

Big Government's Return

Reviewed by David R. Henderson

THE CASE FOR BIG GOVERNMENT

By Jeff Madrick

205 pages; Princeton University Press, 2009

It had to happen. It was almost inevitable that an economist on the statist edge of the mainstream or a little beyond would come out swinging for big government. Jeff Madrick, the editor of *Challenge* magazine, has. In *The Case for Big Government*, Madrick argues for substantial increases in regulation, government spending, and taxes. He specifies spending programs he would like to see increased or initiated, and gives some particulars about the added taxes.

To make a case that would persuade anyone other than the already converted, Madrick needs to show why and where he thinks economic freedom fails and why he thinks bigger government would work. But he does not succeed on either count. His argument that economic freedom has failed rests heavily on his claim that, for the last two or three decades, the United States has had a laissez-faire marketplace. If he were right, then it would follow that the problems today are due to laissez-faire. But he never makes that case. Moreover, his argument for added government spending is, with only a few exceptions, based on the idea that the spending will create benefits and, therefore, is good; opportunity cost is not a prominent concept on display in this book. Along the way, Madrick also subtly shifts criteria, both for measuring big government and for measuring economic well-being. He does score a few points around the edges, but overall he fails to make a strong case for big government.

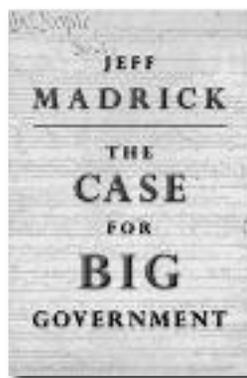
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DEREGULATION Consider how Madrick makes the case that economic freedom has failed. If economic freedom works, he argues, our economy should be doing very well because we have had “the rise of laissez-faire economics since the 1980s.” What is his evidence of the rise of laissez-faire economics? He gives none. That’s not surprising given the heft of the *Federal Register*, the U.S. government publication that lists new regulations. It averaged 72,844 pages annually during the Carter years from 1977 to 1980, just before Madrick’s “laissez-faire” 1980s. The average fell to 54,335 during the Reagan years, rose to 59,527 during the George H. W. Bush years, then to 71,590 during the Clinton years, and finally to a record 75,526 during the administration of the supposed great believer in laissez-faire, George W. Bush. It’s true that *Federal Register* pages aren’t a perfect measure: when governments deregulate, they must announce those changes, and so some of the pages represent genuine deregulation. But most of the pages listed new regulations, no matter which president was in power at the time. Far from moving away from regulation, the U.S. economy has become even more regulated in recent decades. The almost quarter of a million federal regulators would be surprised to learn from Madrick that they don’t have jobs.

He writes, “The financial system, progressively deregulated since the 1970s, broke free of government oversight entirely in the 1990s and early 2000s.” It’s true that there was substantial deregulation of banking, but banking is still one of the most regulated industries in the country—not only by the Federal Reserve System, but also by the comptroller of the currency. Moreover, various state regulators oversee banks. Indeed, as University of Dallas

economist Stan Liebowitz has shown, regulations under the Community Reinvestment Act pushed banks to make mortgage loans to people who were bad risks. Those loans were a substantial factor in the housing boom and the subprime bust. There are other sectors in the financial industry that are less regulated, of course, and Madrick may have those in mind. But his statement that there was no government oversight in the early 2000s is shockingly wrong. To his credit, though, Madrick does point out that the substantial deregulation of airlines and trucking in the late 1970s was “sensible.”

GOVERNMENT AND GROWTH Drawing heavily on work by economic historian Peter Lindert, Madrick establishes that there is no strong correlation between, on



the one hand, the level of either taxes or government spending and, on the other, either the growth of real gross domestic product or the level of output per worker. This exposition is one of the few useful parts of the book. The lack of connection between government spending and growth has always puzzled me. Madrick uses this result

to argue that big government is not bad for growth.

But there’s another possibility: that big government is neutral for growth in economic well-being, but bad for the level of economic well-being. The steady-state growth that a large-government economy can achieve might be the same as that of a small-government country. But the levels could be different. What if, for example, high government spending and high marginal tax rates discourage work effort and, therefore, output and economic well-being are lower than otherwise. Growth could still proceed, but it would be from a lower level. Interestingly, Madrick makes a claim consistent with this possibility. He writes that the high levels of unemployment insurance in Western Europe “can remove less productive workers from the labor force.” The remaining workers would then have a higher average productivity

than otherwise because of the exclusion of less-productive workers. We could achieve that same outcome in the United States and vault way ahead of Western Europe in output per worker simply by removing from the workforce all workers whose productivity is less than \$100,000 a year. We, too, would have a very productive labor force — along with few people working and mass poverty. Indeed, all that is needed to see that we have substantially more per person in the United States than in Western Europe is to visit Western Europe. Cars are smaller and less luxurious; houses are smaller and have fewer amenities; Europeans have less food per person; and on and on.

Madrack points out a factor in measuring the size of government that undercuts his own case, but he doesn't seem to be aware that it does. He writes, "National government frequently had a strong and defining influence, even when its expenditures were a small share of total income." In other words, we can't judge how big government is simply by considering the size of government spending as a percent of GDP. He's right. The Interstate Commerce Commission, for example (this is my example, not his), imposed billions of dollars of deadweight loss on the U.S. economy annually, even though its annual budget was far below \$1 billion. But this lack of a one-to-one correspondence between government spending and government control undercuts Madrack's use of Lindert's data on the benign nature of big government. Lindert's data, recall, are on government spending.

PRIVILEGE Madrack claims that high-income people are privileged, but gives no evidence for that. How was Bill Gates privileged? The government never gave him any special privileges; indeed, the federal government prosecuted him for his success in achieving a large market share for Microsoft software. It's clear from context that Madrack uses the word "privileged" to mean high-income or wealthy.

Defenders of economic freedom, including me, generally believe that one of the benefits of even a somewhat-free economy is that the great majority of people become better off over time. Madrack grudgingly admits this, pointing out that the real prices of milk and shirts, for exam-

ple, have fallen over time. But then he claims that because "the needs of society change," what "may seem like a luxury becomes a necessity." He gives as examples telephones and cars. He could have added washers and dryers, microwaves, color televisions, and refrigerators, all of which are in the vast majority of homes occupied by people officially classified as poor. Madrack is correct that we have come to regard as necessities what we previously thought of as luxuries. But that makes the point. As Joseph Schumpeter wrote, "Queen Elizabeth owned silk stockings. The capitalist achievement does not typically consist in providing more silk stockings for queens but in bringing them within reach of factory girls."

Interestingly, Madrack wants to tax those necessities. In a chapter titled, "What to Do," Madrack proposes a 50-cent-per-gallon tax on gasoline, higher taxes on cigarettes, and a national sales tax. He fully admits that such taxes are regressive, "taking more [he means a higher percent] of the earnings of low-income than high-income workers." Nevertheless, he says, a national sales tax "has high revenue raising potential." Indeed.

And how does Madrack want the government to spend the added revenues? He would increase the federal government's annual spending by over \$400 billion: \$150 billion on pre-kindergarten, \$35 billion on college subsidies, \$25 billion on K-12 government schools, \$25 billion on caregiver support, \$50 billion on infrastructure and energy, and \$120 billion on Social Security, to name the biggest items. He doesn't make much of a case for them other than to say that they will create benefits. But what about costs? Moreover, Madrack counts some costs as benefits: one argument he makes for various programs is that they would create jobs. In other words, they would take labor that could have been used elsewhere.

Fortunately, Madrack sees some of the downsides of big government. The best line in the book is: "The war in Iraq serves as a supreme and tragic reminder of government activism gone awry." He also seems rightly critical of government-sponsored sterilization. Too bad he doesn't consider the mess government has created with government schools, socialized medicine, and the drug war. 

The Woman who Killed Santa Claus

Reviewed by Jeremy Lott

"THERE IS NO ALTERNATIVE": Why Margaret Thatcher Matters

By Claire Berlinski

386 pages; Basic Books, 2008

In October of 1984, during the United Kingdom's weekly Questions to the Prime Minister, a member of Parliament asked of Margaret Thatcher, "Is the Prime Minister aware that this Christmas thousands of striking miners...single parent families, and people on lower incomes will not be able to buy their children food or toys or new clothes and will tell their children that Father Christmas is dead?" He inquired, if that's the right word, "Is she aware that, in addition to having blood on her hands, she will go down in history as the woman who killed Santa Claus?"

The humor of the Santa mortality query actually disguised much of the venom Labourites felt for the Tory prime minister. In an earlier question period, another Labour MP had accused her of "trying to starve miners back to work," an action that had "disgraced her motherhood." He strongly encouraged the prime minister to "consider joining a closed monastic order as quickly as possible to repent of her sins and reflect on her crimes against humanity."

Thatcher eventually prevailed. She broke the miners strike and trounced Labour at the polls, again and again. Yet any respect she won was, well, grudging. The title of Claire Berlinski's new book, *There Is No Alternative*, comes from an old Oxford don of hers who admits, much as he loathed Thatcher's policies, that perhaps there really wasn't any other way to reverse Britain's relative decline.

The Iron Lady's reputation is much

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higher in the United States and much of the rest of the world than it is in the UK. Right-leaning American observers often fail to understand this about British politics. They assume that since Ronald Reagan is venerated by American conservatives, respected by most Americans, and frequently appropriated by liberals to club the current crop of Republicans, the same must apply to Thatcher. It does not.

But why not? Thatcher was Britain's most effective prime minister of last century. She regularly confounded critics and she never lost an election. Her major reforms were lower taxes, a more stable currency, several wildly successful privatization programs that turned citizens into stakeholders, a less rapacious government, and a much reduced regulatory burden. She launched a decisive military campaign in the Falkland Islands that also toppled the invading government of Argentina's strongman, Gen. Leopoldo Galtieri.

By the time she left office, Thatcher's country was no longer hostage to the whims of its labor unions. Only a few years earlier, in the winter of 1979, strikes had so crippled the country that it suffered from rolling blackouts because of low coal reserves. Garbage and corpses piled up, uncollected, in the streets. ("Come on, there weren't *that* many corpses," Thatcher's detractors tend to respond when this point is raised," writes Berlinski.) The financial situation was so dire that the government of Prime Minister James Callaghan requested assistance from the International Monetary Fund. Now that malaise is long gone (even today's crisis hasn't sent the UK scurrying to the IMF, hat in hand), along with the politics that helped perpetuate it. The Labour Party that rules Britain is radically different from the socialist one that she beat into submission with her handbag.

RELENTLESS On the red side of the ledger, Thatcher presided over massive unemployment, caused in part by her government's monetary management. She brought her country to the brink of civil war with the miners strike, and broke it with the help of British police and intelligence services. Thatcher was finally

deposed in what amounted to a palace coup, when her poll tax provoked public outrage. She radically changed her tune on further European integration, going from Europhilia to Euroskepticism. Critics accuse her of backwardness and xenophobia and of relentlessly pursuing policies that favored the rich.



Certainly, there was something relentless about Thatcher, but a summary of her statecraft is not accurate if you say that it was all about "greed" or "nationalism." Berlinski is not the first to argue that Thatcherism is much more than an economic plan for reviving Britain, though it was that too. Shirley Robin Letwin, for

instance, in *The Anatomy of Thatcherism*, argued that at heart her ideology was about the promotion of the "vigorous virtues."

There Is No Alternative picks up on the theme of Thatcher as moralizer and plumbs the depths. Reagan tended to cast

leftists as misguided. ("There you go again, Mr. President," Reagan would say to dismiss President Jimmy Carter's criticisms during their 1980 debates.) Thatcher took a different, harsher approach that has made her harder to love. Through her "words and actions," she "conveyed...a thesis: Britain's decline was not an inevitable fate, but a punishment." This punishment was not "as many believed, a punishment for the sin of imperialism." Rather, it was "punishment for the sin of socialism. Thatcher proposed that in 1945 the good and gifted men and women of Britain had chosen a wicked path."

Berlinski argues for the enduring importance of Thatcher by casting her as the great scourge of socialism at a time when financial crises have led many governments to take a larger role in controlling their economies. Everywhere we turn these days, the state is advancing and private initiative is discouraged and denigrated. But that's only for now. Thatcher proved socialism's gains aren't irreversible by trampling them underfoot. **R**

An American Icon Speaks Out

Reviewed by Richard A. Epstein

A TIME TO SPEAK: Selected Writings and Arguments

By Robert H. Bork

750 pages; Intercollegiate Studies Institute, 2008

Robert Bork's public career in academics and in public affairs has had, to say the least, its ups and downs. His name is seared in the public mind by his controversial role in the Saturday Night Massacre when he fired Archibald Cox in October 1973, and by his abortive effort to win Senate confirmation for a seat on the United States Supreme

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Court in the fall of 1987. The materials that he draws together in his new book, *A Time to Speak*, do not address those issues directly. The book does, however, offer insight into why he has received so rocky a reception, especially in his failed bid for the Supreme Court, which for the record I supported with some evident reservations. At some points, Bork's work shows a lucidity and power that we should all envy. At other times, it shows a gratuitous nastiness that he just cannot restrain: insisting that Bill Clinton should hang upside down in a dungeon is not the right way to clinch a technical antitrust argument. Yet at 82 years of age, Bork has still not internalized the difference between incisive prose and petty invective, which leaves him in the unique position of being, alternatively, one of this nation's most admired and most reviled public figures.

This collection of previously written

essays does nothing to alter that judgment. By design, Bork has included virtually nothing new in this volume. Instead, he contents himself with a few brief explanatory notes to set his various writings in context and to offer some brief account of his updated views on certain key questions. Otherwise, he lets his previous writings speak for themselves. And speak they do, in two quite divergent voices, on two disparate areas: antitrust and constitutional law. The simple verdict is this: On the bench and off, Bork made enduring contributions to antitrust law. On the bench, he was a splendid constitutional law judge. Off the bench, his newfound cultural conservatism often gets the best of him, so that his writing is by turns occasionally illuminating, but often dismissive, intolerant, uninformed, and wrong.

ANTITRUST Bork's success in antitrust law stems from his uncanny ability to relate all of his particular insights back to one sensible major premise: the desire to maximize consumer welfare or economic efficiency. Prior to his entry into the field in the late 1950s and early 1960s, antitrust case law and scholarship too often lacked any useful organizing principle. To be sure, most early cases eventually subjected horizontal arrangements (i.e., those among rival sellers at the same level of distribution) that either restricted output or raised prices to a *per se*, or automatic, rule of illegality. As Bork rightly observes, this conclusion had in fact been hotly contested in the years immediately following the passage of the Sherman Act in 1890. Early on, the Supreme Court was inclined to hold that only "unreasonable" prices set by cartels should violate the Sherman Act's prohibition against contracts in restraint of trade. As Bork reminds us, one of his early heroes, William Howard Taft (then a judge on the Sixth Circuit) insisted that this one qualification of the Sherman Act would gut its central protection by converting courts into ratemaking agencies that would be forced to review the endless array of cartel price lists, clearly an impossible task. The better approach was therefore to presume the harm from the existence of the cartel in order to give the government a clear path to enjoin those arrangements and fine their members.

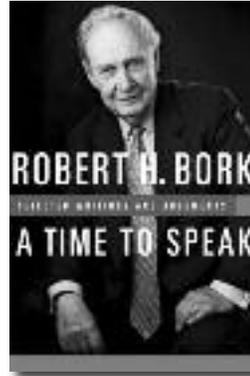
Private parties could then pick up the slack with ordinary treble damage actions.

So far Bork echoed the received wisdom of antitrust law. Yet, by formulating his position in the modern language of efficiency and consumer welfare, Bork broke from many of the earlier writers on the subject for whom cartel behavior was just one manifestation of the insistent populist equation of bigness with badness. Bork recognized that throwing such heavy sanctions against other business practices stuck a dagger in the heart of American commerce. In these contexts, the choice of the consumer welfare trope led to a reevaluation of the rest of antitrust law. Two types require some specific mention here: mergers and unilateral practices of individual firms.

On mergers, it is easy to forget how far the field has moved since Bork's contributions in the 1960s. To Bork and all modern writers, mergers present a more difficult analytical challenge than cartels. The combination of two separate firms not only works to increase the market power of the surviving firm, but it may also have powerful efficiency advantages by allowing firms to harmonize product lines, coordinate production efforts from multiple-firm dealing, cut duplicative costs, and combine research programs. The hard question in all cases is whether the social losses from the restrictive element of any merger outweigh its productive efficiencies. In many early cases that Bork criticizes, the government was allowed to stop mergers between two firms, neither of which had anything close to a dominant market position. The Supreme Court's ill-advised 1962 opinion in *Brown Shoe v. United States*, for example, blocked the merger of two shoe companies that between them had less than 5 percent of the market share on both the manufacturing and retail side of the business. *Von's Grocery* — another antitrust relic — repeated the blunder in the Los Angeles grocery business five years later. To fast forward to the 1992 horizontal merger guidelines propounded by the Clinton antitrust department is to observe a world transformed. *Brown Shoe* mergers are now

per se legal. The action is directed solely to complex mergers involving firms with hefty market shares. Bork's early writings did much to move the field in the right direction.

Bork's choice of world view also exerts a profound influence on the antitrust treatment of a broad class of unilateral practices by individual firms that, beginning in the late 1930s, came under attack for "monopolization" under Section 2 of the Sherman Act. The antitrust populists regarded many of those practices with abiding suspicion. Prior to Bork, courts flirted with imposing liability for predation — the supposed sin of selling goods for too



little money in the short run in the (vain) hope of recouping their gains in the long run once the original rival was smashed. Similarly, antitrust gurus of an earlier generation backed *per se* rules to condemn both minimum and maximum resale price maintenance agreements, exclusive dealing contracts, tie-in contracts (where a customer could only purchase the tying good if he agreed to purchase the tied good as well), requirements contracts, and the like. Bork (inspired by his great teacher, the late Aaron Director) led the charge to remove the *per se* condemnation of those transactions. By helping to explain their efficiency advantages, Bork paved the way for a more balanced rule of reason analysis (which in some cases generates a virtual rule of *per se* legality) that dominates the field today. In his most well-known antitrust opinion, *Rothery v. Atlas* (1986), reprinted in this volume, Bork neatly applies his long-time approach by flatly rejecting an antitrust claim brought by Atlas's independent carrier agents who challenged the company's new policy, initiated after the deregulation of surface transportation, of requiring its agents to abandon their independent business in order to remain in the Atlas family. In what today seems like an easy case, Bork highlighted the efficiency dangers from free riding that arise when one firm is allowed to commandeer the resources of a second for its own advantage, without having to pay anything in return. The short-term gains to customers of the inde-

pendent agent are quickly overshadowed if the dominant carrier is forced to cut back on its investment in its own business under the weight of a legal compulsion to subsidize its competition. Bork's merciless dissection of Rothery's claims still counts as a staple of modern antitrust jurisprudence.

It would, however, be a mistake to read Bork as an apologist for any and all unilateral firm practices. Readers of *Regulation* in particular will remember his spirited attacks on both Visa and MasterCard on the one hand and Microsoft on the other. (Full disclosure: in both instances I worked from time to time on the other side.) He attacked the two credit card companies for mounting a collective refusal to deal with customers in the ordinary course of business. And he thought, as did the courts that reviewed the matter, that Microsoft did engage in unfair business practices to extend its monopoly position.

On those complex matters, however, it seems fair to say that Bork has not been able to forge a modern consensus, in part because it is so difficult to compare the restrictive and efficiency implications of various marketing practices in network industries that at their best do not admit of competitive solutions. The refusal, for example, of MasterCard and Visa to do business with banks that want to carry American Express was held, as Bork urged, to be a collective boycott of the companies in question. But the same trial judge did find that the government failed to make out an antitrust violation by proving that the same banks served on the boards of both associations, given the extensive competition among banks for credit card customers. And his attack on Microsoft for various monopolistic practices again met with mixed success, for while some of the company's practices did restrict entry by rivals to its platforms, as the D.C. Court found, others were pro-competitive. In general, a fair assessment of the more recent litigation in network industries poses novel antitrust challenges that require the use of techniques not developed when Bork did his best work in the field. But this qualification in no way detracts from the enduring importance

of Bork's early work, which remains a towering contribution.

CONSTITUTIONAL LAW Much the same care that one sees in his antitrust writing carries over to his judicial opinions on the United States Court of Appeals for the District of Columbia. His stirring and text-based defense of freedom of expression in *Ollman v. Evans & Novak* (1984) remains required reading for anyone interested in First Amendment law. Yet his extrajudicial writings exhibit a painful contrast between his careful exposition of antitrust law and his broad-brush treatment of knotty constitutional issues. It

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is, regrettably, a problem of temperament, not intellect or approach. Bork has never learned the first rule of good writing: kill your darlings.

It did not have to be this way. On constitutional matters, Bork generally aligns himself in the "originalist" camp, whose central contention is that the interpretation of the key provisions of the United States Constitution should be gathered by using terms as they were used and understood by the Framers. Some phrases like "letters of marque and reprisal" require a close appreciation of historical practice. For others like "commerce" or "freedom of speech," an understanding of their usage in ordinary language is appropriate since the Constitution does not provide its own set of definitions. And in intermediate cases involving such concepts as "due process of law" and "cruel and unusual punishment," sound judgment depends on a combination of both sorts of information. No one who works within the originalist tradition will claim that the originalist tool kit supplies agreed-upon answers to all cases. The originalist who tries to reconcile the conflicting demands of text, structure, purpose, and history will inevitably discover that this wide range of basic materials generates conflicting signals even if we don't make appeals to the "Living Constitution."

Given its close-grained attention to history and text, originalist scholarship rarely adopts the contentious language that defines Bork's extrajudicial writings.

To get some sense of the difference, just compare Bork's judicial and nonjudicial work. Bork leads off his volume with the solicitor general's 1976 brief in *Gregg v. Georgia* that he wrote with Frank Easterbrook and A. Raymond Randolph, now on the Seventh Circuit and D.C. Circuit respectively. Bork put himself in excellent company on a brief that skillfully defends the constitutionality of the death penalty against charges that it violates the Eighth Amendment's prohibition against "cruel and unusual punishment." The brief relentlessly rebuts the contrary claim by showing how a per se prohibition on the death penalty cannot coexist with the Fifth Amendment that speaks about capital crimes, guards persons against being "twice

put in jeopardy for life or limb," and states that no person shall be deprived of life, liberty, or property without due process of law. To my mind, the wholly misguided maneuver of the Supreme Court to introduce a principle of proportionality into the Eighth Amendment unwisely threatens to make the Supreme Court arbiter of the entire criminal code, not only in death cases, but for lesser offenses where the punishment may not fit the crime.

It is nice therefore to report that Bork and his colleagues did persuade a majority of the Supreme Court to embrace in part their historical and text-based argument. But unfortunately, clean victories are hard to come by in contentious areas. So side by side with the historical arguments, the fractured *Gregg* court also intoned that all punishment must respect the "dignity of man," which, however important in the abstract, is beside the point on this interpretive question. And it surely counts as a modern vindication of Bork's interpretive stance that the Supreme Court majority led by Justice Anthony Kennedy stumbled embarrassingly in *Kennedy v. Louisiana* (2008), when a majority of the Court held that the prohibition on cruel and unusual punishment precluded the death penalty for a brutal child rape. No originalist could commit such palpable blunders. The sup-

posed social consensus on this issue is nonexistent. Indeed, the United States Congress had recently imposed the death sentence for child rape on military personnel. At the very least, a Supreme Court that willfully pushes a constitutional provision beyond its natural contours should tread carefully before usurping a traditional legislative function — the definition and punishment of various criminal offenses. On this case, Bork's dire prediction of judicial aggrandizement has regrettably borne real fruit.

SOCIAL ISSUES Alas, *Gregg* and *Kennedy* are not representative of the full range of constitutional issues. The larger question, therefore, is what interpretive approach should be brought to the Constitution writ large. The nub of the difficulty lies in Bork's worldview, which is as weak and fearful on social issues as it is strong and confident on antitrust matters. Anyone who reads through these pages is struck by his deep sense of social alienation that has turned a former libertarian into a strident social conservative who rails incessantly against modern popular culture. Bork's near irrational leitmotif is that the absence of common values will lead our culture into a terrible moral quagmire from which it will never escape. He urgently postulates that all cultures need some common moral glue to hold themselves together. He sees the Supreme Court as a mortal threat to our traditional religious values when it champions a philosophy of excessive individualism, which is only a thin veneer for personal self-indulgence.

Bork is particularly unforgiving of homosexual relations. His essay "The Necessary Amendment" proposes a constitutional amendment that, in anticipation of Proposition 8 in California, states categorically: "Marriage in the United States shall consist only of the union of a man and a woman." In urging this position, Bork dismisses as inadequate a more modest proposal of Michael Greve of the American Enterprise Institute providing that "The United States Constitution shall not be construed to require the federal government, or any state or territory to define marriage as anything except the union of one man and one woman."

Bork's constitutional amendment offers an instructive barometer of his

intense hostility toward any who thinks that the Constitution expresses any overarching world view. Huge portions of his constitutional philosophy are meant to disabuse us of the supposed error that the Constitution provides guidance on either the right or the left to the larger political questions of our time. Bork, for example, dismisses the famous 1905 decision of the United States Supreme Court in *Lochner v. New York* — striking down a law that would have limited the work day to 10 hours as a violation of the right to freedom of contract — with the blunt statement that the right to make contracts is "nonexistent." On this issue he sides with the modern constitutional left. But any such alliance is highly transitory. Time and time again he excoriates the current Court for seeking to impose its left-wing views on a nation that does not share its peculiar constitutional understanding. But Bork's staunch defense of the democratic process comes to a screeching halt on the question of gay rights, where he wants to ban gay marriage once and for all.

In this question, Bork takes every wrong turn in his approach to constitutional law. On the narrow question of gay marriage (Bork cannot bring himself to use the word "gay"), there is ample evidence in his favor, none of which Bork bothers to assemble or analyze, that the police power gives the state sufficient leeway to regulate all sexual arrangements and to impose, however unwisely, even criminal prohibitions against homosexual conduct. Yet it is a fair question why any state should seek to exercise that power today to target certain groups of its citizens, let alone by a constitutional amendment. Bork is happy to speak of the diffuse social harms that he imagines will result from legitimating the practice of gay marriage, without troubling to examine any evidence to the contrary. In so doing, he persuades us only of his growing intolerance, not the soundness of his substantive view. The blunt truth is that the United States today harbors a wider variation of viewpoints and lifestyles than at any time in its history. Bork sounds the clarion call to beat them all into submission to preserve his preferred, religiously grounded vision of the good society.

Regrettably, his claim gets it all pre-

cisely backwards. The wider the range of social mores, the more important it is to limit the state functions to those core activities on which all agree. Under today's conditions, the strong libertarian view that minimizes the role of the state in social affairs is more imperative than ever. The one point on which the nation should insist collectively is that all individuals refrain from the use of force and fraud against other individuals. This account rests on a narrow definition of Mill's phrase, "harm to others," not Bork's woolly notions about some mysterious forces leading to social decay. But one of the necessary correlates of the Millian harm principle is that we never, repeat never, count as an actionable harm the offense that some individuals take to the lifestyle choices of others. Bork may vent and fume about how gay couples lead their lives, just as they may denounce Bork with equally strong language for demeaning the life choices of others. But neither side should ever be allowed to use the instruments of the state to cudgel the other. Bork, therefore, finds in me a willing ally against any state effort to use the antidiscrimination laws to force religious or secular institutions to accept anyone, gay or straight, into their ranks. But the basic noninterference principle works in both directions to prevent either group from mandating how others govern their own affairs. Perhaps governments don't need to remain neutral on cultural judgments in nations with homogeneous views. But unless we are to keep out all immigrants and all new ideas, those days are over.

ORIGINALISM Bork's pinched worldview leads, then, to exactly the wrong position on contentious social issues. Sorry to say, his general constitutional philosophy turns out to be equally unworkable in many other contexts. The first point to note here is the deep tension between his preference for judicial restraint and his insistence that judges interpret constitutional phrases in accordance with the clear sense of their times. The difficulty does not lie in asking how old constitutional commands apply to new social settings. Bork, like every sensible originalist, understands that the commerce clause applies to railroads, airplanes, and telephones that post-date the adoption of the Constitu-

tion. And he is equally correct to note that the general protections of freedom of speech under the Constitution apply as much to television as to pamphlets. And Bork was right eventually to reject his earlier attempt in his famous 1971 *Indiana Law Journal* article, “Neutral Principles and Some First Amendment Problems,” to limit First Amendment protection to some narrow category of political speech. As he later noted, it is impossible to disentangle political speech from artistic expression, and it is not worth trying.

Bork is comfortable with those developments. But on too many issues he is doctrinaire, sloppy, and uninformed. Return for the moment to *Lochner* to ask this simple question: Why treat the right to enter into voluntary contracts — surely one of the distinctive marks of a free society — as utterly devoid of constitutional protection? That result only stems from the improbable view that the Constitution is a random assembly of clauses with no overarching theme. But its genius lies in its incorporation of a political worldview, not in some abject denial of that possibility.

A quick look at the Constitution reveals that the protection it affords to various individual rights looks to be both broad and categorical. “No state shall...make any...Law impairing the Obligation of Contract” is a phrase that contains more than its fair share of interpretive difficulties. But no lesser figures than Chief Justice John Marshall and Justice Joseph Story in *Ogden v. Saunders* (1827) argued that the contracts clause did just that, in a case they lost by a vote of 4 to 3. The Fourteenth Amendment contains the broad statement that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Maybe Bork would see in this broad declaration the indefensibly narrow reading that Justice Samuel Freeman Miller attached to it in the 1873 *Slaughterhouse Cases*, to which Bork makes no reference at all. But why? One defensible reading of the phrase “privileges or immunities” includes the right to make lawful contracts. Similarly, from Roman times forward, private property has included at a minimum the right to the exclusive possession, use, and disposition of any material thing. Why then doesn’t the takings clause — “nor shall private property be

taken for public use without just compensation” — protect the right to make future contracts?

Bork, however, simply ignores the provisions that any careful originalist would have to put on a par with the First Amendment guarantees of freedom of speech and religion. As he acknowledges in his critique of the natural law theories of Hadley Arkes, no sound view of constitutional interpretation could reduce those broad guarantees to nullities, even if it dare not treat them as absolutes. But in dealing with those issues, it turns out that often the best techniques are those of the natural law philosophers who resort to political theory to explain what qualifications should be added on to expand and contract, for example, the First Amendment guarantee of freedom of speech. On the expansion side, the protection of speech that is good for speech must cover both writing and pantomime. But no matter what forms of expression are covered, on the contraction side the freedom of speech does have to yield not only when someone yells fire in a crowded theater, but also whenever people coerce or deceive other individuals by words or gestures. Note the obvious reassertion of libertarian themes in any sensible interpretive framework.

The technique is catching. If Bork is prepared to undertake sensible inquiries concerning speech, why then baldly condemn their use in analyzing rights of property and contract? Do we really think that it is unconstitutional to ban contracts that allow newspapers to buy paper and ink but wholly acceptable to prohibit ordinary businesses from buying paper and ink to keep their business records? Quite simply, any commitment to originalism must give broad readings to broad constitutional protections. A categorical insistence on judicial restraint is inconsistent with a faithful originalism that reads constitutional text against the background of the political theory that animated their adoption. Ironically, Bork’s insistence on the dominance of democratic processes finds, at most, lukewarm support in the Constitution, which at every turn — the electoral college, the early appointment of senators by state legislators, the presidential veto — shows a deep ambivalence toward the democratic processes that he selectively champions.

Bork’s views are also hopelessly inadequate to deal with a second inescapable feature of constitutional interpretation. Quite simply, we do not write on a blank slate. It is all too easy to identify major constitutional practices today that count as manifest deviations from the historical practices and shared understandings at the founding. These departures from the original plan are not confined to points of detail, but go to its core elements. The original Constitution draws categorical distinctions between the legislative, executive, and judicial branches. Prominent scholars, most recently Steven Calabresi and Christopher Yoo, have insisted in their book *The Unitary Executive* that the original constitutional plan contemplates a unitary executive — the president — vested with all executive powers and only with executive powers. One clear corollary of this position is that all independent agencies are flatly unconstitutional for at least two powerful reasons:

- Their members cannot be dismissed by the president, assuming they are in the executive branch.
- As Justice George Sutherland said (weirdly) in *Humphrey’s Executor v. United States*, these officials belong in the executive branch because they discharge quasi-legislative and quasi-judicial powers.

So what do we do now? Abolish those agencies, or continue to live with them? And the same thing can be said about federal judges. The Constitution places “the” — not “some” — judicial power in courts consisting of judges with life tenure. What then are we to make of the oxymoronic Article I (or legislative courts) in which judges serve only for limited terms? Do we blow up the system in the name of originalism, or do we turn a blind eye to those constitutional infelicities on the grounds that they have been legitimated through long practice?

The same dilemma applies to the scope of federal powers that were clearly and strictly enumerated in Article I under the heading “all legislative powers herein granted.” Yet everyone knows that the great transformation wrought by the New Deal judges allowed, in *Wickard v. Filburn* (1942), the federal government to regulate a farmer that fed his own grain to his own cows

under the commerce clause that provides that “The Congress shall have power...to regulate commerce, with foreign nations, among the several states and with the Indian tribes.” No originalist examination of text, structure, or history could defend that tortured interpretation. Yet when the moment of reckoning came, no less a conservative icon than Chief Justice William Rehnquist in *United States v. Lopez* (1995) meekly acquiesced in the proposition that no general economic activity could escape the watchful eye of Congress, while imposing tiny limitations on federal power in saying that it could not prohibit the carrying of guns within a thousand feet of a school — a paltry victory for the principle of enumerated federal powers.

CONCLUSION Our checkered Constitution is thus marked by many wrong turns. But what is so striking about Bork’s collection of *ipse dixit*s is that they never rest on the close and careful reading of text that the originalist method mandates. Thus, the real indictment of Bork lies not in the views that got him into such hot water in his 1987 confirmation hearings. Historically, the regulation of contraception was subject to state regulation under the police power, notwithstanding Justice William O. Douglas’s artful invocation in *Griswold v. Connecticut* of “penumbras” of the Bill of Rights. What really makes Bork a disappointing constitutional scholar is that his moral self-indulgence has led to an utter lack of intellectual discipline.

So this review ends by pointing out this historical irony: When Bork was constrained by the institutional requirements of the judicial role, his evident intellectual and stylistic talents shone through. He was an excellent judge. Indeed, had history been kinder to him, he would have been a distinguished Supreme Court justice because his temper would have been held in check by the norms of his office. But I couldn’t persuade a soul of the soundness of that counterfactual judgment if one took his extrajudicial writings as a barometer of probable judicial performance.

Sadly, it is easy to explain why a great antitrust scholar has had so little influence in constitutional law. Bork may think it is time for him to speak out on constitutional issues. But most people will just tune him out, and for good reason. **R**

Good Corporate Governance or the Appearance Thereof

Reviewed by William A. Niskanen

CORPORATE GOVERNANCE: Promises Kept, Promises Broken

By Jonathan H. Macey
278 pages; Princeton University Press, 2008

Jonathan Macey, a professor of corporate law at Yale, has written a radical analysis of corporate governance — radical in both its simplification of the analysis of corporate behavior and in its analysis of governmental policies that affect corporate governance.

For Macey, the sole goal of corporate governance should be to reduce the variance of “actions by managers and directors that are at odds with the legitimate, investment-backed expectations of investors” — no ifs, ands, or buts about any other “stakeholders.” Macey’s “response to the oft-heard critique of modern, shareholder-centric corporate governance is that the goals and objectives of the corporation should be determined by the organizers of the corporation and disclosed to participants *ex ante* at the time the corporation goes public or otherwise attracts its first outside (non-controlling) investors.” Those goals may include something other than maximizing shareholder wealth, but those goals should be communicated to outside investors when they first purchase their shares. The problem is that all too many corporate executives change the objective function of their corporation in response to some personal or public concern — an action that is best described as a breach of promise to the shareholders.

Most of this book is an analysis of how various institutions and practices affect corporate governance. The most intriguing

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conclusion of the book is that there is an almost perfect *negative* correlation between the institutions and practices that have been shown to strengthen corporate governance and those that are supported by government, business associations, and many academics. Macey’s list of institutions and practices that strengthen corporate governance but are subject to broad criticism include the following:



- the market for corporate control,
- initial public offerings,
- insider trading and short selling,
- hedge funds, and
- banks and other fixed claimants.

In contrast, Macey presents the following list of institutions and practices that he

judges as not effective in promoting corporate governance but that are broadly supported:

- the Securities and Exchange Commission,
- boards of directors,
- accounting rules and the accounting industry,
- derivatives and class action suits,
- whistle-blowing,
- shareholder voting,
- credit rating agencies, and
- stock market analysts.

From my perspective, Macey makes a strong case for his judgment about most of these institutions and practices, and events since his book was completed reinforce his judgments. For example, the nominal budget authority of the SEC increased at a 12 percent annual rate from 1990 to 2005, and yet the agency still failed to detect early the 2001–2002 corporate scandals or Bernie Madoff’s Ponzi scheme. And the credit rating agencies were similarly ineffective in warning investors about the 2001–2002 corporate

scandals or the recent collapse of some major financial firms.

In one judgment however, Macey does not make a convincing case: he concludes that insider trading and short selling strengthen corporate governance, but that whistle-blowing does not. From my perspective, this seems inconsistent with the difficulty of determining who is doing the insider trading and short selling, and why. Macey is more convincing in concluding, “Whistle-blowing and insider

trading are complements, not substitutes.”

The most disturbing conclusion that I draw from Macey’s book is that most of the publicly championed measures that supposedly improve corporate governance actually work — whether by accident or design — to strengthen the incumbent management and corporate board at the expense of the shareholders. For me and many readers of this book, the remaining question is whether to read it and weep or to read it and try to do something about it. **R**

The Best Anti-Poverty Program We Have?

Reviewed by *Walter E. Williams*

MINIMUM WAGES

By *David Neumark and William L. Wascher*
377 pages; MIT Press, 2008

In their new book *Minimum Wages*, David Neumark (University of California, Irvine) and William Wascher (Federal Reserve) offer an extensive review and analysis of the academic literature on minimum wages, including their own research. Starting with a history, they set out to answer several important questions that drive the controversy about minimum wages, such as what is the employment effect of minimum wages and what impact do minimum wages have on the distribution of wages and income, human capital formation, profits, and prices of final goods.

HISTORY In most developed nations, minimum wage laws in some form have existed for more than a century, starting with New Zealand in 1894 and Australia in 1896. In the United States, Massachusetts enacted the first minimum wage law in 1912. By 1923, 15 other states, the District of Columbia, and Puerto Rico had minimum wage laws on their books. By 1930, seven of the 17 minimum wage laws were declared unconstitutional, five others were repealed or not enforced, and

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the remainder were rendered ineffective by adjustments in contemplation of legal challenges.

It was not until 1936, when President Franklin Roosevelt threatened to pack the U.S. Supreme Court that had previously ruled against much of his New Deal legislation, that the Court upheld the State of Washington’s minimum wage law. Justice Owen Roberts, who had previously sided with justices who held that minimum wage laws were unconstitutional, changed his vote, an episode in Court history known as the “switch in time that saved nine.”

The 1936 ruling paved the way for Congress to enact the Fair Labor Standards Act of 1938 (FLSA) establishing an initial federal minimum wage of 25 cents per hour, with an increase to 30 cents the next year, and 40 cents by 1945. The federal minimum wage has increased many times since then, and is slated to become \$7.25 an hour on July 24, 2009. Many states have enacted state minimum wages that are higher than the federal minimum.

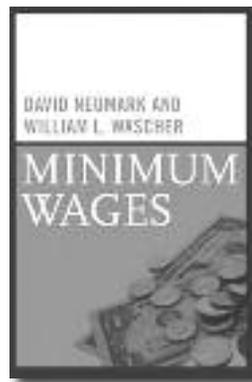
Initially, minimum wage coverage was not as widespread as it is today. During the early 1940s, only 20 percent of the workforce — about 300,000 workers — were covered by the FLSA. Today, about 90 percent of the workforce is covered.

ECONOMICS AND POLITICS There should not be much academic debate about the effects of minimum wage laws. Early economists such as John Bates Clark argued that the effect of minimum wages was to produce unemployment for some workers. But there were progressives such as Sidney Webb and John Commons who thought that workers were paid according to their subsistence needs and that higher minimum wages would encourage an increase in work effort. Most economists then and now believe that the first fundamental law of demand applies to labor markets as well as other resource markets and markets for final goods — that is, when the price of something rises, buyers buy less of it. Thus, the only debatable issue is about the magnitude of the effects of the minimum wage, not the direction of those effects.

However, in 1997 two Princeton University economists, David Card and Alan Krueger, published *Myth and Measurement: The New Economics of the Minimum Wage*, challenging the standard findings about the effects of minimum wages. They concluded that increases in the minimum wage led to increases in employment. The book was a godsend for advocates of higher minimum wages. Further research by other economists demonstrated that Card and Krueger’s statistical techniques were seriously flawed. When their study was repeated using correct statistical techniques, the results were opposite to their findings, suggesting that higher minimum wages led to higher unemployment.

So what is the consensus of economists on the minimum wage? One way to measure consensus is to review what introductory and intermediate economics textbooks say on the subject. There one finds broad agreement that the minimum wage causes unemployment among low-skilled workers.

But politicians’ view of the minimum wage is different. In 1998, following the increase of the minimum wage to \$5.15 the previous fall, President Bill Clinton said the increase will “raise the living standards of 12 million hardworking Americans.” Sen. Edward Kennedy (D-Mass.) said “the



minimum wage was one of the first — and is still one of the best — anti-poverty programs we have.” While the minimum wage is often pushed as an anti-poverty tool, there is no compelling evidence that the minimum wage on balance helps poor families, though some poor families might be better off at the expense of others. The minimum wage as an anti-poverty tool does not quite pass the smell test because, were it so, poverty could be erased from the globe simply by having countries enact minimum wage laws.

After an extensive survey of the literature, in addition to their own research, Neumark and Wascher make several important conclusions. First, the preponderance of evidence shows that increases in the minimum wage have unemployment effects, particularly for low-skilled workers. They suggest that some studies might miss the unemployment effect because they do not give enough weight to what might be considered the second fundamental law of demand, that demand curves are more elastic in the long run. Applied to the minimum wage, this means that employers will have a greater response to an increase in labor price over the long run.

In terms of skills training and schooling, the authors conclude that most evidence suggests that the minimum wage has either no effects or negative effects. In terms of the minimum wage’s effects on the prices of goods and services produced by low-skilled labor, it is unambiguously positive but has no appreciable effect on inflation, primarily because the output of people who work at or near the minimum constitute a relatively small portion of the U.S. economy. Moreover, though the authors did not say it, inflation for the most part is a monetary phenomenon.

Appearing near the end of their book, Neumark and Wascher have a chapter titled “The Political Economy of Minimum Wages” that gets to the heart of what they see as the reason for considerable political support for minimum wages. They say that the public might have a more positive view of the minimum wage than is warranted by the evidence because the impact of the minimum wage on the national economy is relatively small. For that reason, any unemployment effects

are likely to go unnoticed by the public. Also, the beneficiaries of increases in the minimum wage are visible — at least, those who keep their jobs are visible. They are likely to be more numerous than the losers — those who lose their jobs or who do not become employed in the first place.

I think there is another reason, not discussed by the authors, for why well-intended people, with no self-interested hidden agenda, give support to higher minimum wages. It is their vision, though implicit, of

Neumark and Wascher do a yeoman’s job in writing the most comprehensive review, analysis, and discussion of minimum wages.

how the world works. If it is one’s vision that employers require a certain number of workers to perform a given task, then he will advocate increases in the minimum wage because it simply means a higher wage for all workers and lower profits for the employer. Another person, with the vision that employers can substitute capital for labor, employ productive techniques that use less labor, or relocate to another jurisdiction or country, can share the identical concern for the low-skilled, low-wage worker but advocate against increases in the minimum wage because he sees it as making some workers less well off.

HIDDEN AGENDAS The authors do discuss the hidden agenda of some minimum wage advocates. Unions have long supported the minimum wage because it shifts demand toward higher-skilled unionized workers. That is, for many activities, high-skilled labor can be a substitute for low-skilled labor. If one is able to use government to price low-skilled labor out of the market, higher-skilled labor benefits. Businesses can also have a hidden agenda that would compel them to support higher minimum wages. The northern U.S. textile industry supported minimum wages in their attempt to reduce competition from low-wage southern states. American manufacturers sought minimum wages for Puerto Rico as protection from competitors who benefitted from low wages there.

In this chapter, I would criticize the

authors for completely ignoring another important reason why some people support minimum wage laws: the laws lower the cost of preference indulgence. This can be seen in the following two statements from the 1975 book *The Black Worker of South Africa*:

■ “There is no job reservation left in the building industry, and in the circumstances I support the rate for the job [minimum wages] as the second best way of protecting our white artisans.”

■ “A year later he stated that he would be prepared to allow black artisans into the industry provided that minimum wages were raised from Rand 1,40 to at least Rand 2,00 per hour and if the rate-for-the-job was strictly enforced.”

The quotation in the first bullet is from Gert Beetge, the secretary of South Africa’s apartheid-era, avowedly racist Building Workers Union. The second bullet shows the “enlightened” policy that Beetge later embraced. As quoted in the 1961 book *The Industrial Colour Bar in South Africa*, members of South Africa’s Wage Board stated, “While definite exclusion of the Natives from the more remunerative fields of employment by law has not been urged upon us, the same result would follow a certain use of the powers of the Wage Board under the Wage Act of 1925, or of other wage-fixing legislation. The method would be to fix a minimum rate for an occupation or craft so high that no Native would be likely to be employed.”

While no one would argue that racial discrimination is the primary motivation for today’s level of support for minimum wages, the unemployment patterns associated with minimum wages do have a racial component. That is, black workers, especially younger workers, are disproportionately represented among the low-skilled, less preferred workers. Moreover, the effects of a policy or law are independent of its stated intentions.

All in all, Neumark and Wascher have done a yeoman’s job in writing the most comprehensive and thorough review, analysis, and discussion of the minimum wage that one is likely to come across. **R**