Government by our wickedness; the former promotes our happiness *positively*, by uniting our affections, the latter *negatively*, by restraining our vices. Society in every state is a blessing, but Government, even in its best state, is but a necessary evil; in its worst state, an intolerable one." Tactics - - -

⁵"Many laws are the sign of a corrupt state," wrote the English radical Whig philosophers who profoundly affected early American political thought. Thus, another principle believed in by America's Founders (but virtually forgotten today by all but libertarians and Objectivists) was the notion that as society becomes more advanced, the less necessary it should be to use force, or the coercive power of the law, to provide order in society.

of government to a few, essential and legitimate functions.

However, this revolution in the philosophy of government was incomplete, as the dramatic growth in the size and pervasiveness of governmental power (at all levels, and especially the national government) in the 20th century so vividly illustrates. The American Revolution was incomplete--and the Founders' carefully devised constitutions failed--because the Founders' generation had no consensus about where *exactly* to draw the line between individual liberty and the coercive power of law, especially in the realm of economics. They failed, in short, to have a coherent theory of individual rights. This failure can be explained by two "gaps" in American thought, one in ethics and the other in politics.

but it's
a confusion
of
philosophy

First, the political revolution was not accompanied by a revolution in moral philosophy. Many of the Founders adhered to traditional Judeo-Christian ethics based ^{no.} on altruism. Others, as "free-thinking" students of the Scottish Enlightenment--men such as Thomas Jefferson--instead naively believed that humans had an instinctive "moral sense" that vaguely inculcated one's moral "duties" to others.⁶ Under either the traditional or the "enlightened" ethics, it was regarded as "immoral" for an individual to pursue his own self-interest, even if he did so in such a way as not to interfere with the equal freedom of others to do the same. To be "moral," it was assumed, one must sacrifice one's self-interest to the "needs" of others. Such a moral philosophy--rooted in older visions of a homogeneous communitarian society--was hardly compatible with the reality of American capitalism: the free, robust society of energetic, enterprising individuals, mutually profiting from each others' pursuit of their own rational self-

but
it is
common
sense

⁶See, for example, Jefferson to Peter Carr, 10 August 1787, and to Thomas Law, 13 June 1814, in *The Portable Thomas Jefferson* (Merrill D. Peterson ed., 1975), 424-25, 540-43.

interests--for example, the society described in the early 1830s by Alexis de Toqueville in his book *Democracy in America*.

Second, in early American political thought, coexistent with the dominant radical Whig, or libertarian, political tradition--with its emphasis on individual rights--there was an older, competing tradition. This tradition, which scholars have called the "civic republican" tradition, traceable back to ancient Rome, preached civic "virtue" as consisting in the subordination of self-interest to the "public interest," or "common good." This notion, which was central to 16th- and 17th- century paternalistic theories of government,⁷ unfortunately persisted in American political thought and in American law. One consequence was a hostile attitude toward commerce and commercial activities that long has been part of American culture but which, too, was incompatible with a capitalist, "free enterprise" economy.

*wide - might be inevitably
gov incentives to free
ride.*

This mixed ideology in American political thought of the Founding period made possible the so-called "mixed economy" of the 20th century. The rise of industrial capitalism in the late 19th century, during the several decades following the end of the Civil War, was accompanied by a growth in government regulation of business, at both the state and federal levels, under expansive definitions of the states' "police power" and Congress's power to regulate interstate

⁷An interesting example in English law is the 1606 decision by the Exchequer Court in *Bate's Case*, upholding the King's power, without consent of Parliament, to impose a tax on imported currants. In his opinion for the Court, Chief Baron Flemming dismissed the challenge to the tax by Bates, the importer, by observing that "the end of every private merchant is not the common good, but his particular profit." In contrast, Flemming noted that "to the King is committed the government of the realm and his people," and in promoting "the general benefit of the people," the power of the King was "absolute" and discretionary. *Bate's Case*, 145 Eng. Rep. 267 (Ex. 1606). Thus, like the apologists for 20th-century Marxist dictators, apologists for 17th-century "absolute" monarchs invoked the "common good" as their rationale for undermining the rights of individuals.

commerce. Responding to American public opinion--which was profoundly distrustful, indeed paranoid, about "big" business⁸--as well as political pressure from various special interest groups, Congress passed the Sherman Antitrust Act and created regulatory agencies, such as the Interstate Commerce Commission and the Federal Trade Commission, allegedly to "protect" competition. The Supreme Court, in a series of decisions beginning in the 1870s, sanctioned this expanded role of government by applying the old, 17th-century concept of "public interest"--particularly, "business affected with a public interest"--to undercut the constitutional safeguards given property and economic liberty through the due process clauses of the Fifth and Fourteenth Amendments.⁹

⁸The rise of "trusts"--business combinations, such as holding companies, designed to enhance efficiency--was a response by businesses to the intense competition that characterized most major American industries in the late 19th century. "Progressive"-era proponents of bigger government often exploited the public's fear of big business in making the case for their political programs. Consider, for example, Woodrow Wilson's famous "New Freedom" speech, calling for a new definition of *freedom*, in his 1912 presidential campaign: "You know that one of the interesting things that Mr. Jefferson said in those early days of simplicity which marked the beginnings of our government was that the best government consisted in as little governing as possible. And there is still a sense in which that is true. It is still intolerable for the government to interfere with our individual activities *except where it is necessary to interfere with them in order to free them*. But I feel confident that if Mr. Jefferson were living in our day he would see what we see: that the individual is caught in a great confused nexus of all sorts of complicated circumstances, and that to let him alone is to leave him helpless as against the obstacles with which he has to contend; and that, therefore, law in our day must come to the assistance of the individual. It must come to his assistance to see that he gets fair play; that is all, but that is much. *Without the watchful interference, the resolute interference, of the government, there can be no fair play between individuals and such powerful institutions as the trusts*. Freedom to-day is something more than being let alone. The program of a government of freedom must in these days be positive, not negative merely." Wilson, *The New Freedom* (1913)(emphasis added).

⁹For example, *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding the Illinois legislature's power to set maximum rates for grain elevators in Chicago), and *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding the New York Milk Control Board's authority to set minimum retail prices for milk sold in grocery stores). After the so-called "New Deal Revolution" of 1937, the

Antitrust law,¹⁰ together with the law of "unfair" trade practices,¹¹ subjected American businessmen in the 20th century to vague legal standards,¹² under which entrepreneurs may be

Court abandoned another line of cases in which it had struck down (albeit inconsistently) state and federal laws "unreasonably" restricting economic liberty; the Court adopted instead the minimal "rational basis" test for constitutionality, under which it has upheld virtually any law regulating business activity.

¹⁰The Sherman Antitrust Act (1890) and its progeny, in various federal laws (primarily the Clayton Act of 1914) as well as state statutes modelled after the federal legislation.

¹¹The common law of "unfair" trade practices, codified in the Federal Trade Commission Act (1914), as well as various state statutes. See generally Edmund W. Kitch & Harvey S. Perlman, *Legal Regulation of the Competitive Process*, rev. 4th ed. (1991).

¹²Consider, for example, the problem of pricing one's goods or services. As Rand observed in her essay "America's Persecuted Minority," "If [a businessman] charges prices which some bureaucrats judge as too high, he can be prosecuted for monopoly, or, rather, for a successful 'intent to monopolize'; if he charges prices lower than those of his competitors, he can be prosecuted for 'unfair competition' or 'restraint of trade' [the terminology under modern law is "predatory practices"]; and if he charges the same prices as his competitors, he can be prosecuted for 'collusion' or 'conspiracy.'" *Capitalism: The Unknown Ideal*, 49. Essentially the same criticism has been made by modern economists critical of the antitrust laws. See, for example, Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (1982) and *Antitrust Policy: The Case for Repeal* (1986).

Compounding the problem is the fact that interpretation of the laws has been left entirely up to the courts, largely because Congress, at the time it passed the Sherman Act, deliberately used vague terms such as *monopoly* or *restraint of trade*, the meaning of which were undergoing substantial changes in popular and legal culture at the time. See William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965). Rand aptly describes the precarious position in which the law leaves American businessmen: "This means that a businessman has no way of knowing in advance whether the action he takes is legal or illegal, whether he is guilty or innocent. It means that a businessman has to live under the threat of a sudden, unpredictable disaster, taking the risk of losing everything he owns or being sentenced to jail, with his career, his reputation, his property, his fortune, the achievement of his whole lifetime left at the mercy of any ambitious young bureaucrat who, for any reason, public or private, may choose to start proceedings against him." *Capitalism*, 50. Rand actually understates the injustice of the laws, for it is not only bureaucrats who can invoke the antitrust laws: Section 7 of the Sherman Act (and its corollaries in the laws of most states) allows any competitor--literally anyone "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act"--to sue, for treble damages! This provision in the law encourages many business disputes to become antitrust suits.

penalized for being *too good* as competitors.¹³ A notorious example from the turn of the century involved the man who probably was the real-life model for Nathaniel Taggart: James J. Hill, founder of the Great Northern Railroad Company, the only major transcontinental line built entirely by private capital, without federal land grants or other government subsidies. When Hill created the Northern Securities Company, a holding company combining his and his partners' railroads into a larger company in order to avert a takeover attempt by the Harriman interests who controlled the Union Pacific, the Company was immediately targeted by President Teddy Roosevelt's "trust-busting" campaign. The Justice Department brought suit under the Sherman Act, and the Supreme Court, in a 5-4 opinion written by Justice Harlan, found the Company in violation of the Act as a "restraint of trade," even though the creation of the Company in fact had *enhanced* competition.¹⁴ Thus has antitrust law been used in the 20th century to penalize, for their ability, men of magnificent productive achievement: whether James

¹³An obvious, especially egregious example cited both by Rand in her "America's Persecuted Minority" essay and by Alan Greenspan in his essay "Antitrust" (also published in *Capitalism: The Unknown Ideal*) is the case of ALCOA, found guilty of antitrust violations in the 1945 case, *United States v. Aluminum Company of America*, because, in the words of Judge Learned Hand in his opinion for the court, the company produced more of its product to meet the public demand: "It [ALCOA] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel." *Capitalism*, 57, 70-71.

¹⁴*Northern Securities Company v. United States*, 193 U.S. 197 (1904) (Harlan, emphasizing that the language of the Sherman Act prohibited literally "every contract, combination, or conspiracy in restraint of trade," while newly-appointed Justice Oliver Wendell Holmes, Jr., in dissent, suggested a "rule of reason," under which only those business combinations that "unreasonably" restrained trade, by lessening competition, would be deemed unlawful). For a discussion of the factual background of the case, see Albro Martin, *James J. Hill and the Opening of the Northwest* (1976), 511-20.

J. Hill at the beginning of the century, or men such as Bill Gates today.¹⁵

Ayn Rand was a good student of American business history.¹⁶ The world she portrayed in *Atlas Shrugged*, of course, exaggerated this fatal flaw in the law--but only slightly. As she said in her 1964 lecture "Is Atlas Shrugging?"¹⁷ "the principles of every edict and every directive presented in *Atlas Shrugged*--such as 'The Equalization of Opportunity Bill' or 'Directive 10-289'--can be found, and in cruder forms, in our *antitrust* laws."¹⁸

To be sure, the novel "portrays a world in decline as power-hungry politicians gain control of the economy," as the description of this session in the conference brochure notes. But the significance of *Atlas Shrugged* goes far beyond its critique of the modern

¹⁵Acting on complaints brought by one of Bill Gates's chief competitors, Mark Andreessen, co-founder of Netscape, the Clinton Justice Department launched an investigation of Gates's Microsoft for alleged "predatory" practices by, among other things, pricing *too low* its Internet Explorer Web-browser software. As Donald J. Boudreaux has noted, the Justice Department's harassment of Microsoft "is true to antitrust's long history of abuse." "Microsoft Is a Competitor, Not a Predator," *Wall Street Journal*, October 3, 1996.

¹⁶See Rand's essays "America's Persecuted Minority: Big Business" (1961-62) and "Notes on the History of American Free Enterprise" (1959) in *Capitalism: The Unknown Ideal* (1967). My own research into the history of the American railroad industry and the origins of federal government regulation confirms Rand's general conclusion that "[a]ll the evils, abuses, and iniquities, popularly ascribed to businessmen and capitalism, were not caused by an unregulated economy or by a free market, but by government intervention into the economy," as well as the distinction she draws between the good businessmen--such as James J. Hill, Commodore Vanderbilt, or Andrew Carnegie--who "earned their fortunes by personal ability, by free trade on a free market"--and the bad, such as Leland Stanford and the other "Big Four" of the Central Pacific Railroad, "men with political pull, who made their fortunes by means of special privileges granted them by the government." "America's Persecuted Minority," in *Capitalism*, 48-49. Compare Martin, *James J. Hill, supra*, and Oscar Lewis, *The Big Four: The Story of Huntington, Stanford, Hopkins, and Crocker, and of the Building of the Central Pacific* (1938).

¹⁷Lecture given at The Ford Hall Forum, Boston, on April 19, 1964, published in *The Objectivist Newsletter* (August 1964) and reprinted in *Capitalism*, 150-66.

¹⁸Rand, "Is Atlas Shrugging?" in *Capitalism*, 159.

welfare/regulatory state. Rand herself noted that the story of *Atlas Shrugged* "demonstrates that the basic conflict of our age is *not* merely political or economic, but moral and philosophical," the conflict between "two opposite schools of philosophy, or two opposite attitudes toward life": what she called the "reason-individualism-capitalism axis" and the "mysticism-altruism-collectivism axis."¹⁹ That conflict is at the heart of the basic contradictions in American law and constitutionalism to which I've alluded.

To resolve the conflict, and to place the Founders' "new science of politics" upon a firm philosophical footing--and thus to complete the work of the American Revolution--we need not only to reaffirm the Founders' commitment to individual rights but to ground that commitment in a coherent theory of rights. Constitutional protections of life, liberty, and property have been proven insufficient to guard individuals from the tyranny of the so-called "common good" or the "public interest"; we must realize, as clearly and as fully as Rand did, that there is no such thing, that it is an undefined and an undefinable concept, and that this "tribal notion" indeed "has served as the moral justification of most social systems--and of all tyrannies--in history."²⁰ By presenting a new code of ethics--the morality of rational self-interest--Rand's novel provides what the Founders failed to grasp, the missing element of the American Revolution: the moral justification of capitalism, and with it, of the rights of all persons--including the American businessman.

The purpose of *Atlas Shrugged*, Rand said in 1964, was "to prevent itself from becoming prophetic," and she added that, just a few years after its publication, that there were "many,

¹⁹Ibid., 151.

²⁰Rand, "What Is Capitalism?" in *Capitalism*, 20.

many signs to indicate that it is succeeding in that purpose."²¹ Now, over thirty years later, there are, unfortunately, many more negative developments, more examples for what Rand called her "Horror File": the expansion of federal entitlement programs, the continued dominance of collectivism on the faculties of American colleges and universities, and the further erosion in our civil and criminal law of the concept of individual responsibility.

Yet for each "horror," I think, there's at least one encouraging development. To cite a few examples: Even Bill Clinton is forced to adopt anti-"big government" rhetoric, and--thanks in part to the work of Cato Institute--the abolition of the income tax and genuine reform of Social Security at last are beginning to be discussed seriously here in Washington; the popular reaction against "political correctness" on college campuses, together with the entry of pro-individualist, pro-capitalist young scholars into academia, has broken the left's monopoly on higher education; capitalism continues to be defended on the editorial pages of *The Wall Street Journal* (except in Al Hunt's columns), and ABC News broadcasts John Stossel's reports exposing, among other things, "The Blame Game" and "Freeloaders"; talk radio listeners can hear "Dr. Laura" Schlessinger advise her callers to take responsibility for their actions and Rush Limbaugh defend the right of productive Americans to keep the money they've earned; and finally, of course, the Internet teaches everyone who uses it the value of free markets. Such positive developments provide, in Rand's words, "many, many signs" to indicate that *Atlas Shrugged* is succeeding in its purpose of not becoming prophetic. Today, as we celebrate the 40th anniversary of publication of *Atlas Shrugged*, Rand's observation continues to hold true.

²¹Rand, "Is Atlas Shrugging?" in *Capitalism*, 150, 165.