

## IN REVIEW

## Markets and Prescription Drug Addiction

REVIEW BY PHIL R. MURRAY

**P**raising and defending markets are among the useful tasks performed by an economist. David Herzberg, a historian, tells the story of a market that is challenging to defend. His *White Market Drugs* is a history of addiction crises in America. Pharmaceutical drugs, it turns out, are a good example of creative destruction.

Getting the right policies on drugs is a challenging task.

**Medicine–drug divide** / Herzberg understands markets. Here is what he means by “white markets”: “legal and medically approved social institutions within which the vast majority of American experiences with psychoactive drugs and addiction have taken place.” White market drugs are “sedatives, stimulants, and opioids.” The “white” in the moniker means legal markets, as opposed to illegal black markets. Also, there is a racial connotation: White market consumers are “the doctor-visiting classes: people who were white, native born, Protestant, middle-aged, and middle class.” Racial minorities and immigrants shop in what the author calls “informal markets.”

The existence of different markets owes to “the medicine–drug divide.” This divide pervades and biases our thinking. People think “medicines” are legitimate and “drugs” are illegitimate. People buy and sell medicines in white markets; they buy and sell drugs in informal markets. Doctors prescribe medicine to patients who need medical care; dealers sell drugs to recreational users. The author proclaims, “Both

law and custom are designed to promote access to medicines while prohibiting use of drugs.” The medicine–drug divide is counterproductive. Too many white market consumers become addicts; too many informal market consumers become prison inmates.

Herzberg blames addiction crises on the profit motive. He claims, “Profit-driven drug markets follow a predictable damaging cycle.” He continues:

Companies hype new medicines as safe and beneficial and sell with insufficient regard to consumer safety; a health crisis ensues as consumers are left ill equipped to make informed decisions; authorities respond with consumer protections and destructive drug wars; the pharmaceutical industry devises strategies to circumvent the new restrictions and start the cycle over again.

**First wave** / There have been three addiction crises in the United States. The first involved opioids beginning around the turn of the 20th century. The second involved sedatives and stimulants spanning the middle of the 20th century. The

third, familiar to contemporary Americans, involved all three white-market drugs and began at the turn of the 21st century.

Americans began consuming opium at the end of the 19th century. In the white market, the opiate of choice was morphine; in the informal market, it was “smoking opium.” Consumption became excessive and the concept of “addiction” was born.

A political coalition made of “therapeutic reformers” and “consumer advocates” sought to regulate morphine as medicine. Another coalition made of “moral crusaders and anti-immigration activists” sought to prohibit smoking opium as a drug.

The 1914 Harrison Act was the significant federal anti-drug legislation of the era. Therapeutic reformers got what they wanted: doctors would decide who gets opioids. Consumer advocates got what they wanted: “strong regulation.” The act required producers, doctors, and pharmacists to pay sales taxes. Only patients with a doctor’s prescription were permitted to possess opioids. The taxes and prescriptions created a paper trail for monitoring.

Although moral crusaders expected the act to prevent anyone from taking opioids for recreation or to maintain a habit, they would be disappointed. Buyers and sellers who could not legally transact migrated to the informal market. According to Herzberg, the primary accomplishment of the Harrison Act was the unintended consequence of creating and fortifying legal versus illegal markets for opioids.

Aside from transforming opium into pain relievers, manufacturers developed synthetic drugs such as barbiturates to relieve insomnia. Manufacturers’ determination to sell barbiturates plus consumers’ zeal for the drug led to a peak in sales per capita during the late 1940s. To halt

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the addiction and overdoses that accompanied the sales peak, policymakers rallied to incorporate barbiturates into the Harrison Act during the 1950s. The effort failed because of a lack of support from key players such as doctors, pharmacists, and the Committee on Drug Addiction. Herzberg implies that by using barbiturates as a model, “the pharmaceutical industry crowded in with a host of new drugs such as amphetamine stimulants and so-called minor tranquilizers.”

**Second wave** / Thus was born the second addiction crisis, in the late 1960s. The data are telling. “By 1962” Herzberg reports, “the [Food and Drug Administration] estimated that eight billion [amphetamine] pills, or a remarkable forty-three per person, were being sold annually.” He does not cite a similar estimate for tranquilizers, though he reports that American doctors wrote 85 million prescriptions for tranquilizers in 1965, when the U.S. population was about 200 million.

“It is difficult to assess how many people actually suffered specifically from addiction,” the author admits, “because there was no effort to measure this statistic at the time.” Nevertheless, he is confident that “white market sedatives and stimulants were responsible for far more addiction and harm than informal-market drugs like heroin.” Scholars estimate that people addicted to pharmaceuticals “probably numbered in the millions,” compared to 600,000 addicted to heroin around 1970. Likewise, estimated fatal overdose rates for “sedatives alone” exceeded those for heroin during the 1950s through the 1970s.

**Controlled Substances Act** / The second wave of addiction and overdose motivated consumer advocates and “medicalizers,” who advocated treatment for addicts, to formulate a policy response.

They produced the Controlled Substances Act of 1970, which regulated the supply side to protect consumers. Herzberg describes it as follows:

The new law weakened criminal punishments for informal-market consumers, while strengthening policing of major white market commercial actors (i.e., drug companies and physicians). It also included a provision that held at least the potential for a much deeper transformation: an administrative mechanism to change the legal status of any substance without an act of Congress. This mechanism was related to the law’s central reform, the creation of a Schedule of Controlled Substances that included both the drugs formerly known as “narcotics” (under the Harrison Act) and those formerly known as “dangerous drugs” (under the Drug Abuse Control Amendments).

This nuanced the distinction between medicines and drugs. Schedule I listed prohibited substances such as heroin and marijuana. Schedule II listed substances likely to be addictive such as morphine, which could be prescribed by a doctor. And so on down to substances on Schedule V, which posed minimal risk of addiction, such as cough syrup. Manufacturers faced production quotas on Schedule I and Schedule II substances. The FDA and the attorney general determined whether and where a substance would be on the Schedule.

Another supply-side regulation worth mentioning is that the Committee on Drug Addiction would assess the addictiveness of sedatives and stimulants before manufacturers could introduce them to the market. Herzberg endorses the Controlled Substances Act except for its “complete opposition to non-medical drug use.”

**Third wave** / Given that estimates of fatal overdoses per person stopped rising during the 1970s and 1980s, the new policies appear to have been effective. Fatal overdoses began to increase, however, during the 1990s. Deaths from opioids rose from less than five per 100,000 to over 20 per 100,000 after 2010.

Herzberg sees four causes of this third wave of addiction and overdose that began around the turn of the 21st century. First, politicians lost faith in treatment and renewed the war on drugs. Second, politicians deregulated parts of the economy, including FDA drug approval. Despite referring to the “so-called drug lag,” the author points out that diverse groups criticized the FDA approval process, including politicians of both parties, “ideological warriors,” and patients suffering from AIDS and cancer. Third, there was a “revolution in American psychiatry”: The American Psychiatric Association switched from defining mental disorders based on their causes to their symptoms. The number of mental disorders increased and “the proliferation of new mental illnesses was a boon to pharmaceutical companies selling psychoactive medications.” Fourth, some members of the “pain reform movement” urged increased use of opioids to treat not only cancer patients and the terminally ill, but “pain patients” in general.

Herzberg writes at length about the way that opioid manufacturers—Purdue Pharma in particular—used the pain reform movement to increase sales. Manufacturers subsidized “radical pain reformers” to preach the “new gospel of opioids,” the message of which was that opioid addiction was nothing to worry about and that long-term pain should be treated with opioids. The author provides evidence that Purdue Pharma captured the FDA as well as “professional and state regulatory bodies.” Whereas doctors had been reluctant to prescribe opioids, state medical boards now listened to arguments that doctors who wrote too few prescriptions for opioids might be committing malpractice by leaving their patients in pain. Also, the industry informed consumers that pain



**White Market Drugs:**  
*Big Pharma and the  
Hidden History of  
Addiction in America*

By David Herzberg  
365 pp.; University of  
Chicago Press, 2020

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was “a medical problem” that could be solved with opioids.

According to a graph furnished by the author, opioid sales per person rose six-fold from 1990 to the peak around 2010. Cases of addiction and overdose accompanied the rising sales. Although Herzberg portrays pharmaceutical industry marketing techniques as quite effective and a primary cause of the crisis, he addresses confounding factors. For example, most opioid addicts were recreational users and did not have a doctor’s prescription. In the end, the author remains critical of industry behavior enabled by inadequate regulation.

**What to do?** / Herzberg gives us his idea of good drug policy, “one that charts a narrow path between the Scylla of prohibition and the Charybdis of the ‘free market.’” He generally approves of “strong federal regulation” and “robust regulatory controls.” He specifically approves of the tactics of the Federal Bureau of Narcotics (FBN) in white markets after the Harrison Act of 1914. For example, the FBN set import quotas on opium and determined which companies would get how much. The FBN countered “marketing hype” that downplayed the risk of addiction with analysis from the Committee on Drug Addiction. The longtime head of the FBN, Harry J. Anslinger, insisted on approving pharmaceutical industry marketing strategies. Herzberg deems these regulations a success because “per capita medical opioid sales stayed relatively flat for most of the twentieth century.” He sees a cost as well: “relatively little exploration of the benefits of opioids or how to provide them safely.”

Herzberg admires “the consumer protection innovations of the 1970s” related to the Controlled Substances Act. In general, they are supply-side regulations that aim to protect consumers. Specific regulations included requirements on what information labels must display, identification of and scrutiny of doctors who were heavy prescribers, and limits on prescription refills. He offers this evidence for the benefit

of these policies: “The 1970s saw declines in both the overall volume of sedative and stimulant use, and the overall volume of emergency room visits and fatal overdoses linked to those drugs.”

Aside from tactical regulations, Herzberg recommends a principle of “harm reduction” that distinguishes between “safe and unsafe use rather than medical and nonmedical use.” Recognizing that there are both benefits and costs of pharmaceutical drugs, he imagines that

regulating the market for drugs could be like regulating the market for cars. That approach to policy seems sensible. At the same time, we should be as wary of government officials wielding and enforcing monopoly power as we are of unethical capitalists seeking profits.

Herzberg’s history proves that good drug policy is difficult to achieve. Perhaps the difficulty is rooted as much in human nature as it is in the role of markets and government. R

## Capitalism and Immorality

REVIEW BY GEORGE LEEF

**T**he economic system based on private property, individual rights, and limited government—that is to say, capitalism—did not emerge by chance. It required a certain moral order, one in which most of the people believed in liberty, tolerance, and something like the Golden Rule. In those places where capitalism arose, the people enjoyed prosperity and progress that far exceeded that which humans had ever before known.

And yet, attacks on capitalism for its supposed immorality abound. Going back to the 18th century, critics complained that it was upsetting the traditional social order and causing misery among the people. They claimed that it had ushered out the era of happy peasants and ushered in the dark, satanic mills of the Industrial Revolution. Those “right-wing” critics were joined in the 19th century by leftist opponents like Karl Marx, who declared that the evils of capitalism could be remedied by the abolition of private property.

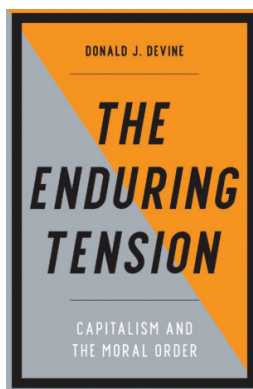
In the mid-20th century, Austrian economist Joseph Schumpeter observed that the institutions and beliefs that had supported capitalism were eroding and predicted that once-capitalistic

nations would descend into some sort of managerial socialism unless those supports could be strengthened. He doubted that would happen.

Also apprehensive about the future of capitalism is Donald Devine in his book *The Enduring Tension*. A scholar with The

Fund for American Studies and former political science professor, Devine has penned a book that provides much food for thought. Just how thin is the ice beneath the feet of capitalism’s defenders and is there anything we could do to keep from plunging into the icy depths?

Devine writes, “The tension between freedom and order is fundamental to capitalist civilization and also the central challenge it faces today.” His book provides a historical account of the various strands of thought on the supposed need to “tame” or “rationalize” capitalism to



*The Enduring Tension: Capitalism and the Moral Order*

By Donald J. Devine  
371 pp.; Encounter Books, 2020



render it morally tolerable through government intervention, if not to do away with it altogether.

**Philosophical and religious views** / John Locke was one of the first philosophers to argue that capitalism stood on a solid moral foundation. A religious man, Locke saw no Christian grounds to criticize the non-coercive acquisition of property. His views are not without detractors. Some of his contemporaries complained that his philosophy gave the green light to unbridled greed and some philosophers today scoff at his ideas' simplicity and even "incoherence." The 20th century political philosopher Eric Voegelin assailed Locke's religious tolerance because it made religion "impotent," thereby "inviting new secular creeds to fill the void in spiritual life." Notre Dame political theorist Patrick Deneen contends that Lockean individualism "undermined the traditional institutions of family, community, and natural law, which are essential to a good social order."

In the 19th century, two of the great thinkers, Alexis de Tocqueville and John Stuart Mill, arrived at different conclusions on the morality of capitalism. De Tocqueville was comfortable with the liberal, pluralist society he observed during his tour of the United States, but Mill (from his British point of view) looked disdainfully on capitalist society, arguing that central government needed to intervene because he considered one result of capitalism—material inequality—to be morally unacceptable.

Marx, of course, excoriated capitalism for its inequality, blaming the institution of private property for the misery of the poor.

Private property has had some very able contemporary defenders, such as Armen Alchian and Hernando de Soto. Both have argued that it is the lack of secure property rights that holds the poor back from being able to capitalize on their work. Unfortunately, far more people are swayed by Marxist criticism of private property than the defenses for it.

No doubt the most famous current critic of the morality of capitalism is Pope Francis, who has written that capitalism

entails "fundamental terrorism against all humanity." The pope has declared that capitalism's "trickle down" of wealth can never bring justice for the poor and must be replaced with a centrally planned world economic order. Devine points out that the pope's view of capitalism is a highly distorted one, based on his life in Argentina. What he saw as "capitalism" was in fact a fascistic mutation nurtured by Juan Peron and his successors. Under it, Argentina has gone from one of the wealthiest countries in the Western Hemisphere to an inflation-wracked mediocrity. Nevertheless, the pope's attacks on capitalism have persuaded many that it is not a moral system.

**Government intervention** / For several decades after World War II, a coalition of American anti-communists, free-market

### ***The unwritten pact between groups on the political right is now coming apart, with the defection of the social conservatives being especially striking.***

advocates, and traditional social conservatives advocated for capitalism among other values. Their unwritten pact is now coming apart, with the defection of the social conservatives being especially striking.

Devine cites the work of Hillsdale College historian Allan Carlson, who decries the effects of capitalism on the family. He blames capitalist businessmen for wanting cheap labor, which eventually drew women into the labor force and away from their traditional household roles. So, Carlson argues, capitalists promoted feminist ideology as well as liberal immigration policies. Rather than allowing the market to determine compensation, he advocates a governmental "family wage" for fathers so that wives could have children and remain at home with them. He contends that the New Deal shows how such federal policies can work.

Throughout the book, Devine offers much evidence that government interven-

tions meant to improve upon the alleged moral and economic failings of capitalism have been costly and often counterproductive. Those efforts don't seem to have helped shore up support for capitalism. President Lyndon Johnson's "War on Poverty," for example, has spent vast amounts and yet failed to accomplish its goal of enabling the poor to become self-supporting citizens.

**Religious morality** / How important is religion in the foundation of capitalism? That is a recurring question in the book. If people don't believe in some "higher law," will they embrace the limits on behavior that necessarily go with capitalism?

Devine cites several thinkers on the subject. Friedrich Hayek, while not a religious man himself, thought that a mere utilitarian outlook was insufficient in society. Hayek wrote that "the loss of what we regard as nonfactual beliefs would have deprived mankind of a powerful support in the long-run development of the extended

order we now enjoy." He saw "great difficulties" from the decline in religious belief. Similarly, British philosopher Kenneth Minogue, once president of the Mont Pelerin Society, maintained that the Christian moral order was what had allowed the openness and productivity of Western nations where capitalism took root.

But even if religion remains strong in America, as Devine contends, that doesn't offer much reason for optimism. Religious belief is neither necessary nor sufficient for supporting capitalism against its foes. On the one hand, Devine notes that some of capitalism's strongest defenders, including commentators George Will and the late Charles Krauthammer, are not religious. (Krauthammer once quipped when asked about God, "I don't believe in him, but I'm afraid of him.") On the other hand, a great many devout people, starting with Pope Francis, find capitalism to be morally questionable at best.

**Music** / Near the end of the book, Devine points out that it isn't only with respect to economics that modern "rationalist" intellectuals have set their sights on a transformation. They have also targeted the fine arts, particularly music. Audiences were accustomed to the melodies, harmonies, and tonality of composers from Bach through Beethoven and Mahler. But in the early 20th century, avant-garde composers decided that traditional music had to be overthrown. Arnold Schoenberg devised the 12-tone system that was meant to disorient listeners. Thus began a musical fad that eventually led to John Cage's compositions that amount to nothing more than "noise through chance operations."

With music, at least, there has been a return to tradition. Devine happily writes that contemporary composers like Gian-Carlo Menotti, David Diamond, and George Rochberg have given up on avant-garde techniques in favor of listenable music and have done so because of their spiritual feelings. That seems to give Devine reason for optimism. If spiritual reawakening can rescue music, might it not do the same for capitalism?

As a lover of music who laments that so few uplifting compositions have been written since roughly 1950, that's a pleasant thought, but I can't see any such trend working in favor of capitalism. There was little to be gained in the undermining of classical music, but there's much to be gained in the undermining of capitalism: money and power.

**Conclusion** / For most of human history, economic systems based on coercion have been the norm. Only in a relatively few nations in a relatively short span of time has the economic system based solely on voluntary interactions among people—i.e., capitalism—held sway. Its production of wealth makes it a target for those who prefer to live by appropriation rather than exchange. They attack capitalism from all angles, with the moral angle currently in vogue. This book leaves you wondering if we will be able to hold onto capitalism (or at least what's left of it) in America. **R**

# The State of the Labor Movement and the Strike Tool

◆ REVIEW BY VERN MCKINLEY

**W**ith Joe Biden as president, one of the policy areas expected to see a dramatic turnabout from Donald Trump's administration is government's relationship with organized labor. The former mayor of Boston, Marty Walsh, has been tapped as the new labor secretary. Consistent with Biden's rhetoric during the campaign

that he would be the "most pro-union president you've ever seen," Walsh has a strong connection with labor unions, having served as the head of the Boston Building Trades Council, a labor union.

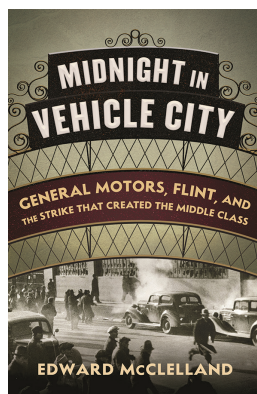
Notwithstanding that appointment, it is unrealistic to think that there will be much of a change in a benchmark percentage cited in this new book by Edward McClelland: "[In 1983] 30 percent of factory workers were still unionized. Today, it's around 9 percent."

**Antecedents** / McClelland's *Midnight in Vehicle City* returns us to the heyday of the union movement during the late 1930s. He has multiple books to his credit, most of them historical reviews about the U.S. Midwest, including *Nothin' but Blue Skies*, which follows the ups and downs of America's industrial heartland, and *Young Mr. Obama*, which traces Barack Obama's time in the Midwest.

*Midnight in Vehicle City's* nearly exclusive storyline focuses on a sit-down strike at the General Motors plant in Flint, Mich., that occurred over a six-week period during the winter of 1936–1937. This story is particularly interesting for me because my father had a union job at an oil refinery in Indiana for 40 years, joining the workforce about the time of the Flint strike.

Owing to the critical issues involved and the timing during the Depression, the dynamics of the sit-down strike were not a simple bilateral conflict between GM in Flint and its workers who initiated the strike. Beyond those two parties, McClelland introduces the reader to the Flint Alliance, an anti-strike group that represented the "silent majority of Flint residents, including Flint autoworkers"; the United Auto Workers of America (UAWA), which was a newly formed national union that had broken away from the American Federation of Labor (AFL); Franklin Roosevelt's administration, which (like the Biden administration) was seen as more labor-friendly than its predecessor; and Michigan's governor, Frank Murphy, previously mayor of Detroit, who later became Roosevelt's attorney general and then a Supreme Court justice.

**Ground zero** / Those familiar with Flint's recent history know about its water crisis, its dramatically shrinking population (about half of what it was in the 1960s) largely attributed to the loss of well-paying union jobs, and its high crime rate. But like many industrial Midwestern cities during the early 20th century, Flint was on the upswing of population ebbs and flows, drawing in a steady stream of willing labor adversely affected by the Farm



*Midnight in Vehicle City: General Motors, Flint and the Strike that Created the Middle Class*

By Edward McClelland  
232 pp.; Beacon Press, 2021

Belt recession and the ongoing Depression.

Although Flint presented opportunities for this ready queue of workers, McClelland describes in graphic detail the difficult working conditions, including exhausting and dangerous work (primarily caused by assembly line “speed-ups”), accompanied by fluctuating and declining incomes. A GM line worker’s compensation was a black box of adjustments. Pay was regularly docked when the assembly line shut down, even if it was not the worker’s fault. As GM line worker Frank Perkins understandably complained, “We’re gettin’ sick of workin’ without knowin’ how much we made.”

Tensions began to build in late 1936 and talk of a sit-down strike began to swirl among the GM workers. McClelland explains the long history of sit-down strikes:

Laborers have been sitting down on the job to protest working conditions since the beginning of the twentieth century.... It’s more effective than walking out of a plant, because if workers abandon their machinery, the bosses can hire scabs to get it running again.

Perkins and his brother Bill decided to try the sit-down tactic after reading about such a strike ongoing at a Bendix plant in South Bend, Indiana. They were promptly fired: “When the brothers arrive for their Friday-night shift their timecards have been replaced with red cards.... A red card means termination.”

The brothers were ultimately brought back to work and were paid for their half-day sit-down strike. But the underlying issues were not resolved and the situation came to a head after UAWA organizers made a sustained push to sign up hundreds of members for the union. After being outed as members, some workers were fired.

January 1, 1937 was targeted for a sit-down strike, which not coincidentally was also the day Frank Murphy would be sworn in as governor. But pressure rose to move up the date when GM began moving metal-shaping dies out of the Flint plant. Flint

produced dies critical to manufacturing auto parts used in every GM facility.

The sit-down strike was initiated on December 30, as announced by union steward Louis Strickland to the men in his department: “This here’s it. There’s a sit-down strike. Everyone is to sit right here.” Managers and plant security were evicted, women were sent home, and the strikers began welding the doors shut. GM management dug in its heels: “Such strikers

***A GM line worker’s compensation was a black box of adjustments. Pay was docked when the lines shut down, even if it was not the worker’s fault.***

are clearly trespassers and violators of the law of the land.... We cannot have bona fide collective bargaining with sit-down strikers in illegal possession of plants.”

Within a week, GM production was cut by 75%. The Flint police and National Guard intervened but were not a major factor.

***A slow, grinding narrative*** / The middle third of the book chronicles the tedium of the strikers’ daily routine of bringing food into the factory, reading newspapers, doing calisthenics, and listening to a band known as the Hillbilly Orchestra, which entertained the strikers. The Women’s Emergency Brigade provided support on a number of fronts.

In response, a GM employee and representative of the anti-strike Flint Alliance wrote a letter to President Roosevelt with some heated rhetoric:

I wish to call your attention to the terroristic activities of the union agitators here. These agitators are mostly outsiders with no stake in Flint and have been desperately trying to scare us workers into joining their so-called union.

Governor Murphy’s initial attempt to get the sides together was, in the words of

McClelland, a “failure.” Murphy admitted that “the government must play a helpful part.” McClelland clarifies: “That means the federal government. A strike that has immobilized the nation’s most important company has turned out to be too big for a rookie governor to handle on his own.”

It would ultimately be left to the Roosevelt administration in Washington to bring the strike to an end, a scenario of interventionism that would be repeated in the labor industry in the ensuing decades. Labor Secretary Frances Perkins’ goal was to bring together GM CEO Alfred P. Sloan and John L. Lewis, leader of the Congress of Industrial Organizations (CIO),

which had recently split off from the AFL. Perkins became a conciliator after first trying some hardball tactics, which included asking Congress for authority to subpoena the disputants in the strike and publicly chastising GM: “However much I think General Motors have failed in their public duty I am still willing to talk to them and explain the situation.” She also brought Roosevelt into the negotiations at appropriate times to, as McClelland describes it, “nudge both GM and the union as negotiations proceed.” The final agreement was for GM to rehire all the workers regardless of their actions during the strike and to negotiate only with the UAWA for six months.

***Conclusion*** / Up until the book’s epilogue, McClelland presents an even-handed historical review. However, the epilogue presents a disappointingly one-sided “politics of envy” summary of his conclusions about the strike and the labor-management relationship generally, with little regard for supporting facts and citations. He refers to the strike as the “battle that founded the blue-collar middle class,” a conclusory statement that is echoed in the book’s subtitle. He further laments that “American workers are back to where they were before the [Flint] strike happened,” without mentioning that the labor costs imposed by



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union negotiators weakened the competitiveness of union-dominated industries.

He adds overblown rhetoric for good measure:

The shrinking of the middle class is not a failure of capitalism. It's a failure of government. Capitalism has been doing exactly what it was designed to do: concentrating wealth in the ownership class, while providing the mass of workers with just enough wages to feed, house and clothe themselves.

He also takes a swipe at Ronald Reagan for taking "the side of employers rather than

unions," a reference to the 1981 air traffic controllers strike. McClelland offers nary a mention that the union's action violated a prohibition against strikes by government employees.

McClelland concludes the book by suggesting that a sit-down strike against Amazon today would be a good start to restoring labor's place in the economy. Obviously, this conclusion was written before Amazon workers in Bessemer, Ala. voted not to unionize their warehouse. My overall assessment of McClelland's book is to enjoy the historical narrative but skip the epilogue. R

## Responding to Fears of AI

◆ REVIEW BY THOMAS A. HEMPHILL

**A**rtificial intelligence is here. How can society make the best use of it?" asks Darrell West, vice president and director of governance studies and the Center for Technology Innovation at the Brookings Institution, and John Allen, Brookings' president. In their new book *Turning Point*, they attempt to answer that question, focusing on artificial intelligence (AI) applications in health care, education, transportation, e-commerce, and national defense. They also review the "techlash" movement against digital commerce and offer suggestions for ethical safeguards as well as lay out their vision of building responsible AI in society. While West and Martin include sections on AI policymaking in China and the European Union in their study, this review focuses on their thoughts on U.S. AI policymaking.

**Exploring AI/** In Chapter One, "What is AI?" the authors embrace the definition offered by Indian engineers Shukla Shubendu and Jaiswal Vijay: "machines that respond to stimulation consistent with traditional responses from humans, given the human capacity for contemplation, judgement, and intention." This definition differentiates AI from mechanical devices or traditional computer software, as AI-based computer systems learn from

data, text, or images and undertake intentional and intelligent decisions based on that analysis.

AI operating today is considered "artificial narrow intelligence" (ANI), which is defined as supporting specific processes with well-defined rules (and, incidentally, does not have any "intelligence" or "common sense"). The next phase of AI, "artificial general intelligence" (AGI), would consist of software that has cognitive abilities similar to humans and a sense of consciousness; so far, it remains technologically aspirational. Machine learning (ML), an important part of AI, consists of algorithms that can classify and learn from data, pictures, text, or objects without relying on rules-based programming. AI is dependent on data analytics, which involve the application of statistical techniques to uncover trends or patterns in large data sets. For AI to make informed decisions, effective ML and data analytics are prerequisites.

**AI applied/** In Chapter Two, "Healthcare," West and Allen note AI opportunities that already exist in assisting physician diagnostics in the fields of dermatology ("skin cancer"), ophthalmology ("diabetic retinopathy"), radiology ("detecting breast cancer"), and oncology ("offering personalized treatment of cancer at the molecular level"). Moreover, ML (specifically, "natural language processing") is being used to analyze text-based medical records to anticipate patient risks. In new drug clinical trials, the application of AI and ML can reduce the time necessary to bring new drugs to market. In addition, AI can more efficiently scan research studies, molecular databases, and conference proceedings to identify possible drug candidates. And AI and ML can combat health care fraud, abuse, and waste (estimated by the U.S. Government Accountability Office at \$75 billion annually) by identifying suspicious treatment plans or lab test usage. Yet, AI problems in health care are pervasive and include having unrepresentative or incomplete data or using AI operationally in a manner that promotes biases based on race, gender, age, income, and geography.

Chapter Three, "Education," finds that AI assists administrative processes, augments human teaching resources, and makes it possible for policymakers to make sense of large-scale data. Moreover, AI opportunities include helping manage school enrollment decisions, personalizing instruction for individual students, employing teaching assistants to answer basic student questions online, tracking "at-risk" students, and protecting against school violence by monitoring AI-linked video cameras. On the other hand, AI risks in educational systems involve student privacy, bias in educational algorithms, and inequitable access to K-12 quality schools.

Chapter Four, "Transportation," focuses on autonomous vehicles (AVs) using AI and ML to combine data from dozens of onboard cameras and sensors, then analyze this information in real time and automatically guide the vehicles using high-definition maps. The authors argue that the benefits of AVs include improving highway

safety (according to the U.S.-based Insurance Institute for Highway Safety, a full deployment of AI-based vehicles would lead to 11,000 American lives saved each year), alleviating highway congestion (translating to an annual savings of \$121 billion in lost human labor), reducing air pollution and carbon emissions, and improving energy usage. In the United States, the authors believe that the major challenge to broad AV deployment is overcoming state governments' idiosyncratic vehicle laws and standardizing guidelines across state boundaries. Other issues to be resolved include a significant national investment in infrastructure to facilitate advanced AV deployment, establishing how AVs are regulated, deciding where legal liability claims reside, and settling data protection, privacy, and security issues involving automotive industry safeguards, as well as adopting legislation against malicious behavior perpetrated against AVs.

In Chapter Five, "E-Commerce," West and Allen explore how this economic sector has grown so dramatically in the United States and the role AI, targeted advertising, and data analytics have played in its expansion. U.S. e-commerce grew from \$28 billion in sales in 2000 to \$451.9 billion in 2017, including 24% growth over the period 2015–2017. Amazon, the largest e-commerce company in America, utilizes ML to predict what products will most likely interest customers and make recommendations (estimated to drive 35% of its annual total sales) to those customers. Likewise, eBay, another U.S. company, deploys AI and ML to design systems for advertisement placement, personalization, visual search, and shipping recommendations for customer-to-customer sellers.

E-commerce challenges include expanding universal access to home internet access (89% of Americans presently have access) and 5G networks; addressing drone delivery

and zoning obstacles; dynamic pricing (i.e., charging different prices based on consumer traffic volume or product demand), often leading to charges of price gouging or overt discrimination based on geography, income, race, age, or gender factors; revising labor laws and improving working conditions for independent contractors; and increasing cybersecurity and data breaches. West and Allen recommend addressing these challenges by encouraging telecommunication firms, internet providers, and satellite companies to build out their networks to underserved communities, experimenting with drone delivery systems to reduce neighborhood traffic congestion, changing rules to require new, large apartment buildings to have a loading dock for delivery purposes, harmonizing tax rules for physical and digital retailers, recognizing labor unions to represent independent contractors, and enacting federal legislation to protect consumers from e-commerce data breaches.

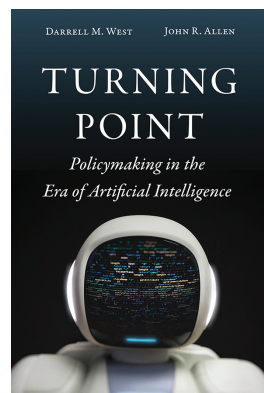
The authors evaluate the role of AI in "National Defense" in Chapter Six.

They argue that AI will dramatically change the speed of war, not only enhancing the human role in conflict, but leveraging technology as never before, as technology is not only changing, but its rate of change is accelerating. The ethical and human rights challenges of relinquishing human control of autonomous weapons systems in combat remain unresolved but are balanced by AI's potential to improve military and political decision-making, speed, and scalability, resulting in a strengthening of leadership capacity, general readiness, and performance on the battlefield. Furthermore, both China and Russia have enhanced their AI capabilities and are investing in robotics and autonomous systems with military applications, resulting in the U.S. confronting increased AI-based national security risks. The authors advocate for

increased financial investment in AI for national security, workforce development in STEM fields (to address a shortage of trained professionals with AI skills), general digital literacy programs, cybersecurity and infrastructure, and strengthening domestic technology transfer and export controls.

**Overcoming technology backlash/** Techlash is a growing phenomenon. In Chapter Seven, West and Allen review several Brookings Institution opinion surveys examining American attitudes toward four emerging technologies: AI, robots, autonomous vehicles, and facial recognition software. In 2018, 14% of Americans surveyed were very positive about AI, 27% were somewhat positive, 23% were not very positive, and 36% did not know or gave no answer. When it came to Americans' impression of robots, 61% were uncomfortable with robots, while only 16% were comfortable and 23% were unsure. Furthermore, when asked how likely they would be to ride in a self-driving vehicle, only 23% of American adult internet users said they would, compared to 61% who would not. Lastly, concerning whether facial recognition violates personal privacy, 42% of Americans thought it does, 28% did not, and 30% were unsure. The authors recognize a substantive backlash among Americans against emerging technologies they believe will invade their personal privacy, be used for public surveillance, take away employment opportunities, and bias certain individuals—all factors leading to a world where machines are ascendant and humans are oppressed.

Given those concerns, West and Allen discuss potential "ethical safeguards" in Chapter Eight, reviewing ways to build trustworthy AI and incorporate ethical considerations in corporate decision-making. Many non-government, academic, and corporate organizations have developed principles for AI development and processes to safeguard humanity. For example, Google, Microsoft, Amazon, Facebook, Apple, and IBM have collectively formed the Partnership on Artificial Intelligence to Benefit People and Society. The organization seeks to develop industry best practices to guide AI development



**Turning Point: Policymaking in the Era of Artificial Intelligence**

By Darrell M. West  
and John R. Allen

277 pp.; Brookings  
Institution Press, 2020



## IN REVIEW

with the goal of promoting “ethics, fairness, and inclusivity; transparency, privacy, and interoperability; collaboration between people and AI systems; and the trustworthiness, reliability, and robustness of the technology.” The authors recommend that business organizations hire professional ethicists for corporate staff; establish an ethical code that prescribes principles, processes, and ways of handling ethical aspects of AI development; establish internal AI review boards for evaluating product development and deployment; require annotated AI and AI audit trails; implement AI training programs; and provide a means of remediation for aggrieved AI consumers.

West and Allen, in Chapter Nine, offer a series of recommendations for “Building Responsible AI.” First, in a time of pandemic and remarkable technological change, it is appropriate to directly address AI’s challenges, improve its governance through distributed collaboration involving front-line people with others who have differing skills to solve AI-related problems, and create guiding principles establishing values, objectives, and criteria for AI’s further development. Moreover, the authors recommend adopting horizontal rules that apply across every industry sector and vertical rules that address AI problems in specific sectors, strengthening public sector oversight through formal AI impact assessments, and restoring the federal Office of Technology Assessment (abolished by Congress in 1995) to evaluate AI and other emerging technologies. West and Allen also recommend creating AI federal agency advisory boards comprised of relevant stakeholders; defining corporate culpability, including reconsidering legal immunity now accorded to digital platforms; and administratively enforcing privacy violations, anticompetitive practices, and discriminatory behavior through existing federal statutes.

The authors strongly endorse improving digital access to Americans; reducing AI biases through independent, third-party audits; and moving beyond existing personal privacy notice-and-consent requirements to data sharing rules. West and Allen support the use of business and personal insurance

to mitigate exposure to AI risks, diversifying the tech industry workforce, and penalizing (and thus, discouraging) malicious or abusive treatments designed to inappropriately manipulate software or use it for unsavory purposes. They also recommend establishing a national research “cloud” that provides computing access to technical experts and academic investigators, developing a U.S. data strategy that enables fair and unbiased exercise of AI, and addressing geographic inequalities and workforce training in America, especially for those Americans not attending universities or colleges. Lastly, the authors argue for improving mechanisms that exercise oversight and control of AI systems, encouraging AI for the “public good,” and actively building a community of democracies deploying AI technology in responsible ways.


**Conclusion/** West and Martin have written a well-researched book that comprehensively covers AI as it has emerged in applications relevant to health care, education, transportation, e-commerce, and national defense and law enforcement. The authors have thoughtfully recognized the “dual-use” aspects of AI, ML, and data analytics, focusing not only on the potential benefits that AI offers American society and the global community, but also the potential threats of misuse and anti-democratic applications by authoritarian governments and mega-corporatist entities. In this light, West and Martin follow the late Georgia Tech technology historian Melvin Kranzberg, whose “Six Laws of Innovation” began with “Technology is neither good nor bad, nor is it neutral.”

One can reasonably conclude from the Brookings survey results that Americans are not comfortable with emerging technology. But this backlash goes much deeper, and West and Allen do not discuss the issue of the economic power (and political influence) that the tech industry has—or, at least, is perceived to have—on American institutions. The authors argue for a litany of ethical safeguards for tech giants to implement (and they have the potential to be important safeguards for

internal control and governance), but a more fundamental problem looms: do Americans trust these corporations to place the “right” people in these important deliberative positions of authority? Moreover, will the ethical safeguards carry any authoritative weight—other than of an “advisory” nature—in the C-suites? Lastly, do tech companies’ previous performance on issues of consumer privacy, security, transparency, censorship, and competitive behavior offer solace to Americans seeking substantive improvement?

Daily headlines announcing “hacks” to major tech (and non-tech) companies’ databases, “ransomware” attacks on businesses, and cyberattacks on defense agencies and government and federal systems proliferate—as most recently evidenced by the attack on Colonial Pipeline. Each year since 2001, the monetary damage caused by cybercrime has increased exponentially and reached an estimated \$4.2 billion in 2020. Moreover, data breaches reportedly exposed 36 billion records in the first half of 2020, alone.

With AI systems eventually having the ability to make decisions that carry life-and-death consequences for individuals, how assured should Americans be that errors or malicious behavior will not have dire consequences for people? The data on the integrity of digital systems appears to be worsening. If “AI is here,” as the authors emphatically state, the future for potential threats from AI applications to consumers and citizens—whether from malicious behavior by hackers or from violations of human liberty and privacy exercised by authoritarian governments—is a realistic outcome. The discussion of the threats of AI misuse and vulnerability needs to move from academia and think tanks to actionable policies developed and implemented by government agencies and corporations.

To that end, West and Martin offer thoughtful recommendations that should be considered by legislatures in democratic countries—as well as by industry associations and major corporations—seriously interested in developing AI for its potential benefits, while ensuring liberty, privacy, and security for their citizens and customers. 

# A Rearguard Defense of the Administrative State

◆ REVIEW BY JONATHAN H. ADLER

**T**he administrative state is under siege, or so it may seem. In just the past three years, the U.S. Supreme Court has invalidated the structure of the Consumer Financial Protection Bureau, invalidated the appointment of administrative law judges at the Securities and Exchange Commission, and curtailed judicial deference to agency

interpretations of their own regulations. More significantly, a majority of justices appear willing to limit Congress's ability to delegate broad policymaking authority to federal agencies, a move that could strike at the heart of the modern administrative state.

Numerous academics and even a few jurists have applauded these developments, hoping for a decades-overdue correction in federal administrative law. In 1952, Justice Robert Jackson warned that administrative agencies had "become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." In decades since, commentators have challenged the administrative state's departures from rule-of-law principles, deprivations of due process, and challenges to the Founders' conception of limited government. Yet this is far from a consensus view, as others perceive such "anti-administrativism" as a more ominous trend and wish to rescue the administrative state from its critics before it is too late.

Harvard Law School professors Cass Sunstein and Adrian Vermeule are in the latter camp. In *Law & Leviathan: Redeeming the Administrative State*, they attempt a rescue. In the face of what they repeatedly describe as a "fundamental assault" on the premises of administrative law, Sunstein and Vermeule seek to explain why administrative law, in operation, is fundamentally moral and sound. The heart of some modest critiques may be true, they concede, but the leviathan of the book's

title is sufficiently constrained by law to preserve its moral legitimacy.

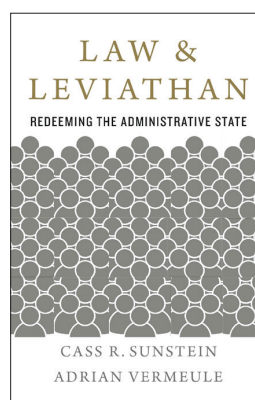
**Surrogate safeguards** / Rather than offer the full-throated defenses of the administrative state each has offered elsewhere, in *Law & Leviathan* Sunstein and Vermeule suggest administrative law has developed a set of "surrogate safeguards" that enable the administrative state to protect public welfare while preventing the worst abuses of bureaucratic excess. Aligned with a set of principles articulated by the legal philosopher Lon Fuller in his 1964 book *The Morality of Law*, these safeguards embody an "internal morality" of administrative law that serves to "both empower and constrain the administrative state." By requiring agencies to follow their own rules, limiting retroactive rulemaking, and ensuring rules are clear, consistent, stable, and non-contradictory, these safeguards serve to "legitimate, rather than curtail, the administrative state"—and for our authors that is all to the good.

These surrogate safeguards do not derive from constitutional text, nor are they to be found in the 1946 Administrative Procedure Act (APA). Rather, Sunstein and Vermeule explain, they have developed within administrative law over the past 70 years as courts have confronted various challenges to agency

action. These safeguards respond to "many of the concerns and objections of those who are deeply skeptical of the administrative state," but ultimately serve to vindicate, rather than undermine, the prerogatives of administrative law. Accordingly, our authors argue, these safeguards should be accepted as a sufficient response to concerns raised by the administrative state's critics—those anti-administrativists that Sunstein and Vermeule dismissively deem "the New Coke." This is a reference to the common-law judge Edward Coke, "a (putatively) heroic opponent of Stuart despotism" who has inspired some of the administrative state's contemporary critics.

At times, the authors seem to suggest that these surrogate safeguards are baked into administrative law itself. As they note, the APA represented something of an accommodation between constitutional formalism and the post-New Deal administrative state. As Justice Jackson famously observed in *Wong Yang Sung v. McGrath* (1950), the APA "settle[d] long-continued and hard-fought contentions" through "a formula upon which opposing social and political forces have come to rest." This "formula" did not give administrative agencies carte blanche, but it stretched prevailing understandings of due process and separation of powers just enough

to provide sufficient flexibility and force to be effective. Like all compromises, this formula may have been unsatisfying—and it is neither explicated in the text of the APA nor wholly derivable from the Constitution's text—but it embodied a set of principles that "offer a powerful rejoinder to many, though certainly not all, of the objections to the administrative state."



**Law & Leviathan: Redeeming the Administrative State**

By Cass R. Sunstein and Adrian Vermeule  
208 pp.; Harvard University Press, 2020

**Deference to agencies** / While situating the origins of such surrogate safeguards in the APA-era, when pointing to examples our authors sometimes focus on more recent doctrinal developments, including some they them-

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selves opposed. As a consequence, parts of their argument seem to be something of a rearguard action, meant to preserve as much of the administrative state—and agency discretion—as can be salvaged in an age in which devotees of the New Coke may seem ascendant. Nowhere is this clearer than in their treatment of *Auer* deference, under which courts are obligated to defer to an agency's reasonable interpretation of its own ambiguous regulation.

*Auer* deference takes its name from *Auer v. Robbins*, a 1997 decision in which Justice Antonin Scalia, writing for a unanimous Court, held that an agency's interpretation of its own regulation must be "controlling" unless it is "plainly erroneous or inconsistent with the regulation." Under *Auer* it did not matter how the interpretation was issued, so long as the interpretation represented the official and authoritative position of the agency. Nor, under *Auer*, did it matter whether the agency's interpretation was at odds with prior understandings of how the relevant regulatory standards might apply. In *Auer* itself the Court deferred to the interpretation offered in an agency amicus brief filed at the Court's request that adopted a non-intuitive (and perhaps politically motivated) interpretation of the Labor Department's rules concerning which supervisory employees (in this case, police officers) were eligible for overtime. Although the idea that courts should give weight to agency understandings of their own regulations was well-established, *Auer* embraced a more categorical rule of deference to agencies' interpretations of their own regulations than had been the norm.

*Auer* was an inviting target for anti-administrativists because the rule it created was so prone to abuse. Residual ambiguity is rather easy to find in federal regulations concerning complex and technical areas of administrative law. Accordingly, under *Auer*, regulated firms had little choice but to acquiesce to post-hoc agency interpretations of potentially ambiguous regulatory text. Provided they were reasonable—a low bar in federal court—such interpretations would likely prevail in any subsequent legal proceedings. This was so no matter the form

in which the interpretation was expressed.

Under the *Chevron* doctrine as it has evolved, an agency seeking deference for its interpretation of an ambiguous *statutory* provision would need to conduct a rulemaking or otherwise act with the force of law to obtain this protection. Under *Auer*, however, obtaining deference for the interpretation of a *regulation* required nothing of the kind. A simple guidance document, "Dear Colleague" letter, or other casual missive would suffice, so long as the agency could convince a court that the underlying rule contained residual ambiguity and the interpretation represented the agency's "fair and considered judgment on the matter in question." Accordingly, *Auer* allowed agencies to adopt and revise regulatory interpretations with the stroke of a pen.

Many commentators viewed *Auer* as something of an outlier within administrative law, unmoored and unsupported by other deference doctrines. Even Scalia came to view it as an aberration, violating the fundamental separation-of-powers principle that "he who writes a law must not adjudicate its violation." Sunstein and Vermeule championed a different view, however. In a 2017 *University of Chicago Law Review* article, they celebrated "The Unbearable Rightness of *Auer*" and rejected any calls for its reform. They argued *Auer*'s downsides were more than outweighed by the value of yielding to agency competence, expertise, and accountability. Given the alternative of instructing generalist judges to offer up controlling interpretations of agency rules, they concluded, "The balance cuts hard in the direction of *Auer*."

Sunstein and Vermeule saw nothing wrong with *Auer* deference as it stood, but the Supreme Court seems to have felt otherwise. When *Auer* came before the Court in 2019's *Kisor v. Wilkie*, a majority of the Court voted against overturning *Auer* outright, but not a single justice offered an unqualified endorsement of *Auer* deference as it then stood. While Justice Elena Kagan's opinion for the Court sought to explicate some of *Auer*'s virtues, this portion of her opinion only garnered the assent of three other justices, one short

of a Court majority. Meanwhile, opinions encompassing the entire Court embraced a suite of conditions and constraints to be appended to *Auer* in the future. If anything was "unbearable," it was allowing *Auer* to continue unrestrained.

As Sunstein and Vermeule remark with some understatement, "Justice Kagan took pains to note that she was merely restating *and expanding* upon limitations already present in the case law" (emphasis added). A less charitable interpretation would be that the Court had to emasculate *Auer* deference in order to save it. As Chief Justice John Roberts and Justice Brett Kavanaugh each noted in their separate opinions, there are likely to be few cases in which agencies prevail with the help of *Kisor*-constrained *Auer* that would not have prevailed had *Auer* been overruled outright.

Insofar as *Kisor v. Wilkie* embodies Fuller's principles that law should be transparent, consistent, and relatively stable, it is not clear it helps the authors' case. *Kisor* represents a fairly late-stage correction that the authors themselves had opposed. Whereas in 2017 Sunstein and Vermeule trumpeted the need to maintain *Auer* deference so as to preserve agency flexibility, in *Law & Leviathan* they acknowledge that, under *Kisor*, agency inconsistency "counts against the agency" as much as if *Auer* unabridged were no longer on the books. As a technical matter, *Auer* survives, as it was not overruled. As a practical matter, it is "hedge[d] round with Fullerian constraints" it previously lacked. Despite their earlier position, in *Law & Leviathan* Sunstein and Vermeule consider this a "vindication of the internal morality of law."

Herein, perhaps, lies the heart of the authors' project: not a defense of administrative law as it could or should be, but a defense of as much of existing administrative law as can be maintained. In this sense, *Law & Leviathan* adopts a defensive crouch, seeking to preserve as much territory as possible as the administrative state's defenders seek higher and more secure ground from which to repel the forces of New Coke. In this light, the "surrogate safeguards" are as much a reserve line of defense for the



modern administrative state as they are a principled accommodation of the anti-administrativists' critique. In the authors' ideal world, such safeguards might not be necessary, but their project here is explicitly about identifying and defending a compromise that may serve as a "non-ideal second best."

In *Law's Abnegation: From Law's Empire to the Administrative State* (2016), Vermeule argued that "the long arc of the law has been steadily toward deference." In this prior telling, courts had become ever more deferential to administrative agencies as the logic of the law worked itself toward greater consistency and coherence. The mere existence of *Law & Leviathan* suggests Vermeule's prior pronouncements may have been a bit premature. As Chief Justice Roberts' refusal to embrace *Auer* shows, one need not drink the anti-administrativist New Coke to think deference has gone too far. The law's internal pressures may now be pushing against abnegation.

**Conclusion** / In the end, Sunstein and Vermeule are likely correct that the administrative state is here to stay. Future court decisions are more likely to trim doctrine around the edges than they are to disembowel the administrative state. Accordingly, the task of modern administrative law will be to accommodate the actual needs of administration with constitutional constraints and liberal values to reach a "sort of equilibrium accommodation." In this endeavor, Fullerian principles may prove useful, particularly insofar as they "both channel and enable" administrative law in ways that are responsive to anti-administrativist concerns about separation of powers and due process of law. Yet, just as *Kisor* departed from our author's preferences, so too this new equilibrium may lie some distance from the location *Law & Leviathan* describes, let alone that which the authors may prefer.

*Law & Leviathan* offers an insightful perspective on the 20th century's accommodation between law's morality and the administrative state. Time will tell whether the accommodation it describes is more past than prologue. R

# Overreacting to COVID

◆ REVIEW BY DAVID R. HENDERSON

**J**ohn Tamny bravely describes the terrible and senseless economic pain caused by politicians panicking in the face of a health concern that—let's be real—is no worse than a bad flu season." So writes *Forbes* publisher Rich Karlgaard in his blurb for John Tamny's latest book, *When Politicians Panicked*. Let's see: The worst flu season

in the last 100 years was in 1957–1958, when the Asian flu (technically H2N2) killed between 70,000 and 116,000 Americans. If a flu today killed the same percentage of the U.S. population, the death toll would be between 135,000 and 223,000. As this goes to print, the official U.S. death toll from COVID-19 is nearing 600,000, which is almost three times the upper limit of the worst flu in a century. It's Karlgaard who should "be real."

After reading that blurb, I didn't expect to find Tamny's book impressive. Fortunately, I did. The highest compliment I can give it is that it's Hayekian. Friedrich Hayek, in his 1945 article "The Use of Knowledge in Society," argued that central planners could not successfully plan an economy because they didn't have the necessary knowledge of people's individual circumstances. Although I read every page and every footnote of *When Politicians Panicked*, I didn't see Tamny ever reference Hayek. (The book doesn't have an index.) But his book is thoroughly Hayekian. He argues that government officials didn't know enough, and couldn't know enough, to shut down whole sectors of the economy. He also argues quite persuasively that government policies like the Paycheck Protection Program badly misallocated both labor and capital, making us poorer than otherwise.

**Lockdowns** / Tamny completely opposes any lockdowns and even any restrictions on large, dense gatherings of people. How does he justify that? Absent such government regulations, wouldn't people have simply continued to get together and

ignore the danger? He argues that "the more lethal something is presumed to be, the less authorities need to do or say anything." He notes, quoting several sources, that much of the decline in restaurant meals, travel, and mass entertainment events happened before any mayor or governor had acted to limit or restrict such activities. The NBA and NHL interrupted their regular seasons and the NCAA cancelled its men's and women's basketball tournaments before governments imposed restrictions. Thousands of colleges evicted millions of students. And large numbers of employers sent their employees home before they were required to.

Would some people have not followed those norms? Absolutely, says Tamny. But he argues that that can be good:

What cannot be stressed enough is that if the goal is figuring out the best way to combat a virus with no known cure, those who don't follow norms are as crucial producers of information that will enable victory as those who do. Precisely because they don't follow the unwritten societal rules, their contracting of the virus (or not), their sickness (or not) from ignoring broad social convention, and their death rates relative to the COVID-obsessed would hopefully give those searching for solutions exponentially more to work with.

This reasoning does ignore the whole idea of negative externalities. But now that we've had extreme government lockdowns for many months—lockdowns that were badly thought through—Tamny could

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argue that harms from the lockdowns were worse than the possible externalities from the virus.

In a chapter titled “They Didn’t Need a Law,” he points to what would have happened if businesses had been allowed to be “individual laboratories.” Some “would have limited crowds by decree and some would have used surge pricing to moderate crowds.” He points to One Manhattan Dental in New York City, which offered a \$1,500 private appointment to any patient who wanted to be the only one in the office. The beauty of freedom, he writes, “is that people are free to innovate.” Compare that to the innovation-deadening one-size-fits-all approach that most state governments used.

#### **Saving and creating jobs /**

And then there was the federal government’s more than \$600 billion Payroll Protection Plan, which paid small businesses substantial amounts to keep their employees on the payroll even if the employees were being underemployed. Was that a good idea? Absolutely not, says Tamny. He points out what should have been obvious to all but apparently wasn’t: government officials had no way of knowing which jobs should be kept and which ones shouldn’t. Precisely because some customers might want less human interaction because of their fear of the virus, “it was possible that businesses would devise all manner of ways to save on labor while meeting new or evolving needs of customers that they didn’t express before the spread of the coronavirus.” He notes that some factories and warehouses were rushing to “automate away some aspects of human exertion simply because employees of companies like Amazon were demanding the evolution.”

But isn’t it important that government save jobs? Every economist knows,

or should know, the problem with that view, but Tamny has a particularly refreshing way of making the point. In a chapter titled “They Would Stop You at ‘Job Creation,’” Tamny writes that the fact that the Paycheck Protection Plan “was all about job preservation was the surest sign of

how pointless and wasteful it was.” No one, he writes, starts a business with the goal of creating jobs. You create a business to make money and you make money by creating goods and services that people value. Indeed, often you do well by introducing technologies that allow you to produce more with fewer workers. That’s the story of agriculture, steel making, auto production, and pretty much everything else. Tamny writes, “If readers are looking for 100 percent labor force participation, just travel to the world’s poorest countries.” There you will see very little unemployment and a lot of people working

in “unrelenting drudgery.”

One obvious fact about a dynamic economy that even many economists missed in their advocacy of government bailouts is that companies that are doing badly at one time can do better later and companies that are doing well now can fail later. Tamny doesn’t miss that point. He conducts a quick conceptual experiment, asking what would have happened if the virus had hit in 2000 instead of 2020? Would Apple, Amazon, and Netflix have qualified for loans? Probably not. Which companies might have qualified? Tamny suggests, quite plausibly, AOL, Enron, and Tyco.

#### **Are economists all Keynesians now? /**

Tamny also lays out the problems with thinking that the way to stimulate an economy is for government to stimulate consumption. That idea is one of the worst legacies of Keynesian economics.

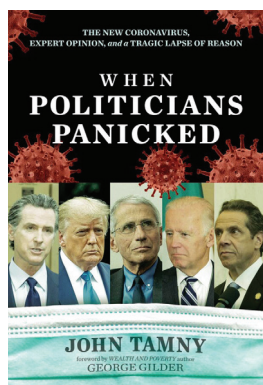
Unfortunately, he writes as if he believes that all economists think this way. But even many New Keynesians see only a limited role for government stimulating consumption in demand-side recessions. And many, many non-Keynesians—present author included—agree with Tamny. But in numerous places in the book, Tamny lumps us all together as unreformed Keynesians.

He goes even further in criticizing economists. He writes:

Economics is said to be a science, but it’s generally a profession for the lazy and thoughtless. Almost to a man and woman, nearly every credentialed economist in existence believes that economic growth causes inflation (no, it’s the surest sign prices are falling), that government spending boosts growth (no, the political allocation of precious resources weights on progress), and that wars grow an economy.

To be sure, there are economists who believe the ideas Tamny cites, although many of them are neither lazy nor thoughtless. There are also many economists who are on his side of all three of the above issues. So why does he not seem to know that? His caricature of economists is the major failing of an otherwise quite successful book.

Tamny also points out how dangerous it is for governments to rely on experts because the experts often don’t know much. He quotes investigative journalist Michael Fumento’s statement in his 1990 book *The Myth of Heterosexual AIDS* that Dr. Robert Redfield had said in the 1980s that the chance of male-to-female vaginal HIV was 50% per contact. Does Redfield’s name ring a bell? He was the director of the Centers for Disease Control and Prevention from 2018 to 2021. And although Tamny doesn’t mention this, presumably because he had already sent the book to press, in September 2020 Redfield testified before a Senate committee that wearing a face mask might offer more protection from the coronavirus than getting vaccinated. Tamny mentions many



*When Politicians Panicked: The New Coronavirus, Expert Opinion, and a Tragic Lapse of Reason*

By John Tamny  
286 pp.; Post Hill Press, 2021

other examples of expert failure.

Tamny's less-important failing is his ambivalence about statistics. In his final chapter, "If Lockdown Critics Make This a Numbers Game, They Ensure Future Lockdowns," he starts by stating his conclusion, writing, "This chapter will conclude with an argument that numerical battles are a waste of time." But if he really believed that, he wouldn't have written most of the chapter, which is chock-full of numbers. His more nuanced conclusion is that "if we make the C[OVID]-19 argument solely about numbers, we hand the very politicians who created so much personal and economic misery the power to do so again."

I agree with Tamny that we should not argue *solely* about numbers and should give a full-throated defense of freedom. I would love to have politicians who care a lot about retaining and even increasing freedom, but such people are in short supply. If politicians had been willing to look at numbers available in the spring of 2020 that showed the death rates from COVID-19 to be three orders of magnitude higher for the very old than for the very young, even those who cared little about freedom would have had trouble justifying many of their extreme measures. The moral of the story is that we should use both pro-freedom and statistical arguments. R

## Is Populism the Savior of Democracy?

◆ REVIEW BY PIERRE LEMIEUX

In his recent book *In Defense of Populism*, historian Donald Critchlow of Arizona State University presents a fascinating history of the main populist protest movements and their political successes in the United States since the late 19th century. Critchlow defines populism as grassroots, anti-elitist movements that change public policy.

He argues that these "social movements" are necessary for "democratic renewal" by translating popular discontent into government actions. Populism is necessary for democracy but, he notes, democratic change has paradoxically generated "an enlarged bureaucratic government that is further removed from the people."

His argument is interesting but has some weak links.

**American populism** / Critchlow's story starts with the populism of the last two decades of the 19th century, culminating in the founding of the People's Party (also called the Populist Party). At the federal level, populist ideas included an income tax, antitrust legislation, more regulation of banks, expansion of the money supply, protection of workers and consumers, and federal aid to farmers. State-level populism

often called for even more government intervention.

The populist vision might have been, as Critchlow claims, "to employ statist methods as a means of restoring small competitive capitalism," but it certainly called for much government intervention. Most of the populists' demands were fulfilled by subsequent progressives and New Dealers. After the 1912 election, both the Republican and Democratic parties "accepted the construction of the new regulatory state. The era of big government had begun."

By the time of the New Deal, populism had become more clearly socialist. Sen. Huey Long of Louisiana proposed an annual income for every American family. In 1937, supporters of populist Minnesota Gov. Elmer Benson, "known for his blunt, bellicose rhetoric," occupied the State Senate chamber to protest the rejection of the

governor's legislative program. At the federal level, the Socialist Workers Party was created in 1933. Often organized or supported by socialist or communist activists, strikes were frequently bloody. The new populists were more radical than Franklin Roosevelt and often turned against him.

Critchlow's definition of populism is very wide, which has both benefits and drawbacks.

**Civil rights movement** / The next populist period according to Critchlow was the civil rights movement launched in the 1960s. Let's mention that a large part of it can be seen as a libertarian movement. In the South, blacks not only lacked an effective right to vote but, more important, were often deprived of equal rights in their daily lives. White mob violence, often with state governments' approval and even support, was frequent. Juries acquitted white aggressors.

We can conclude from Critchlow's detailed history that many leaders and activists of the civil rights movement were not "grassroots," at least in the sense of representative of average Americans. The concept of grassroots is not self-evident. One indication is how, after the passage of civil rights legislation, the movement splintered into small ideological and revolutionary groups. The Black Panther Party had ties with the Socialist Workers Party of Trotskyist obedience and embraced Maoist indoctrination. Promotion of violence spread to other movements, including paradoxically the Student Nonviolent Coordinating Committee (SNCC), which had waged many peaceful and heroic actions against Southern mob violence. After his 1966 election as SNCC chairman, Stokely Carmichael moved the organization toward black power and black nationalism.

There were lots of cranks in the Black Panthers, including founder Huey Newton who bestowed upon himself the title of "supreme servant of the people." I would not say that libertarian economist and political theorist Murray Rothbard was a crank but, Critchlow tells us, he supported the Black Panthers. Wider public opinion,



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including its liberal-left component, soon turned against this drift despite a continued support for civil rights laws.

Interestingly, the extreme wing of the black liberation movement offered a foretaste of today's assault on Western civilization. "When you talk about black power," Carmichael said, "you talk of building a movement that will smash everything Western civilization has created."

### Second-wave feminism /

Extremist feminists traveled the same road at about the same time. Critchlow's description of second-wave feminism in the 1960s and 1970s (the first wave having started in the early 20th century with the suffrage and progressive movements) is also very instructive. The milestone victories of the new feminism were the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 (which prohibited discrimination on the basis of sex), Title IX of the Education Amendments of 1972 (which prohibited discrimination in any education program receiving federal financing), and the 1974 Equal Credit Opportunity Act.

Second-wave feminism was partly taken over by misandry, abortion-rights absolutism, and even lesbian separatism. At a 1969 activist meeting, a woman testified that when she learned she was pregnant, her first reaction was "Get this child out of me!" She derided her (probably patriarchal) boyfriend's reaction of "Isn't it romantic?" In Shulamith Firestone's 1970 book *The Dialectic of Sex: The Case for Feminist Revolution*, she wrote that "women stood on the verge of a new epoch in human history in which culture could be reordered" to replace male oppression. She wanted a "revolt against the biological family," an idea that, Critchlow notes, strangely resembles the test-tube babies raised by the state in Aldous Huxley's *Brave New World*.

Reading Critchlow's description, second-wave feminism looked more like an elitist than an anti-elitist movement. It became enmeshed with the New Left and relied on an elite of white, middle-class, privileged women. Betty Friedan, author of the 1963 *The Feminine Mystique*, was close to communist groups. Under those conditions, it is not surprising that "one of the greatest gains feminism made was inside the academy, as women's studies took root."

Feminism was a fractured movement, even over the proposed Equal Rights Amendment (ERA). Approved by Congress in 1972 with the support of Richard Nixon among other politicians, the amendment seems uncontroversial: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Yet,

many "New Deal liberals" and feminists opposed the ERA because they wanted government *privileges* for women, not equal rights, including in labor law. The National Organization of Women, founded in 1966, favored the amendment but, obsessed with abortion and gay rights, campaigned for it separately from the pro-ERA mainstream.

Critchlow could have added that, from this twisted discriminatory perspective, ERA opponents were right to be scared. The 1972 Title IX has been more and more frequently invoked to prevent colleges and universities subsidized by the federal government from discriminating against men with special programs for women only. (See George La Noue's "Title IX for Men," *Law & Liberty*, February 23, 2021.)

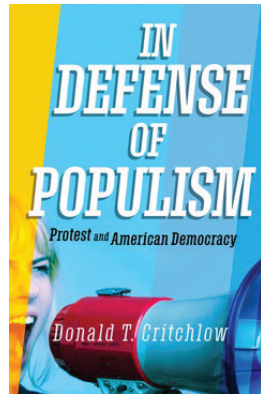
Conservative activist Phyllis Schlafly's STOP ERA movement saw the amendment as "a loosely worded constitutional amendment that would be interpreted by the courts." She very effectively campaigned against the ERA, which died after failing to receive the approval of a sufficient

number of states. Her movement was probably more grassroots and less elitist than the feminist movement. Public opinion polls suggested that women's liberation remained popular through the rest of the century but that those who called themselves feminists were not.

I would add to Critchlow's scholarly history that, like other populist movements, second-wave feminism was marred by a clash between two sorts of rights: positive and negative. It is one thing to request negative rights (rights against government-built obstacles to individual liberty and formal equality) and another thing to call for government to grant positive rights (special rights to be exerted against other individuals in society). Critchlow does note that the feminist movement "called on government to redress social problems of women, even while promoting anti-statist policies." Feminists asked for equal pay for women (regardless of market-determined wage rates), federally supported child-care centers, job training for minority women, and more social welfare programs.

**Populism on the right /** *In Defense of Populism* also analyzes what Critchlow sees as a populist reaction of the American political right following World War II. "The grassroots right expressed a rebellion against the welfare-regulatory-administrative state that was a consequence of previous social movements," he writes. He distinguishes two phases: the anti-communist and religious right of the 1950s and 1960s, and the anti-statist and anti-elitist right of the Reagan sort in the 1970s and 1980s.

Dominated by religion and anticommunism, the first phase was often proto-Trumpian in its simplistic understanding of the world. Critchlow gives many examples. Carl McIntire, a Presbyterian minister and popular religious radio broadcaster, believed that Catholicism was more dangerous than communism. Originally a supporter of Barry Goldwater, who was more a libertarian than a conservative, McIntire later became, more logically, a follower of segregationist George Wallace. Billy Hargis, another radio preacher, thought that



*In Defense of Populism: Protest and American Democracy*

By Donald T. Critchlow  
224 pp.; University of Pennsylvania Press,  
2020

“it is ignorant people who are going to save this country.” His associate, David Noebel, believed that the Beatles were part of a Soviet conspiracy to brainwash American youth with hypnotic techniques. Robert Welsh, founder of the John Birch Society, thought that Eisenhower was a Soviet agent and Sputnik was a hoax. Later, the Birchers shifted to attacking the New World Order as a Masonic conspiracy.

All that without the help of today’s social networks—not a mean feat!

Critchlow includes Ronald Reagan in this phase of the right-wing populist movement, which is debatable, as is his claim that Trump amplified Reagan’s message. Although Reagan turned out to be more conservative than libertarian, he was not (let the truth be told) an ignorant buffoon.

Critchlow views the second phase of conservative populism as an extension of the cultural backlash of the first phase as well as a reaction to government corporate subsidies in the Great Recession. He correctly understands that the libertarian element in the Tea Party was rapidly overcome by conservatives.

Among many other interesting facts, *In Defense of Populism* reports that, as late as 1976, Republicans were more supportive of abortion rights than Democrats. In 1967, for example, Reagan, freshly elected governor of California, signed an abortion rights bill into law. Republicans became anti-abortion to attract Catholics and Protestants, the latter newly converted to that position.

**Populism and discontent** / Critchlow believes that if democratic politics responds to populist protests, popular contentment will result. But nothing is less sure, as the 20th century suggests. The more government intervenes to satisfy this or that populism by granting positive rights to new electoral clienteles against others, the more discontent and politicization results.

The author of *In Defense of Populism* does not seem to envisage the possibility that popular discontent is more a consequence than a cause of galloping democracy under the form of populism. I think he would benefit from reading Anthony de Jasay’s

1985 book *The State*, where he sketched out a model of political competition in which, to satisfy more and more grievances, the state must control all of society like slaves on a plantation.

Critchlow suggests that by 2016, “right and left shared little—except on a single point: government should not be trusted.” The reality, I believe, is very different: each side only distrusts a government run by the other side. When government is on their side, both right and left trust it blindly. Each succeeding populism thus adds its own bricks to the construction of the totalitarian state. Discontent grows along.

Critchlow is right to identify Sens. Bernie Sanders and Elizabeth Warren as populists. But this does not improve his case that populism is necessary for democracy. Another Trumpian episode, this time on the left, would only exacerbate the risk for the future of America.

The source of the problems with Critchlow’s thesis may lie in his initial definition of populism, which confuses competitive

authoritarianism or serial populisms with democracy, at least in the sense of liberal democracy. (See “Populist Political Choices Are Meaningless,” Spring 2021.) Populism is a sacralization of the will of the people and a degeneration of liberal democracy, not its savior.

These failings should not distract us from *In Defense of Populism* as a good book of American history. It is scholarly and as objective as such books can be. When I started working on this review, I had read nothing from Critchlow and knew nothing about his political leanings. I tried hard to ferret them out while reading the book, with no success. As I read, I made a few puzzling observations, such as his use of the words “anti-statism” and “anti-statist,” which do not belong to the vulgate. Only after I had basically finished this review did I check out the author. He is a Republican—obviously an intelligent and knowledgeable one. Hopefully, this means that this sort of Republican is more common than the last five years might have led us to believe. R

## The Ignored Consequences of the Fed’s Interventions

◆ REVIEW BY VERN MCKINLEY

**T**he Federal Reserve’s massive interventions in response to the Great Recession led many to become great admirers of the institution. However, some financial industry observers had a very different reaction. A select few of them wrote hard-hitting books to explain to the public their policy criticisms of the Fed and to assess

the direct and indirect consequences of its interventions. I have previously reviewed two of those books: Nomi Prins’ *Collusion* (“Colluding with Central Banks, Not Russians,” Fall 2018) and Danielle DiMartino Booth’s *Fed Up* (“Black Hats and White Hats but No Clear Methodology,” Summer 2017).

Karen Petrou’s *Engine of Inequality* is a similar book, though it also examines Fed policy in response to the COVID crisis. It engages in a sharp, post-COVID critique of

the adverse effects on income and wealth inequality of those broad-ranging interventions. Petrou is the co-founder and managing partner of Federal Financial Analytics, which has been a mainstay in banking and financial-sector consulting in Washington, D.C. since the 1980s. *Engine of Inequality* is her first book.

**Getting right to the point** / Anyone who has followed the ups and downs of the financial sector and its fits of instability since

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2007 remembers where things stood just over a decade ago. The financial authorities, with the Fed leading the way, had bailed out the big banks, arguing that they were simultaneously helping Main Street. In a widely watched *60 Minutes* interview, then-Fed chairman Ben Bernanke walked around his hometown of Dillon, S.C. to dramatize the point. The financial authorities rallied behind the 2010 Dodd-Frank Act reforms, which in the words of President Barack Obama were going to put a stop to taxpayer bailouts once and for all.

In her introduction, Petrou starts fast and sets the scene well by summarizing the post-Great Recession environment and the ensuing COVID-19 recession. The Federal Reserve “proclaimed that all was right with the national economy and financial system,” and the “Obama administration also congratulated itself on the sound economy and resilient financial system.” Then the pandemic destroyed the confident narrative of the Fed and the Obama administration. In Petrou’s words, “COVID blew away every one of the foundations on which the Fed thought the economy and financial system so securely rested.”

**Focus on inequality** / There has been a recent push from policymakers for the Federal Reserve to bring its vast powers to bear on far-flung issues such as climate change and racial equity. There are some elements of that thinking in *Engine of Inequality*. Petrou criticizes the Fed’s leadership for the assumption that “inequality and even endemic racism are awful, but still someone else’s problem to solve.” Her primary argument is that addressing inequality fits comfortably within the Fed’s current explicit mandates of maximum employment, price stability, and moderate interest rates.

She dedicates an early chapter (“How Unequal Are We?”) to defining inequality and presenting evidence that it has been increasing in the United States. By inequality, she means not just income inequality, but also wealth inequality:

Throughout this book I refer to “economic inequality” even though much popular discussion focuses on “income inequality.” The reason to focus more broadly on economic inequality is that there are at least two key components that determine the have-a-lots, have some, and have-nots.... First indeed comes income.... I’ll look not only at what you earn, but also at what you have left over.... In short, income is what you earn and wealth is what you keep. Wealth is usually measured as net worth.

Graphically, Petrou makes the case that, since the 1980s, inequality has gotten much worse. She relies on time series data showing the share of income distribution produced by the top 1% of earners as

compared to the share for the bottom 50% of earners in the United States and Western Europe, as well as a comparison of growth in income and wealth for the top 10% as compared to the bottom and middle quintiles. Her analysis leads her to conclude, “Western Europe remains more equal than the U.S.”

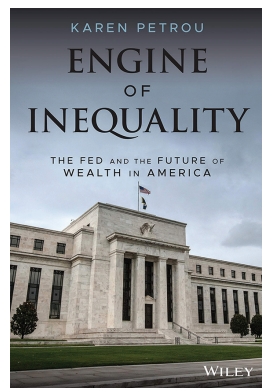
**Bailouts and ultra-ultra-low interest rates** / Petrou claims throughout the book that this level of inequality results from the Fed’s interventions. One direct way the “haves” benefited from Fed actions was through the bailouts of financial institutions and more broad-based market support programs, which most certainly redounded to the benefit of well-off investors. She goes further to point out the interventions’ damaging long-run effect:

All of these Fed bailouts create vicious cycles in which risks grow higher, bailouts seem even more essential to the Fed, and financial markets become even more assured that, the next time stress rolls around, the Fed will open its bailout windows all over again.

I agree with her solution, which is to follow a policy that “retracts the Fed’s safety net from beneath financial markets.” She also faults the Fed for relying on performance benchmarks driven by “across-the-board indicators,” which to her “matter only to the wealthiest Americans who own most of the assets in the stock and bond market.”

Petrou also makes the case that “ultra-ultra-low” interest rates engineered by the Fed cripple the ability of lower-income and younger households to accumulate a nest egg for purchasing a home and for setting aside money for educational expenses and retirement. For older Americans already in retirement, these rates constrain the returns for low and moderate-risk investment vehicles. For her, the answer is to assure that the Fed “recrafts U.S. monetary policy so it sets interest rates at levels [she considers] a living return.”

Although I agree with the argument that the distortive effects of abnormally low rates can hurt those in lower-income groups and on a fixed-income, Petrou’s case studies were not always convincing. To support her thesis that the poor have been made worse off by the Fed’s low interest rates, she bemoans the case of “a parent saving for a child’s education [who] puts \$2,000 a year into a savings account.” In an environment where “the parent earns only the half of one percent interest rate paid on small savings,” such a small saver would be underwater, taking into account inflation. She implies that lower-income households have no easily accessible platform to participate in the “77 percent” returns achievable in the stock market from 2007 to 2019 given that “the bulk of household stock ownership ... was in the hands of the wealthiest 10 percent of households.” What she completely misses



**Engine of Inequality:**  
**The Fed and the Future**  
**of Wealth in America**

By Karen Petrou  
288 pp.; Wiley, 2021



is the ability of this type of small saver to invest for the long-term in the stock market by choosing a 529 education account. Through these accounts, those in lower income groups can become part of the investor class and do so with very low minimums (well below Petrou's \$2,000 a year example).

**Not a partisan advocate, but a clear narrative** / Throughout *Engine of Inequality*, Petrou fancies herself a technocrat schooled in the facts when speaking about inequality: "Because my nature is one of an analyst, not an advocate, I dove into the data." She offers several interventionist programs for those of modest incomes, including a Family Financial Facility to "aid solvent families experiencing sudden income loss and do the same for small businesses forced to shut their doors," and "a bank focused on equality." Her policy prescriptions definitely fall on the progressive side of the ledger, as she admiringly describes Western European social and economic policy and favorably cites economists Joseph Stiglitz, Paul Krugman, and Thomas Piketty.

Her analysis of income inequality as compared to Western Europe is incomplete, as she does not focus on how lower-income earners in the United States dynamically improve their lot over their life cycle to join the middle class or how their incomes compare to those in other developed countries. Instead, she primarily compares them to Jeff Bezos and other top earners. Petrou regularly engages in a zero-sum game analysis of class warfare, as if to say that if Bezos is wildly successful or purchases a "Beverly Hills estate [at a cost of] \$165 million" it somehow takes food from the mouths of those at the other end of the income and wealth spectrum. She makes a good case that we should not bail out millionaires and billionaires, but she does not explain why it is justified to bail out or subsidize credit for anyone else given the unintended consequences and resulting dependency of doing so.

Although Petrou spends much of the

book criticizing the Fed and the unintended consequences of its interventions, she still makes the case that we should push forward with greater government intervention. She summarizes this in a curious comment in the Introduction: "Much in this book lambasts the Fed, but I still trust it with my money more than Facebook." The question for me is why. Similarly, she states in discussing payment innovations like Facebook's Libra that "many in the citizenry prefer central bankers to big bankers and Big Tech." Her supporting arguments are not convincing

given the history of the Fed's management of the payment system.

*Engine of Inequality* provides good, reasoned research for the debate over the Fed's role in the economy and the financial system and makes important points about the distortions caused by the Fed and their effects on people of modest income and means. But it is a grand leap to go from this reasoned critique to agreeing with the policies she advocates. Those policies have the same flawed underlying basis as the government intervention that the Fed she so harshly criticizes represents. R

## Fighting Intellectual Exclusion

◆ REVIEW BY GEORGE LEEF

**D**oes it seem that the United States is, to borrow the title of a Charles Murray book, coming apart? Our political divisions are increasingly vicious and intractable. Tolerance for those "on the other side" is waning. Families are torn apart and friendships severed over the discovery that someone holds a different set of views. Listening

and civil discussion have largely been replaced by angry, reflexive denunciation. Ad hominem attacks have become the norm.

If you think this is a serious problem, so do Gary Saul Morson and Morton Schapiro. The former is a professor of arts and humanities at Northwestern University and the latter is president of that institution. The two have written a book meant to shed light on the rising acrimony in America.

They argue that our discord stems from "fundamentalist" thinking that makes people unable to see any merit in opposing viewpoints or consider weaknesses in their own. They write:

Not so long ago, it seemed as if [the era of] "grand narratives," ... as Jean-François Lyotard observed, was over. No longer would people rush to adopt theories that explain everything.... Also, not so long ago, it was an unchallenged commonplace that cultures are undergoing a far-reaching secularization that, in spite of occasional resistance, is unstoppable.

The rise of militant Islam and what some have termed "fundamentalist Hinduism" have called the "secularization thesis" into question. Where are the inevitabilities of yesteryear?

**Missionary nihilism** / As Morson and Schapiro view matters, people are increasingly prone to categorical thinking that explains everything in terms of some essential text or belief system. They only see confirming evidence for their opinions and treat those who disagree as evil persons who must be squelched.

This sort of thinking is not limited to supposedly backward segments of society. Bear in mind that the authors are at one of America's most prestigious, extremely selective educational institutions. Here's what they say:

In our classes, we have seen students who adopt fundamentalist ways of thinking almost by default: not as a choice, but because they imagine that

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is just what thinking is. These students seem genuinely surprised that there are situations where one cannot find a uniquely correct answer, where one needs to make choices under uncertainty, and where those who recommend a different course of action might turn out to be right.

In short, many of the “best and brightest” young Americans exhibit fundamentalist habits of mind.

The academic world, the authors lament, has been falling more and more into fundamentalist thinking. There, it is mostly a “negative fundamentalism” where the possibility of knowledge is dismissed and those who claim to have some are treated with disdain. “There is such a thing as missionary nihilism,” they write, “and the humanities have seen it.” And that’s a big reason why enrollments in the humanities have been dropping.

What are the indicators of fundamentalist thinking? Morson and Schapiro point to several.

First, there is some canonical writing that is regarded as inerrant, such as the Bible, Koran, *Das Kapital*, or some tract proclaiming imminent environmental apocalypse. The answers to all questions can be found in them, provided you look long enough. Second, the true believers dismiss any counterarguments as the result of evil motives, mental illness, “false consciousness,” or some other defect. That protects the believers against any doubts about their belief system. Third, fundamentalists engage in assertion and avoid dialogue. They declare that certain things must be regarded as true, rather than arguing from evidence and logic. When fundamentalist perspectives clash, the result almost inevitably is violence.

So far, so good. Fundamentalist systems are atavistic. If humans hadn’t largely broken free of fundamentalism over the last

500 years or so, our lives would still be, as Thomas Hobbes put it, “nasty, solitary, brutish, and short.” Peace and progress depend on rationalism; fundamentalism gets in the way.

**Market fundamentalism?** / But there’s a gigantic failure of *Minds Wide Shut*: its condemnation of “market fundamentalism” as one of the causes of our growing antagonism.

The book’s chapter on this is itself an example of the closed-mindedness that the authors rightly condemn elsewhere. Morson and Schapiro write:

There are those whose faith in free markets is absolute and unwavering. To them, the role of government should be as small as possible, limited to such things as establishing and protecting property rights, which a market needs to function, and to providing “public” goods and internalizing externalities, called for by market theory itself.

Of course, there are people who argue for that position, no doubt including many readers of *Regulation*. These people do not, however, base their conclusions

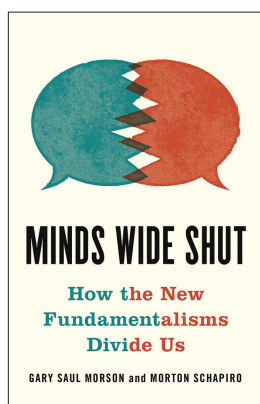
on some fundamental, postulated belief, but instead on carefully devised and well-supported arguments—arguments the authors don’t so much as acknowledge. Morson and Schapiro also do not point out any instances where a pro-market or government-skeptical economist asserted that some policy must be changed merely because it is inconsistent with “faith” in markets. Advocates of free trade, for example, do not stake their position on the mere fact that Adam Smith favored it. If “market fundamentalism” were a serious phenomenon, you would think the authors could give some clear examples—as they do for fundamentalist opponents of economic freedom.

The authors try to make up for this lack of evidence by appealing to authority—citing people who are generally hostile to markets and the concept of spontaneous order. First, they quote George Soros, who claimed in his 1998 book *The Crisis of Global Capitalism* that those who think government should play little or no role in economic regulation “believe their conclusions to be certain.” But believing that your conclusions are correct (rightly or wrongly) is not the same thing as fundamentalism; it merely means you have high confidence in your belief, whether because it’s grounded in some fundamental belief, *or* because of the sound logic of your argument, *or* because of empirical support.

The closest Morson and Schapiro come to demonstrating their point is to cherry-pick a statement by Nobel economics laureate Gary Becker to the effect that he was sure that Americans would agree with his position in favor of allowing the sales of human organs once they considered his arguments. Again, this is a statement of confidence in his argument (and persuasive powers) and not a fundamentalist assertion. And if someone had disagreed with Becker, he would have replied with more arguments, not with a fundamentalist dismissal.

The authors also rely on economist Joseph Stiglitz, who decried what he saw as unwarranted confidence in free markets. That, however, does not show that market advocates are guilty of fundamentalism; it only shows that Stiglitz was not persuaded by them.

Not only do Morson and Schapiro fail to demonstrate that “market fundamentalism” exists, they also give no reason for calling advocacy of markets divisive. Going back to the 19th century, there have been economists who have argued that we would be better off if government stayed out of the economy. For the most part, their arguments were brushed aside by politicians and interest groups, which is why today we have a leviathan state. So why is it harmful for some economists today to make the case against, say, tariffs, federal student loans, or rent control laws? Elsewhere, the



***Minds Wide Shut: How the New Fundamentalisms Divide Us***

By Gary Saul Morson and Morton Schapiro  
307 pp.; Princeton University Press, 2021

authors quote John Stuart Mill on the importance of counterarguments to test and strengthen positions. What is divisive or harmful about subjecting any policy to a radical critique?

The notion that markets are mostly all right but need a large dose of government control is deeply rooted in the minds of most Americans, including the authors. Very rarely do the “fundamentalists” get their way and convince authorities that some instances of government control are counterproductive and ought to be abolished. There are, however, some such cases. We got rid of the Civil Aeronautics Board and its airline price-fixing regulations. That, by virtually all accounts, turned out very well for consumers. Fortunately, that decision was not stopped by cries of “market fundamentalism.” As rationalists, Morson and Schapiro should understand that each argument for or against government control needs to be evaluated on its own merits.

Just how feeble this part of the book is can be seen in the authors’ discussion of the minimum wage. They write that while a

few economists would abolish it and others would raise it to \$25 per hour, the best policy must lie somewhere in the middle. That conclusion doesn’t follow at all. Radical or extreme positions are not refuted just by pointing out that they are “out of the mainstream.” In fact, by calling arguments for eliminating government intervention in certain areas “fundamentalist,” the authors are aiding and abetting exactly what they spend the rest of the book deploring, namely the way so many people dismiss arguments they don’t want to consider by pinning a pejorative label on them.

Market fundamentalism is a strawman. It’s a shame the authors thought they needed to include it in the book.

**How did we get here?** / Despite their “market fundamentalism” discussion, Morson and Schapiro have identified a real problem. They earnestly implore people to listen to and reason with one another. So how do we get there?

What’s missing from *Minds Wide Shut* is analysis of the *causes* for rising fundamentalism. The authors briefly adverted to a

major cause when they mentioned their students who believe that fundamentalist thinking *is* thinking. Throughout our educational system, students are increasingly subjected to teaching that’s meant to indoctrinate them, to see the world in black and white, to ignore the necessity of tradeoffs. American students learn to accept and defend certain positions (positions that are invariably favorable to governmental control) rather than to identify and evaluate evidence before coming to any tentative conclusions. That begins in grade school and continues through high school and into college. The demands that speakers be prevented from talking on campus and that books with “hurtful” material be banished come from students who have been taught for years that such exclusion is virtuous. We won’t successfully combat fundamentalist thinking until we return our schools to teaching knowledge and pull the plug on political activism.

The resurgence of fundamentalism is a serious problem for liberal societies. *Minds Wide Shut* is a worthwhile introduction, but it calls for much more work. R

## Working Papers ↔ BY PETER VAN DOREN AND IKE BRANNON

A SUMMARY OF RECENT PAPERS THAT MAY BE OF INTEREST TO REGULATION’S READERS.

### Price Gouging

■ “Price Gouging in a Pandemic,” by Christopher Buccafusco, Daniel Hemel, and Eric Talley. SSRN Working Paper no. 3758620, January 2021.

**W**hen negative supply shocks occur, debate immediately arises about the appropriate role of price changes as an acceptable allocation method. The conventional wisdom is that only economists favor large price changes to reduce demand and create incentives for increased supply to remedy the negative supply shock. Everyone else supposedly prefers quantity limits on consumption.

This conventional wisdom was first presented academically by Daniel Kahneman, Jack L. Knetsch, and Richard Thaler in their 1986 *American Economic Review* article “Fairness as a Constraint on Profit Seeking: Entitlements in the Market.” They surveyed Canadians in Toronto and Vancouver about a scenario in which a hardware store raised the price of snow shovels from \$15 to \$20

after a large snowstorm. They reported that more than 82% of respondents characterized the price increase as unfair.

The COVID-19 pandemic has provided an opportunity to test whether this view is held by today’s Americans. In this paper, Christopher Buccafusco (Cardozo School of Law), Daniel Hemel (University of Chicago Law School), and Eric Talley (Columbia University School of Law) surveyed 656 U.S. residents in May 2020 about a scenario in which a supermarket raised the price of a bottle of hand sanitizer after the onset of COVID-19 by the same 33% that Kahneman et al. used in their paper. Just 46.6% of respondents deemed the increase to be unfair. The survey also asked about potato chips (a nonessential item) and snow shovels (to replicate the Kahneman et al. question exactly) and found similar results.

Buccafusco et al. also asked participants how government should respond to a supermarket that raises the price of hand sanitizer by 33% after the onset of the COVID-19 crisis. Approximately three-fifths of respondents said the government should do nothing. This finding is particularly striking given that, in many states, a price increase of that magnitude in an emergency would



be prima facie illegal and, in many cases, punishable as a misdemeanor. The price-gouging thresholds most states use—typically a 10–25% increase over normal prices—are significantly lower than the 33% increase that generates consistent acceptance from survey participants. —**Peter Van Doren**

## Securities Regulation

■ “Gamestonk: What Happened and What to Do about It,” by James Angel. SSRN Working Paper no. 3782195, February 2021.

**S**peculative activity surrounding the stock of the video game retailer GameStop has been in the news. The firm’s share price exploded from \$18.84 at the end of 2020 to a high of \$483 on January 28, 2021, before collapsing to under \$60 in early February.

Gamestops are found in traditional shopping malls, which means high lease costs for a retailer that faces growing competition from internet-distributed games. Institutional investors, including prominent hedge fund Melvin Capital, shorted GameStop because they concluded the future of such a business is doomed and that its stock price was overvalued. Shorting stock (borrowing shares and selling them now in the belief that they can be purchased for less in the future when they need to be returned) is a useful and important activity that appropriately disciplines stock market optimism.

According to media accounts, GameStop stock was involved in what is termed a “short squeeze.” Retail investors using venues that do not charge commissions, like E-Trade and Robinhood, purchased GameStop shares in a David-versus-Goliath battle against the institutional shorts. The squeeze results from the fact that those who short the stock must eventually buy it to return the borrowed shares to their original owners. If enough investors buy shares, the shorts must compete against them to buy stock at an increased price to return the borrowed shares. Melvin Capital had to raise \$2.75 billion to close out its failed short bet on GameStop.

This paper, by Georgetown finance professor James Angel, examines possible reforms of Securities and Exchange Commission rules regulating the shorting of securities in light of the GameStop events.

The manner in which the Internal Revenue Service treats the realization of capital gains from shorting inefficiently prolongs the time period over which stock shorting occurs. The IRS generally taxes stock trades when a position is closed out and the profit or loss is realized. This makes sense when cash is received when a stock is sold. In a successful short sale, however, the short seller has received the cash long before the position is closed out as a result of the daily collateral adjustment that occurs in the stock lending market. The current tax treatment induces those who short never to close out the position, and thus short sellers have incentive to spread negative information about the future of the shorted firm forever. The solution is to tax short positions like futures and mark to market at the end of each year.

Retail investors who want to short a stock face obstacles not encountered by institutional investors, so the supply is unnecessarily constrained. The 2010 Dodd-Frank Act explicitly ordered the SEC to enact new rules to improve transparency in the stock lending market within two years. The SEC failed to do so, and currently short interest in each stock is disclosed only twice a month, with a lag of several days. The short market needs a real-time “ticker tape” that resembles the information on stock purchases.

Retail investors also face rules that unnecessarily restrict their ability to loan shares to be shorted. If a customer borrows money from a broker in a brokerage margin account, the broker can lend out shares from that account worth up to 140% of the amount borrowed. If the shares are fully owned with no borrowed money, the broker must navigate a more complicated set of rules. The result is that most brokers don’t allow such shares to be loaned for shorting. Fully owned shares and shares bought on margin should be treated similarly.

Some stock trades are not fulfilled. Prior to the 2008 financial crisis, the United States was very lax about stock delivery. Some short sellers “who were too cheap to pay to borrow shares in the proper fashion took advantage of the system,” Angel explains. During the October 2008 financial meltdown, the SEC implemented a rule that required shares be delivered on settlement day. This knife-edge delivery requirement assists those who engineer short squeezes like what occurred with GameStop. Those who must buy stock at any price to then return shares to their original

***Short interest in a stock is disclosed only twice a month, with a lag of several days. The short market needs a real-time “ticker tape” like what exists for stock purchases.***

owners exacerbate the increase in the price of a stock. Evidence consistent with this argument is that there were relatively few failures to deliver GameStop on January 27, when its price reached \$348. Failures to deliver fell dramatically on January 27, from 1,032,986 shares the day before to 138,179, suggesting the high price was the result of shorts buying GameStop to return shares to those from whom they had borrowed.

Angel recommends that the SEC abandon the required share delivery rule and instead adopt what is used in the U.S. Treasury bond market: a late-fee system. The fees would escalate with the length of the delivery delay and be large enough that market participants will only delay delivery in exceptional circumstances.

Robinhood restricted trading in GameStop because it could not raise collateral quickly enough to cover the trades of its retail investors. Collateral requirements are the result of the two-day settlement period for stock trades that was developed when stock certificates were paper. On the day after a stock trade, money must be deposited with the settlement corporation to cover the cost of

the trade in case the broker goes bankrupt before settlement occurs on the second day. During the GameStop episode, total industry collateral requirements jumped overnight from \$26 billion to \$33.5 billion on January 28. Brokers such as Robinhood scrambled to raise additional capital. The scramble was exacerbated by the SEC's Customer Protection Rule, which requires brokerage firms to segregate customer assets from those of the firm. Even for stocks purchased with cash, the firm is not permitted to use the proceeds to post as collateral the day after the trade. —P.V.D.

## Social Welfare Policy

■ “Lessons from Denmark about Inequality and Social Mobility,” by James J. Heckman and Rasmus Landersø. NBER Working Paper no. 28543, March 2021.

President Biden's American Families Plan includes taxpayer-funded universal pre-kindergarten and community college. Such proposals are always accompanied by the obligatory observation that “the United States is an outlier compared to almost every industrialized country” regarding the provision of universal social safety net benefits.

Supporters of such programs assume that their effects are progressive. That is, they improve the welfare of those with fewer resources relative to those with more. The earlier quote about the United States being an outlier suggests an obvious research strategy before we enact such policies: what have the effects been in Europe?

Previous Working Papers columns (Summer 2014 and Summer 2018) have examined papers by University of California, San Diego economist Gordon Dahl, who has devoted much of his career to examining the efficiency and distributional effects of social welfare policies in Europe. The Summer 2014 column summarized his analysis of expansion of maternal-leave benefits in Norway. Dahl and his co-authors concluded that the program had no effect on a wide variety of desired outcomes and instead redistributed income to the affluent. The Summer 2018 column examined the long-term effects of reductions in disability benefits in the Netherlands between 1993 and 1996. The reductions applied to younger cohorts, while older cohorts were exempted from the new rules. Younger workers who were pushed out of disability insurance or had their benefits reduced are now, a generation later, 11% less likely to receive disability benefits than their parents' generation (with no increased use of other government safety net programs). Further, they earn 2% more in the labor market as adults. The reduction in benefits aided taxpayers as well as program participants.

Nobel economics laureate James Heckman, working with Rasmus Landersø of the Rockwool Foundation Research Unit in Denmark, continues the tradition of examining social welfare policies in Europe by examining Denmark. For many American policy analysts, Denmark is a model welfare state with low levels of income inequality and high levels of social mobility in income across generations. It has free college tuition, universal access to



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## IN REVIEW

high-quality health care, equality of per-pupil expenditures across all neighborhoods, universal high-quality pre-K, and generous childcare and maternity leave policy.

The paper demonstrates that Denmark achieves reduced inequality not by the provision of universal public services that augment human capital, but through tax-and-transfer policies. Intergenerational mobility in educational attainment declined when Denmark moved away from targeted programs that aided the least advantaged (mostly rural) groups and instituted universal education policies such as free college tuition and universal day-care. Current educational mobility in Denmark and the United States are similar and associations between test scores and family background are also strikingly similar. The relationship between cognitive test scores and parental income are remarkably similar in Denmark and the United States and haven't really changed over time in Denmark despite the large expansion of universal welfare state programs. —P.V.D.

## Proxy Advisers

■ “Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting,” by Paul Rose. Manhattan Institute, April 2021.

Investment management is a hyper-competitive business whose practitioners work dreadful hours trying to gain an edge in the market. They don't want to waste time or energy on tasks that are largely irrelevant to their attempts to divine the future performance of publicly traded companies.

One undesirable task they nonetheless have to undertake is voting their proxy shares. The Securities and Exchange Commission requires investment managers to vote their proxies for each company whose shares they own. Because the majority of these votes are rote and inconsequential (shareholders must vote for a slate of directors each year and consider any proposal put forth by a shareholder owning more than \$2,000 in shares), most investment managers turn the task over to a proxy adviser.

However, in the last few years an increasing number of proxy proposals have dealt with issues that could potentially affect a firm's long-run performance. After the 2016 presidential election, many activists engaged public corporations on a variety of political issues that the activists were unable to get traction on in Congress or with the Trump administration, mostly pertaining to environmental, social, or governance (ESG) issues. Some of their proposals had the potential to reduce firms' long-run profits, thereby reducing stock values.

However, most investment advisers do not personally vote their proxies for the companies whose stock they own. Because they own stock in hundreds of companies and by law must vote each proxy, most of them foist that task onto a proxy advisory firm.

Two firms, Glass Lewis and Institutional Shareholder Services (ISS), dominate the proxy advising market and are not indifferent to political issues. Perhaps surprisingly, their perspectives often

align with the activists who submit such proposals. As a result, activists have begun to win some proxy votes, especially on those related to climate change.

The SEC professed concern with investment managers completely abdicating the task of proxy voting to an outside entity—sometimes referred to as “robo-voting”—because the practice

***Even small reductions in an asset's rate of return can have a big effect on the amount of money that a retiree accumulates over a lifetime of savings.***

may reduce clients' returns, suggesting that robo-voting is not in the best interest of investors. In 2020 the SEC completed a rule that put in place a system to allow firm managers to respond to proxy advisory recommendations and requires proxy advisers to distribute those responses to their clients.

The SEC also issued guidance telling asset managers that to fulfill their fiduciary duty to their clients, they have a responsibility to review the proxy adviser's recommendation, along with management's response to that recommendation, to show that they are performing their due diligence and attempting to vote in accordance with their clients' interests.

Paul Rose, a professor at Ohio State University's Moritz College of Law, looked at the extent to which investment managers have conformed to the new rule thus far. The SEC's rule does not fully take effect until the 2022 proxy season, so compliance in 2020 and 2021 is largely voluntary. He suggests that the prevalence of early compliance would indicate the degree of enthusiasm that the profession has for the rule and—perhaps—how likely it is for the rule to remain in place through the next four years. The Biden SEC has already taken several steps toward enhancing the role that ESG-focused investing has in financial markets.

Rose finds that the practice of robo-voting declined only modestly in 2020: 6% fewer asset managers appeared to turn over their votes to their proxy advisers, and this group only accounted for about 3.6% of assets under management for those affected by the rule.

Besides increasing the cost (and hassle) of administering proxy votes, Rose observes that another reason for the relative lack of enthusiasm may be that investment managers care about their *relative* investment performance and not their *absolute* performance. If proxy advisers were to have success in nudging all companies to take positions that would reduce their returns, investment managers may not care because there is no reason to think that it would cost them any clients—or fees.

Nearly a decade ago, the Obama administration moved to strengthen the fiduciary rule because, it noted, even small reductions in an asset's rate of return can have a big effect on the amount of money that a retiree accumulates over a lifetime of saving. That rationale supports this rule as well. —Ike Brannon