Food For Thought

Reviewed by Tim Stonesifer

THE OMNIVORE'S DILEMMA: A Natural History of Four Meals
By Michael Pollan
464 pages; Penguin Books, 2007

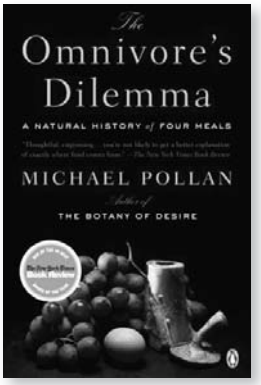
There are 38 ingredients in a Chicken McNugget. Thirteen are derived in some part from the ubiquitous tropical grass *zea mays*, better known as corn. In fact, from the nuggets' modified cornstarch and partially hydrogenated corn oil to the high fructose corn syrup in the ketchup and soda, an afternoon at your local fast food joint can be seen as one giant buffet of corn and its derivative sugars. It's enough to make you wonder why corn is king in America.

Michael Pollan's book *The Omnivore's Dilemma* tries to answer that question and others about your food, including perhaps the most basic of all: What should we have for dinner? The answer, Pollan contends, hinges on our understanding of where the food we eat comes from — be it the American industrial food chain, a small, independent organic farm, or something we've hunted and gathered ourselves — and what sacrifices were made to get it to our tables.

If we are, as Pollan argues, "not only what we eat, but how we eat," then our complex processed foods must be examined with an eye toward how they have taken up residence at the center of our tables. Any such inquiry, he contends, must begin by tracing the history of corn, which is present in over half of the 45,000 items in your typical supermarket.

KING CORN The ties between corn and America date back to the Americans Indians who first introduced European settlers to their maize plant. The Europeans quickly found it ideally adapted to the North American climate and, thanks to its heartiness, versatility, and yield, their early acceptance of it helped them to survive the harsh winters in America. Corn soon presented itself not only as a versatile food, but also a convenient currency, cementing its prominence in the fledgling colonies.

Corn's first watershed moment, though, came in the early 20th century when breeders succeeded in engineering hybrid strains that farmers had to purchase each planting season. Previously, a farmer could buy a quantity of corn once and plant a second-generation crop after the first went to seed. The new hybrids were, according to Pollan, "corn as intellectual property," and such plant patents paved the way to ever-increasing yields of corn.



But the boon would not last. Starting with the New Deal's interference in agricultural markets, and then with the passage of the Agricultural Act of 1949, corn would shift from miracle foodstuff to welfare queen. The 1949 legislation begins innocuously: "To provide assistance to the States in the establishment, maintenance, operation, and expansion of school-lunch programs, and for other purposes." Those "other purposes" turned out to be a vast network of loans, purchases, and price supports for corn, wheat, and other feed crops. And with corn the easiest of plants to grow, the inevitable effect was a spike in production, with other crops (including livestock and the whole notion of a diversified farm) quickly taking a back seat. Overproduction of corn soon became the norm, and mountains of yellow kernels began to sit outside until rotten.

The final step toward "King Corn" resulted from another government intervention, this time by Earl Butz, Richard Nixon's second secretary of agriculture. Beginning in 1973, as supermarket prices soared and shoppers protested, he began removing the price floors that had dominated since the New Deal and been strengthened mid-century. Butz moved the government toward even more destructive regulation: a system of direct payments to farmers. By guaranteeing a buyer for corn at any price and encouraging farmers to "get big or get out" in their production, Butz opened the door for American farmers to grow as much corn as they could regardless of market demand.

Those perverse incentives have led to $5 billion in corn subsidies each year and a market price of $1 less per bushel of corn to the farmer than the cost to grow that same amount. Such market distortions inevitably occur when government plays favorites and decides it can direct resources and lives better than autonomous individuals operating in a market. That is clearly the case with corn: by artificially inflating its price through payments and subsidies, our central agriculture planners have caused an otherwise moderate stream of corn to overflow its banks.

Pollan expends much effort following this "river of corn" from America's farms to its tables. He tracks it to processing plants that deconstruct and rebuild it into high fructose corn syrup, and he follows the 60 percent of it destined for U.S factory farms. These Concentrated Animal Feeding Operations (CAFOs) emerged over time in response to the mountains of unused corn. They managed, both through economies of scale and through converting animals like cattle and salmon to corn consumers, to provide the cheapest meat.

CAFOs present stomach-churning pictures of a "rolling black sea of bovinity" in which a steer eats corn "hock-deep in manure ... overlooking a manure lagoon." Pollan follows this same steer to its ultimate end at the abattoir, detailing from a source (as he was not granted access) the gruesome end of these animals, complete with stories of bloody errors and animal suffering.

Omnivore offers many disturbing

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images of our industrial food chain. And when Pollan details life on the small, idyllic Salatin farm in Virginia, with its diversity of species and transparency of methodology, the reader can't help but be struck by the contrast. "This is the way we should farm," is Pollan's unspoken but obvious conclusion. Small is better.

Here the book falls victim to confused thinking, blaming producers for following the incentives they're presented in hamstrung markets. A culture of cheap and fast food, which Pollan sarcastically calls "private property at its best," may be made up of chicken nuggets with 38 ingredients, may be laced with prodigious amounts of corn syrup, and may leave him "not satisfied, but simply, regrettably full." But it also represents a staggering degree of human thought and productive action that's made food affordable to almost everyone in the United States and many other countries around the world. It is the natural creative response of those working with and around the government-imposed constraints they face. The author, though, still yearns for a better way.

ORGANIC OR NOT? A trip down the winding road of the once-small organic movement reveals that today's grocery store "Organic" label no longer necessarily represents the ethics of the original movement. Specifically, with the passage of the Organic Food and Production Act of 1990, Congress first allowed the Department of Agriculture to fix the meaning and standards attached to the term "organic." The usual regulatory circus ensued. Large agribusiness interests lobbied for a loose definition of the term in order to capitalize on this growing market segment. Initially, meat was considered organic if, in part, it came from free-range animals; now the requirement is that the animals have "access to the outdoors." Enough synthetics were deemed "organic" that business could create everything from the organic TV dinner to the organic Twinkie.

This increased government presence in the market set off a response by a few organic true believers who chose to opt out of the encroaching $11 billion "Big Organic" movement. But from unnecessary safety and packaging standards to a rule that requires animal processing facilities to have a bathroom set aside solely for the use of government inspectors, those trying to run an organic family farm today face an uphill battle.

Centrally imposed organic standards have caused valuable local farm knowledge to be lost. An hour spent in the Whole Foods store provides shoppers myriad stories of animals living care-free, country lives, and lyrical narratives about organic vegetables on picturesque hillsides. However, what can't be replicated through such artful prose and clever marketing is seeing first-hand where dinner comes from, and knowing exactly how it was grown or raised.

> This book falls prey to confused thinking, blaming producers for following the incentives they're presented in hamstrung markets.

To many, such personal involvement is unimportant. But to a growing number of consumers, it is necessary to have a true sense of the cost of getting dinner to the table. For those consumers, a higher price or an inconvenient drive is worth the trouble for food with which they have a personal connection. And for many small organic farmers — who could easily plant corn and collect a subsidy check — the satisfaction of providing their best efforts to willing buyers is still worth the extra cost of jumping government hurdles.

Omnivore disappoints most in Pollan's refusal to draw the obvious conclusion from such facts. He makes the mistake so many have made, assuming *his* issue is too important to be trusted to free-thinking people in a free market, and must instead be planned from the top down.

Pollan's disdain for agribusiness and large corporate farms is obvious, and his desire for growing numbers of small, organic farms is palpable. Yet the relevant comparison is not big versus small farms, but rather a controlled versus a free system. We know the results of the former: in Russia it was famine and misery, and in the United States it has yielded only collusion and misallocation. As to the latter, economies of scale and increasingly efficient mechanization would likely lead to a network of larger agribusinesses and force out some smaller farms.

Still, in a free system where consumers — not subsidies — decide what is profitable for businesses, farmers would be more directly accountable for their products. They would grow a wider variety of crops and adjust to life without artificially cheap corn. And with smaller organic farms free from big-government regulation, their survival would depend solely on their ability to lure customers away with different, specialized goods, a skill at which they've already proven quite adept. Both types of farming would prosper to the extent they satisfied consumers' demands, and today's misallocation and subsidy waste would disappear. Unfortunately, such freedom in farming remains unexplored, and it will stay that way while government holds the keys to the tractor.

KNOW YOUR FOOD A journey through *The Omnivore's Dilemma* — from the corn field to the supermarket, and from the woods to the table — is one that will by turns make your mouth water and your stomach turn. Pollan's descriptions of the dinners he prepares for family and friends are worthy of Anthony Bourdain or Ted Allen. But those depicting chickens crammed into impossibly small crates, wallowing in their own filth, are closer to Stephen King. Yet the book presents a valuable chronicle of U.S. farm regulation. Though the classic liberal reader may not agree with the conclusions he draws, Pollan creates a vivid picture both of Big Agriculture and the smaller farms he favors.

What the book does not do is present any plausible solution to our over-regulated and bureaucratically bloated system of agriculture. Nor does it provide any design more likely to be effective in farming than a free market, where people farm and trade without government stifling their productive activities or distorting their incentives.

Perhaps just making us more aware of what we're now eating and where it comes from is enough. I know I'll be wondering about all 38 of those mystery ingredients the next time I bite into a Chicken McNugget. And for Michael Pollan, that's a good first step. R

The Return of Jimmy Carter

Reviewed by Richard L. Gordon

A DECLARATION OF ENERGY INDEPENDENCE: How Freedom from Foreign Oil Can Improve National Security, Our Economy, and the Environment

By Jay Hakes

252 pages; John Wiley & Sons, 2008

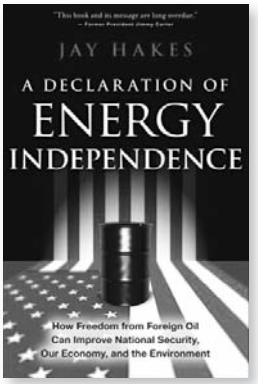
It seemed to me that the candidates in the 2008 campaign spewed forth more than the usual amount of economic illiteracy. Among, but far from the worst of, these was the bipartisan stream of nonsense about the importance of achieving energy independence. To make matters worse, numerous independent organizations and individuals who should have known better nonetheless supported those arguments. Extensive economic analysis amply supported by historical experience indicates energy independence is a stupid idea. The benefits are nonexistent; the costs huge.

Jay Hakes has accomplished the dubious distinction of preparing by far the best-researched effort in this realm and reaching some of the worst conclusions. Hakes is a political scientist who headed the Energy Information Administration in the Clinton administration and now heads the Carter Library and Museum. Thus, not surprisingly, the book views the Carter years as a golden age from which we unwisely retreated. That is the key problem with the book.

Hakes's subtitle nicely if unintentionally epitomizes the fault with the revived goal of independence: politicians are seeking magic from a Wizard of Oz who is, in fact, a humbug.

INSIDE Hakes divides the book into two main parts, the first of which defines the supposed problem. The first three chapters are his presentation of energy history from the start of the Nixon administration onward. That is followed by four overwrought chapters on the overriding issues: the military implications of oil dependence, global warming, the "Magic and Limits of Market-Based Solutions," and ideological blinders. The book's second part offers "solutions" — stockpiles, more fuel-efficient automobiles, alternative fuels, electric vehicles, energy taxation, conservation, and "Hail Marys"(his term).

Hakes errs in more than the usual ways. His first security concern is supply disruptions. In this, he blows his case before he even gets going, killing the cause of energy independence. A short supply disruption once a decade is hardly justification for insanely costly energy independence. He, moreover, shows no recognition of the alleged macroeconomic externalities that provide the only potentially valid market-failure justification for intervention in a crisis. By doing so, he ignores the government-failure problem that precludes optimum market response to crises. Irrational hatred of windfall profits prevents firms from realizing, among other things, the profits in a shortage period that would justify optimal inventories (and, as President Obama fails to note, optimal levels of investment in production capacity). The public inventory about which Hakes is so enthusiastic suffers from restrictions on disposal also because of enmity toward the windfalls that stockpilers would make. His solution of an independent supervising body to oversee stockpiling has numerous defects. It harkens back to the vision of benevolent, omniscient experts — a vision loved by advocates of intervention and discredited by many impartial studies. Hakes's claim that such experts could operate as impartially as the Federal Reserve ignores how rules, rather than discretion, have become popular in the literature on monetary economics.



Hakes does consider the cost of military intervention in oil-producing regions. However, doubts exist that energy independence will reduce military expenditures at all, let alone to an extent that would cover the costs of independence. As long as the United States remains the dominant world power, it will have major military requirements until all forms of threat are removed. Energy independence that leaves the rest of the world oil-dependent will keep oil as much (or little) an influence on defense posture as with free imports.

Hakes' three history chapters cover, first, from the end of World War II to the Nixon years, then the Ford, Carter, and (early) Reagan presidencies, and finally the most recent years. In these chapters he is at war with himself and he ignores analyses that undermine his argument. A core defect is that while he cites M.A. Adelman's classic book on world oil, Hakes completely ignores Adelman's arguments. The central neglect is misunderstanding of the incoherence of U.S. energy policy. Up to the Nixon years, the goal was to balance the advantage of using cheap foreign oil with political pressures to preserve high-cost, small-scale domestic producers. The cost was undermining the emergence of a more competitive world oil industry. Better policy might have prevented OPEC-country price pressures. Hakes similarly neglects Adelman's contention that Saudi Arabia's embargo actions were key despite the country's claims to the contrary. He also overlooks Adelman's demonstration that the 1973–1974 oil supply cuts were intended to exert economic pressure on the West rather than to punish U.S. support for Israel. Hakes does eventually recognize that the ability to alter trading patterns precluded limiting the supply losses to the supposed target countries.

In his Carter-period discussion, Hakes badly distorts the explanation of oil use decline from 1978 to 1983. In particular, he rightfully notes that a large and permanent part of the drop was the broad discontinuation of the use of oil to generate electricity. He wrongly attributes the shift to coal- and nuclear-fueled generation to federal mandates, ignores the rise in gas-fired generation that energy legislation unwisely tried to prevent, and seems unaware of increased exports, recorded in reports to the U.S. Energy Information

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Agency, of coal-fueled Midwestern electricity to the Middle Atlantic states. Moreover, Hakes attributes residential and commercial reductions in oil use to conservation measures and ignores the shift of consumers to natural gas. He says nothing about the large decline in industrial oil use.

The dependence chapter largely discusses the invasion of Iraq as an alleged consequence of dependence. The global warming chapter is a routine presentation of the case for urgent action; he does not advance the case beyond Al Gore in 1992.

A central fault of the book and the whole literature on energy independence is the neglect of the underlying economies. Hakes is particularly vulnerable because he purports to deal with that economics. His chapter on the free market recognizes the virtues of the market, but follows them with dubious assertions that conservation mandates make the market easier to decontrol. He credits the nuclear power program with making a contribution to this. He then employs the canard that free-market economists ignore the existence of externalities. The reality is that free-market economists are more skeptical than Hakes about the level of prevailing externalities. He does not help matters by including foreign-government ownership of oil as an externality instead of simply a monopolistic market failure.

He does not help matters by stating, "Beware of economists whose research is funded by business groups that hate all forms of regulation." This gratuitous insert extends absurdly the standard distraction interventionists use to attack pro-market arguments. The principal defect of such contentions is that causation is reversed. The position of the researcher determines the research support; credible supporters of a position are sought because sellouts are readily determined. Business support, in any case, is no more biased than that of governments or non-business advocacy groups. Even if we generously read "group" to mean persons or organizations rather than just trade associations, his "regulation haters" are virtually nonexistent. Few of the businesses or executives supporting free-market advocacy are as strongly and consistently anti-intervention as those they support. Most relevant for Hakes, the best study ever done on oil-import dangers was an effort by Douglas Bohi and Michael Toman that was funded by the American Petroleum Institute, hardly a bastion of free-market ideology. (A nice irony here is the authors' employer at the time, Resources for the Future, was so scared of attacks on industry support that Bohi and Toman had to prepare the book as an outside activity. In contrast, RFF seems unaware of how its dependence on government grants has distorted its work.) Bohi and Toman are a prime source of doubts about import dangers and should be consulted by those who wish sound analysis.

Hakes's chapter on policymakers' ideological blinders again engages in distortions to indicate the left and right are equally culpable. He correctly faults the left for obstructionism. His critique of the right is repetition of his nonsense claim about neglect of externalities. He adds a silly assertion that personal dislike of Al Gore drives criticism of Gore's writings, as if reading them were not enough to produce rejection.

The second part of the book is a collection of the usual bad ideas for radical changes in energy use. The prior topic listings suffice to make the content clear. The one curiosity is that he wants both carbon limit mandates and either taxes or marketable permits, either of which would make mandates redundant.

Writers of this ilk betray their inadequacies by little errors. Hakes's notes present the economic howler that "the reluctance of OPEC producers to increase output rests less on fears of oversupplying the market than on a desire to keep prices from falling." Were the EIA properly staffed, eight years there should have made him aware that prices and quantities supplied have a one-to-one relationship. R

Power Communication

Reviewed by Richard L. Gordon

DEREGULATION, INNOVATION AND MARKET LIBERALIZATION: Electricity Regulation in a Continually Evolving Environment
By L. Lynne Kiesling
189 pages; Routledge, 2009

Discontent with the state of the electricity market has inspired a steady stream of writings about how best to improve the situation. The writings are dominated by discussions, usually from the same able but convention-bound economists, recognizing the defects of current market regulation, followed by proposals for incrementally improving that regulation. The most recent example to reach me is a special issue of the *Energy Journal*.

However, going back at least to Richard Posner's classic but badly under-cited 1969 *Stanford Law Review* article "Natural Monopoly and its Regulation," another view is that regulation is a flawed concept from which public policy should turn. Posner's basic case stated the points that remain central (and many that do not). Even if natural monopoly exists, the monopolist's ability to engage in price discrimination means the absence of efficiency losses. The only consequence of monopoly is a change in income distribution. That alteration is too small and of too unclear impact to justify intervention; action on a single commodity at the regulatory commission level is not the best way to deal with redistribution. Moreover, even if regulators had efficiency-raising public interest objectives, they lack the ability to attain those ends. Finally, rent-seeking forces may lead to pursuit of less desirable objectives.

Some subsequent writers have expanded on this view and, in particular, suggested that the presumption of natural monopoly was unjustified. Northwestern economist L. Lynne Kiesling's thought-provoking new book *Deregulation, Innovation, and Market Liberalization* adds to this literature. She takes up the classic debate in public utility economics over the optimum way for suppliers to interact with consumers — that is, to use real-time pricing and other mechanisms to moderate

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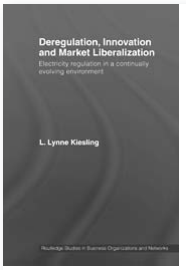
consumer use at times when demand is greatest and grid congestion is worst. Her case boils down to rejection of the skepticism rampant in the more conventional writings about the ability to implement such interaction. Kiesling argues that recent advances in computer technology have dramatically lowered the cost of real-time producer-consumer communication, making it possible to implement those technologies on a large scale.



INSIDE The book's introduction concentrates on its unifying theme that the concept of regulated natural monopoly is ill-suited to dealing with industries that experience rapid technical progress. That flaw has become intolerable in an era when such change could profoundly increase power industry efficiency. Chapter 2 provides an all-too-standard capsule history of the industry, its regulation, and the relevant theory. Kiesling's history is mostly solid, but it has a few standard but still bothersome flaws. The most important of these is her failure to discuss the forms of price discrimination that can produce efficient outcomes in a natural monopoly and that are usually employed, and stressing what she recognizes as impractical: the loss-minimizing elasticity-based markups beloved by many theorists. Her thumbnail description of the industry sticks too heavily to an entity-count approach. Such a technique underplays the fact that the industry is dominated by the generation, transmission, and distribution by the private sector, which has far fewer participants than the public and cooperative sectors. (Moreover, the count of private firms, as usual, is bloated by reliance on sources that treat subsidiaries are separate operations.)

In Chapter 3, she deals with the desirability of decentralized decisionmaking and the need to design institutions that facilitate such decentralization. For the first part of the discussion, she invokes the arguments in favor of decentralization that are advanced in Austrian economics; she uses new institutional economics for the rest. The treatment is too long for an academic audience, but it may not be lucid enough for the nontechnical audience. However, it does convey the essence of the argument.

The remaining chapters present her case that communication between utilities and their customers will promote large efficiency gains. These chapters are what justify attention to the book. The discussions examine the implications of interactions with consumers for resolving the critical problems of the electricity industry.

In Chapter 4, she nicely presents both the theoretic argument for communication with consumers that allows prices to respond to changing supply/demand conditions and the successful results of experiments with such communications. Then Chapter 5 argues for reorganizing transmission into separate firms that are joint ventures of electricity retailers. Chapter 6 briefly indicates the short-run advantages of communication in promoting reliability. Chapter 7 turns to why this approach is far superior to the currently favored policy of creating markets for capacity to ensure the long-run optimal reliability of the power industry. This last is a particularly clear example of the implications of effecting continuous communications with consumers. The resulting price response generates precisely those revenues unavailable when prices stay fixed while loads increase to peak levels. Capacity markets are an effort to compensate for such revenue losses. Price flexibility, if feasible, is preferable because it is based on direct, rather than indirect, evidence of demand conditions. These chapters are all solid presentations of the case.

Chapter 8 is extremely problematic because of its equivocation. Her treatment of the public-good nature of reliability confusingly argues that reliability is simultaneously both a public good and a common-pool good. As she correctly indicates, a public good is one that, if provided, is freely available to everyone and such availability is not affected by the level of individual use. A common pool is one that, if provided, is freely available to everyone but its availability is affected by the level of individual use. (National defense is the classic example of a public good; fisheries and oil and gas fields are among the key common-pool resources.) The common-pool aspects of reliability are clearly explained. The discussion of public goods, in contrast, is murky and incomplete. In particular, she neglects Coase's caution about lighthouses; while public in theory, they were initially provided privately because government lack of interest was more of a problem than the free riding. As nearly as I can determine, Kiesling is dealing with the classic problem of when the transition is made from underuse and an optimum price of zero to congestion and an optimum positive price. In any case, an unequivocal contention that reliability is a common-pool resource seems plausible and should have been made. This would have led to a less equivocal conclusion about the undesirability of regulation.

CONCLUSION While Kiesling's is an attractive and plausible argument, caution is necessary. The idea that more flexible pricing is desirable in principle is long-standing and the subject of a substantial literature. The contention that regulation impeded implementation appeared at least as early as Posner's 1969 article. The contention that computer technology had reduced the costs of communications to a level where it was efficient was the core of the 1988 book *Spot Pricing of Electricity* by Fred Schweppe, Michael Caramanis, Richard Tabors, and Roger Bohn. Neglect of doubts about greater communication is not a critical fault, but neglect of Posner's wider arguments is. He leads to the view, which he refrained from presenting, that regulation has no redeeming virtues. Total deregulation of electricity is justified simply by allowing freedom to experiment. It would be a welcome bonus if responsive prices emerged.

The book is clearly an effort to provide an elucidation for non-specialists of the case for a less regulated, more flexible electricity market. The discussion is kept at a level appropriate for such an audience. It is too bad that this publication is a $130 book directed at academic libraries.

Any effort to break from the assertions that regulation is desirable is welcome. One such as this, which thoughtfully presents and justifies some interesting alternatives, is particularly helpful. One would hope at a minimum that the electricity regulation establishment would be inspired to depart from its cavalier neglect of such arguments. R

Laws Trumping Laws

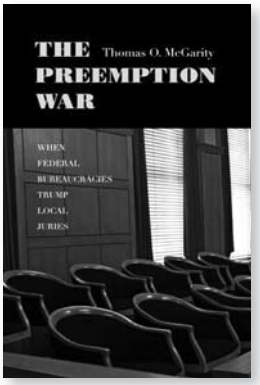
Reviewed by Paul H. Rubin

THE PREEMPTION WAR: When Federal Bureaucracies Trump Local Juries
By Thomas O. McGarity
368 pages; Yale University Press, 2008

"Preemption" deals with the relationship between state and federal law. A federal law preempts a state law if the federal law overrides the state law. Preemption comes in two flavors: In one, federal regulatory law overrides state regulatory law, so that a state cannot, for example, pass a more stringent regulation than that passed by the federal government. In the other, a federal law stops a state common law court from finding liability and awarding damages under tort if a defendant has complied with some federal regulation. *The Preemption War* deals with the second type of preemption.

This issue may seem dull, but it is now quite newsworthy and important. Last November, the Supreme Court heard arguments in *Wyeth v. Levine*, a case regarding exactly this issue; a decision is due by June. (I coauthored a brief with several other economists in favor of preemption in this case. My work was unpaid.) News reports indicate that trial lawyers, a part of President Obama's coalition, seek legal changes in the current law regarding preemption. Thus, there are ongoing developments regarding this issue. This book is a guide to these issues (although if Congress changes statutory language in response to pressure from the trial lawyers, the issue may become moot.)

Those of us in favor of limited government are often conflicted over issues of preemption. On the one hand, principles of federalism would argue against preemption because there are clear benefits to those principles in our system. The benefits have to do with both local control and with what economists call the "Tiebout effect," which allows citizens to move to jurisdictions that more closely favor their preferences. On the other hand, in a national market there are benefits to uniformity. Moreover, in many states, tort law itself is likely to find liability when there is no economic justification for liability, and also likely to award excessive damages. The damages may be paid through higher prices in all states for some product, so one state may use its tort law to extract money from consumers in other states. Thus, we have conflicts between several flawed systems — state and federal regulatory systems, both of which are likely to be overly regulatory, and state tort systems, which are also likely to be excessive. (The libertarian solution is to rely much more on voluntary contract in all of these issues than is the case now, but that is a story for another day.)



A LOOK INSIDE The book's author is Thomas McGarity, a distinguished law professor at the University of Texas. McGarity does a nice job of explaining these issues. Because he is a law professor, the book tends to focus on technical legal issues and on the details of particular cases more than many readers might prefer, but for a patient reader it does explain the topic. The first three chapters explain the legal and political issues involved. The key case was the 1992 *Cipollone v. Liggett Group Inc.*, which involved cigarettes. This was apparently the first case in which a federal law was viewed as preempting a state tort law claim.

Much of the book is an examination of preemption debates in specific industries and particular forums. Chapter 4, "The Preemption War in Courts," examines litigation regarding preemption in transportation, medical devices, pesticides, job-related accidents, consumer products, and credit reporting. Chapter 5, "The Preemption War in Congress," examines particular lobbying battles, including those regarding guns, vaccines, MTBE (a chemical additive in gasoline that may leak into ground water), and the "patient's bill of rights," which would have regulated HMOs. Chapter 6 deals with federal agencies' attempts (largely in the second Bush administration) to achieve preemption in regulating railroad crossings, prescription drugs, automobile roof crush regulations, and mattress flammability regulation.

The final four chapters discuss policy issues. Chapter 7 examines the strengths and weaknesses of courts and regulatory agencies. McGarity concludes that neither type of actor has an overwhelming advantage, so there is room for both, but that neither courts nor regulatory agencies should overreach. Chapters 8 and 9 discuss, respectively, the case for and against preemption. (In the case against preemption, there is only a brief mention of federalism.) The final chapter proposes some ways of ending the preemption wars. McGarity suggests that Congress should fix the issue, and provides some suggestions for how to do so.

The book is thorough and well argued. McGarity is neither a law-and-economics scholar nor libertarian in belief; as a result, there are some arguments that readers of this review might disagree with. One of the most important is the role of what he calls "corrective justice" and what law-and-economics scholars call compensation. The two major functions of the tort system are deterrence (called in this book "preventive justice") and compensation. Law-and-economics scholars generally agree that the tort system is a very bad way of arranging compensation compared with direct first-party insurance. This is because the administrative costs of the tort system (also known as legal fees) are about 50 percent or more of the amount awarded; first-party insurance premiums are on the order of 5–10 percent. Given this, it is commonly claimed that the only efficient function of the tort system is deterrence. McGarity argues that the courts have been neglecting the compensation function of the tort system in favor of deterrence, and that achieving corrective justice through compensation is an important goal of any policy. As a traditional legal torts scholar, he views com-

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pensation as important; as a law-and-economics scholar concerned with efficiency, I think that the tort system should not pay attention to compensation.

McGarity summarizes the particular facts in many cases. There are two problems with this approach (although it is natural to a law professor, immersed in the details of particular cases): First, each case is merely an anecdote, and has little importance in itself; nonetheless, the book is much longer because of this approach. Second, although seemingly neutral, this approach is biased. In examining victims of policies (for example, a consumer harmed by a drug), we see the downside of some action, but we do not see the other side of the issue — those consumers who benefit from the product. Moreover, if state tort suits are added to the federal regulatory system, some products are not produced or are made more expensive, so that some consumers do not use those products. We do not see the harmful effects on those consumers.

In sum, this book is a rather lengthy guide to an important if fairly obscure branch of federal-state legal relationships. This branch of law is now under extreme pressure and is likely to change in important ways. The book explains these issues. However, readers should keep in mind that Professor McGarity does not view these issues through either law-and-economics or libertarian lenses. Nonetheless, the book is sufficiently objective that readers with these preferences can understand the issues. R

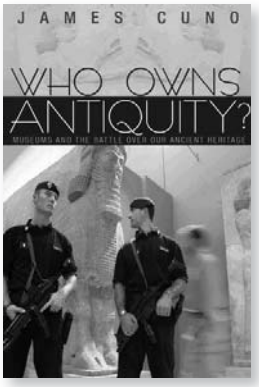
Regulating Indiana Jones

Reviewed by Jeremy Lott

WHO OWNS ANTIQUITY?
Museums and the Battle over Our Ancient Heritage
By James Cuno
228 pages; Princeton, 2008

Those who read *Who Owns Antiquity?* hoping for the answer to its titular question will come away unsatisfied. The book makes one sweeping, unenforceable claim of a common artistic inheritance that doesn't come close to settling the issue. It comes near the end, when author James Cuno writes of his transformative visit to the Louvre in Paris. He found that he could identify with the many ancient exhibits "as exquisite works of human manufacture. There was no sense that they belonged to anyone. They were works of art, no more anyone's property than the great ideas that have come down to us over the centuries. They weren't in any meaningful way possessible."

Oh, horseradish. Obviously they were, and are, "possessible." Museums have alarms and security guards for a reason. All of the items in the Louvre are owned by the museum or by institutions and collectors that loan out items. That only makes sense to ensure visitors look but don't touch, and don't make off with the unburied treasures. Cuno argues that museums are different than private collectors because museums hold antiquities "in trust" for the public, but the Louvre still retains the rights to control or even — in extraordinary circumstances — to sell off exhibits. If that doesn't constitute possession, this reviewer is at a loss to understand what would.



Harrumph. The book is an invaluable if frustrating essay against many protectionist cultural property laws. Invaluable because it gives a good, detailed overview of how such laws came about, and it cuts through the rhetoric and takes incentives and interests seriously. In that, it resembles a public choice history of the conflict. Frustrating because, as a representative of one of the interested parties, i.e., museums (the author is the president and director of the Art Institute of Chicago and the former director of Harvard's Courtland Institute of Art), Cuno only hints at the opportunities lost because of the overregulation of antiquities.

ACTORS AND INCENTIVES To get a rough understanding of the current debate about cultural property laws, we might create a spectrum line with five points spaced out across it. We'll label those points, in order: nation-states, archaeologists, museums, dealers, and collectors. Generally, those interests on the left side of the spectrum favor much more restrictive laws. Those on the right side want a freer market. And museums find themselves in a tough spot.

The antiquities collections that museums once amassed could not be put together today. Why not, you might wonder. Because it has become illegal to transport many items across state lines either at all or without the express permission of bureaucrats who believe the international antiquities market is tantamount to theft. Museums used to be able to purchase antiquities from international dealers or fund archaeological digs and keep about half the items found, through a system known as "partage."

In the last 50 years, however, nations have enacted progressively more restrictive cultural property laws that ended the old system, severing the close connection between archaeologists and museums. Recall the refrain old-school archaeologist Indiana Jones would snarl as he snatched some treasure out of the hands of an evildoer who might profit from it: "That belongs in a museum!" Archaeologists of today, Cuno explains, are different because they depend on states for the permission to excavate and often the funds to do so. Granted, they may call for more laws and tighter enforcement for a number of reasons, but it doesn't hurt to get in good with authorities who can deny permits or shut digs down.

Archaeologists, once well-funded, now have to scrimp for funds, and some of the practices they have endorsed make their discipline less effective. Cuno points out that the Rosetta Stone was salvaged from building material, sold through an antiquities dealer "unprovenanced" — without a documented history of where it was law-

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fully excavated along with the chain of sale. That would render it highly suspect, if not useless, to archaeologists today. Yet without it we might never have translated ancient Egyptian hieroglyphs. Imagine the whole field of Egyptology, stillborn.

The new regime has hurt most of the players on our spectrum. Museums have had their ability to put together new collections much diminished. Scrupulous dealers and collectors are lumped in with the less scrupulous ones. They face suspicion and onerous regulation. Those willing to skirt the laws can make a good deal of money clandestinely digging up antiquities to sell to unscrupulous collectors, who have greater incentive to keep them well out of the public eye. The money makes archaeologists even more likely to have their sites looted. You could even make a good case that states have been hurt by protectionist cultural property laws. After all, many of the museums in poor countries today are filled with artifacts that were dug out of the ground and documented when partage was allowed.

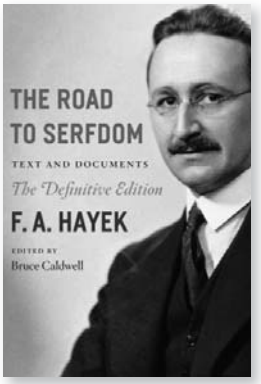
Cuno acknowledges some ill effects of this setup, but he remains more interested in making the case that the laws themselves are unjustified. He argues that modern nation-states are interested in cultural protection laws for what he takes to be very bad reasons: nationalism and militarism, chiefly. This is not wholly convincing, but the author does come up with some fun examples to argue his point. He reveals, for instance, that one Chinese firm that routinely spends huge sums to purchase Chinese antiquities abroad and bring them back to China is an offshoot of a Chinese arms manufacturer — The Poly Group — that was spun out of, and still has close ties with, the Chinese army. It appears the modern Chinese military still attaches great importance to those Qing Dynasty bronzes. R

Still-Relevant — Perhaps More So

Reviewed by David R. Henderson

THE ROAD TO SERFDOM
By Friedrich Hayek
320 pages; University of Chicago Press, 2007

Why write a review of a book that was first published in 1944? Because it's still relevant today. Friedrich Hayek wrote *The Road to Serfdom* during World War II to warn the West that intellectuals and policymakers in traditionally free countries, including Britain and the United States, were repeating the journey that their counterparts in totalitarian countries, especially Germany and Italy, had traveled before the war. That message resonates amidst today's War on Terror, return to regulation, energy plans, financial sector bailouts, and successive economic "stimulus" packages.



In the United States today, the intellectuals' and the public's belief in freedom seems to be in decline and certainly freedom itself is in decline. On the civil liberties side, government agents monitor phone calls, often without a court's permission; SWAT teams invade people's homes; and a federal government agency insists that we get its permission before we board commercial flights. In economics, the federal government has become a much bigger decisionmaker in investments, choosing — regardless of investor or customer desires — to give billions of dollars to various firms. And both George W. Bush and Barack Obama embrace the "fatal conceit," to use one of Hayek's terms, that government can allocate hundreds of billions of dollars better than the owners of those resources can.

Of course, things are not proceeding the same as they were when Hayek wrote. But as Mark Twain once noted, "History may not repeat itself, but it does rhyme a lot." The dangers in World War II stemmed from an explicit belief in central planning. Although the belief in central planning is less prevalent today, you wouldn't know it from looking at the government's policies, which would make sense only if the case for central planning made sense. Hayek's book is relevant today, not just because it tells the intellectual roots of totalitarian governments, but also because some of the same mistakes in thinking that Hayek criticizes so effectively are apparent in people's thinking today.

DISTORTIONS Take the word "privilege." Hayek points out that the word was normally used to talk about special treatment that some people received simply because of their status. Hayek notes, for example, that the right to own land had, at one time, been reserved for the nobility. That was privilege. But the term, writes Hayek, came to apply to anyone who owned property, even though virtually every adult's right to own property had become widely accepted. We see something similar today. Those who have a great deal of wealth are called "privileged," even if they earned their wealth without using any political pull. Those who are poor, on the other hand, are called "underprivileged," even if their being poor has nothing to do with having less than the average amount of privilege. Hayek understood that such distortions in meaning matter.

And consider the following passage:

> The younger generation of today has grown up in a world in which in school and press the spirit of commercial enterprise has been represented as disreputable and the making of profit as immoral, where to employ a hundred people is represented as exploitation but to command the same number as honorable.

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Does this sound as if it were written today? The misunderstanding of profit and production has been around for generations. Thus, one can understand why advocates of freedom have such an uphill fight.

One of Hayek's chapters that speaks most to today is his "Why the Worst Get on Top." In it, he explains why the politicians in a totalitarian system will tend to be the most ruthless people in society. One reason he gives is "that it is easier to agree on a negative program — on the hatred of an enemy, on the envy of those better off — than on any positive task." We see this even in non-totalitarian countries with a large amount of government control, such as the United States. Think about how Al Gore, for example, excoriated "the top one percent" of the income distribution during his 2000 presidential campaign. Hayek quotes the late University of Chicago economist Frank Knight's memorable statement that "the probability of the people in power being individuals who would dislike the possession and exercise of power is on a level with the probability that an extremely tender-hearted person would get the job of whipping-master in a slave plantation." Again, to some extent, this applies even to semi-free countries such as the United States. The last U.S. president I remember who had any reluctance about exercising power was Ronald Reagan. Every president since seems to have loved power.

On power, Hayek also takes on the idea that whether the state runs the economy or we have a free economy in which some people are very wealthy, the amount of power is the same and the only issue is its distribution. The government's power, he writes, "is a power which is newly created and which in a competitive society nobody possesses." Hayek points out that the power a multimillionaire "who may be my neighbor and perhaps my employer" has over him "is very much less than that which the smallest *fonctionnaire* possesses who wields the coercive power of the state and on whose discretion it depends whether and how I am to be allowed to live or to work."

Many people believe that economic values are less important to them than other things. But Hayek points out that the reason people believe this "is precisely because in economic matters we are free to decide what to us is more, and what less, important." Take away our freedom to make those decisions and economic values become obviously important. Hayek writes, "[W]hoever controls all economic activity controls the means for all our ends and must therefore decide which are to be satisfied and which not." Or, as the late Roy Childs, Jr. once wrote in paraphrasing Hayek, when the state has total power over the economy, political power becomes the only power worth having.

Interestingly, even Hayek, for all his pessimism when he wrote the book, failed to predict one significant intrusion on liberty that has happened since. Hayek writes, "[W]ithin the nation few would advocate that the richer regions should be deprived of some of 'their' capital equipment in order to help the poorer regions." Among those few were the officials in the Canadian government who, starting in the 1950s, introduced a plan to transfer resources from "rich" provinces to "poor" provinces. In 2008, those payments were $13 billion, which was over one percent of Canada's GDP.

Having mentioned Hayek's pessimism, I hasten to note that he almost always goes on the offensive. While he is polite and generous to a fault toward those with whom he disagrees, he is not defensive. Instead, in page after page, he points out mistaken thinking and the horrible problems that arise from extensive government economic control. Throughout it all, he maintains a subtle sense of humor. Consider Hayek's statement about one of the main British totalitarian intellectuals: "It deserves to be noted that, according to Professor [Harold] Laski, it is "this mad competitive system which spells poverty for all peoples, and war as the outcome of that poverty" — a curious reading of the history of the last hundred and fifty years."

Of course, many important things today are different from the way they were when Hayek wrote. Included in the list must be the messianic devotion to "environmentalism" and the U.S. government's willingness to intervene in other people's disputes around the world and even, as in the case of Iraq, to start such disputes. Is it time for an advocate of freedom to write a new *Road to Serfdom*? R

Sawing Off the Ladder to Success

Reviewed by George Leef

STEALING FROM EACH OTHER: How the Welfare State Robs Americans of Money and Spirit
By Edgar K. Browning
226 pages; Praeger, 2008

In the Sherlock Holmes short story "Silver Blaze," the key to solving the case was recognizing that something didn't happen — the dog *didn't* bark in the night. Few people (like Dr. Watson) are inclined to think about the importance of things that did not happen, but we can make great mistakes if we fail to do so.

Texas A&M economics professor Edgar Browning's new book *Stealing from Each Other* implores us to think like Holmes did and economists do when they contemplate opportunity costs, namely what we give up when we choose to do X rather than Y. Specifically, he wants us to consider the opportunity costs of our vast federal welfare system. What do we give up when we choose to have the federal government engage in widespread income redistribution? What does *not* happen?

Browning's answer is: a great deal of output. He estimates that our GDP would be at least 25 percent larger if it weren't for our host of programs and taxes comprising the welfare system. He regards this as a bad tradeoff and makes a powerful case for abolishing federal income transfers and adopting a "just say no" policy toward any suggestions for more of them in the future. (Browning is fine with states running whatever welfare programs they want; he respects the Constitution's federalist plan.) "A non-redistributive federal government,"

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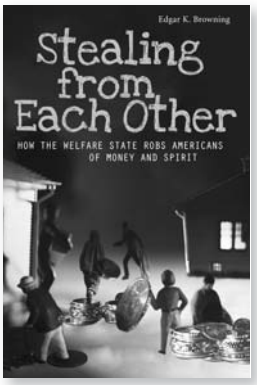
he writes, "would permit more of the productive potential of the American people to be realized." There's the non-barking dog he wants us to concentrate on.

How does the welfare system cause us to lose output? Browning counts the ways:



First, welfare recipients are strongly deterred from working by the high implicit tax rates they face on income they earn. Browning walks us through a typical case: a single mother with children who lives in Pennsylvania. She is eligible for welfare benefits under various programs that amount to $19,217. What if the woman finds a job and earns some money? Suppose she lands a part-time job and earns $5,000 during the year. Is she $5,000 better off? No — after factoring in the reductions in her benefits because of her earnings, she ends up with disposable income of $18,253. The part-time job actually makes her worse off. Browning proceeds to show that she would need to get a job paying $30,000 per year before she would end up financially better off than not working and living entirely at the expense of taxpayers. Even at that income, her gain is less than $700 for all the trouble of working.

It is no wonder that there has been little improvement in the living standards of the poor. They're essentially trapped in a barely tolerable existence of government handouts.

Is that just economic theory? Browning cites data showing that working among poor people has decreased as welfare has become more generous. "In 1960," he reports, "nearly two-thirds of households in the lowest income quintile were headed by someone who worked (at least part time). At that time, welfare expenditures were under 1 percent of GDP. In 2005, when welfare had increased to about 5 percent of GDP, the proportion of workers in the lowest income quintile had fallen by half."

For people with poor labor market skills, welfare has thus sawed off the bottom rungs on the ladder to success. It ensures that we have a more-or-less permanent class of idle, often resentful people. That circumstance is unhealthy, both economically and socially.

Social Security is another bad policy when you consider the hidden costs. What people see (and politicians make sure they do) are the checks flowing from the U.S. Treasury to help Grandpa pay his bills. What they don't consider is how much he would have saved in the absence of Social Security. What if he had invested his taxes in stocks and bonds, thus providing more capital for the economy? Answer: he would enjoy a higher return than Social Security will pay and the economy would have grown faster. Browning estimates that Social Security has reduced GDP by 5 to 10 percent. Further, the higher rate of return on private investments would easily cover the cost of health insurance, thus eliminating the "need" for another vast federal program, Medicare.

There are other villains, too. Unemployment insurance taxes lower the paychecks of all workers to provide the funds that cover unemployment benefits for workers who lose their jobs. Since the standard duration of eligibility is 26 weeks, many workers wait until their benefits are exhausted before seriously looking for new jobs. Moreover, there is a perverse redistributive effect: often it is lower-paid workers who have steady employment (e.g., retail cashiers) and higher-paid workers who have frequent spells of unemployment (e.g., construction workers). It's hardly equitable to tax the former for the benefit of the latter, but we do. If we didn't have a government unemployment insurance system, workers would probably save money for the possibility of a layoff. That money, productively invested and therefore contributing to economic growth, would be theirs. It would provide a nice nest egg for workers who go through their careers with little unemployment. On the other hand, unemployment taxes, like Social Security taxes, do not accumulate wealth for the worker who pays them.

Browning's criticism of the minimum wage as a job destroyer is right on target. However, I think he goes astray in arguing that our immigration policy is essentially an income transfer program from low-paid native workers to the business owners who employ immigrants. He cites studies that indicate that by allowing immigration, native low-wage workers have their earnings reduced by about 4 percent. That may be correct, but I cannot see that a failure to prevent labor market competition is the same as an income transfer program. Immigrant workers no more steal jobs from workers who are American citizens than imported goods steal sales from domestic manufacturers.

BICKERING Otherwise, Browning's case is rock solid. Our 75-year dalliance with federal income redistribution has made us a poorer country than we would otherwise be. It has also made us a far more politicized and contentious one. Browning observes:

> By their nature, transfer programs ensure that people have diametrically opposed interests, and opposing interests are often divisive. Social Security pits the young against the old, the federal income tax positions the wealthy against the middle class, affirmative action sets whites against minorities, and so on.

Political bickering and demagoguery flourish in the hothouse of redistributive politics. James Madison's counsel on the evils of faction comes readily to mind.

Furthermore, the redistributive state has the unhealthy (but again mostly unseen) consequence of encouraging rent-seeking and redistributive factionalism among society's non-poor. People see welfare benefits flowing to the poor and think, "I pay a lot in taxes, so why shouldn't I get something too?" The result is that D.C. and the state capitals are overflowing with lobbyists grubbing political favors and subsidies for every imaginable trade association. Browning doesn't expressly make this point, but the existence of welfare for the poor provides the smokescreen for welfare for the rich. Like a magician misdirecting the attention of his audience, politicians made a big spectacle of their proclaimed "compassion" for the poor while slyly slipping billions to well-heeled interest groups.

Browning reads the minds of egalitarians who might downplay the sacrifice involved here because having more "stuff" — the GDP loss — isn't really important. Of course, some of the increased output would go to poorer people who would have higher incomes if we abandoned welfare, but

there is more to higher productivity than just cell phones and sneakers. Browning reminds readers, "Invariably, higher incomes are associated with better health and longevity, greater artistic as well as scientific achievements — it's not just about 'things.'" Among the benefits of greater overall societal wealth is increased security and ability to respond to unforeseen events. Had the people living around New Orleans in August 2005 been wealthier, they could have coped better with Hurricane Katrina.

I must also commend Browning for not making his book exclusively about the economics of redistribution. He also questions its morality. He contends that when the state taxes Person A in order to transfer the money to Person B, it is stealing. The fact that it's accomplished through democratic politics doesn't change the morality at all. And to those who are inclined to view wealth accumulation by free market activity as morally suspect, Browning replies that in the market, rewards correspond to the individual's contribution to the betterment of other people's lives. Come up with a product that millions want very much and you earn a lot. If you do nothing, you earn nothing. Overall, that's pretty fair.

It may be politically impossible to escape from the quicksand of the redistributive state, but Professor Browning has made it clear that everyone would benefit if we could do so — everyone except for the interest groups that have a stake in maintaining the status quo. There's the real problem. R

Legislating in the Courtroom

Reviewed by George Leef

REGULATION BY LITIGATION
By Andrew Morriss, Bruce Yandle, and Andrew Dorchak
282 pages; Yale University Press, 2008

From time immemorial to the 20th century, litigation was about settling a dispute between two parties. A sued B to make him pay for damage, to perform a contract, or to stop B from doing something harmful to A. In the last few decades, however, litigation has turned into a tool of social policy, used by government agencies or private activists in an effort to get courts to rule in some way that doesn't merely settle a dispute, but makes new law. Activists love this new tool. Sometimes it's effective when legislative bodies or administrative agencies seem to move too slowly. Activists need only come up with a sufficient budget for the legal expenses and find a friendly judge. This approach can also be very lucrative.

The authors of *Regulation by Litigation*, however, take a dim view of this new tool. Andrew Morriss, Bruce Yandle, and Andrew Dorchak (who are, respectively at the University of Illinois, Clemson, and Case Western Reserve) write:

> What is the public cost-benefit balance for regulation-by-litigation? From the public's perspective, there are *no* benefits to regulation-by-litigation compared with regulation-by-rulemaking or regulation-by-negotiation, and there are substantial costs.

The book defends that claim, built around three case analyses.

Before launching into the analyses, the authors provide the reader with a useful overview of our regulatory processes, and they present five theories about regulation. This is crucial information for understanding the book's arguments. Congress and state legislatures have chosen to delegate most regulatory power to administrative agencies. The agencies can engage in rulemaking, which is characterized by notice to the public of the agency's intent to take action on some issue, followed by a period for public comment on the proposed rule, a requirement that the agency respond to at least some of the comments, and possible judicial review after the agency has promulgated its rule.

A second kind of rulemaking is through negotiation. The agency proposes a new rule and notifies all affected parties about it, followed by negotiation to reach unanimous agreement. (The regulated parties may not like the rule, but they often go along with it for fear that they might get saddled with something worse.) This approach also requires public notice and opportunity for comment.

That brings us to regulation by litigation, which makes no effort at rulemaking. Instead, either an agency or private actor files suit against one or more regulated firms to compel behavioral change, extract money, or both. This is markedly different from either form of rulemaking because there is no public participation. This action does away with the element of political compromise and oversight, and it leads to piecemeal regulation because the outcome only binds the defendants in the case.

WHY REGULATE? All right, but what drives agencies and private parties to regulate? How does it really work? The authors realize that they need to answer those questions, and they devote quite a few pages to that end.

First, there is the "public interest" theory, which holds (rather naively) that regulation is undertaken because politicians and their appointees desire to serve the broad public interest. On this theory, regulators act to reduce pollution, improve industrial safety, or control the use of pharmaceuticals out of their devotion to the public interest. This "civics book" notion has been widely criticized, however, since it is difficult to square with the facts.

One of those facts is that regulatory actions often benefit the regulated interests at the expense of the public. To explain that, economists have developed the "capture theory" of regulation, namely that regulation is often best understood as the result of a regulatory agency having been captured by the very interests it is supposed to control. While the Civil Aeronautics Board reg-

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ulated the airlines, for example, the airlines had a powerful motive to influence politicians to appoint people to the board who were sympathetic to them. The board was notorious for suppressing competition to keep airline profits high.

Another theory of regulation is George Stigler's special-interest theory, which holds that regulation is often best understood as a bidding contest in which the outcome depends on which party has the most to gain or lose in the struggle.

A fourth theory is that regulation is frequently done (or threatened) as a way of extracting wealth from an industry. Politicians can propose onerous regulation for some industry, but then withdraw their support for it if political contributions are forthcoming. Fred McChesney, the scholar most associated with this theory, calls it "money for nothing" — politicians get money in return for not doing anything damaging to an industry. (It might less charitably be called legal extortion.)

Finally, there is co-author Yandle's "bootleggers and Baptists" theory, which explains how two groups can act to bring about a regulatory outcome they desire for entirely different reasons. In the classic example, the Baptists work for Sunday-closing laws because they're morally opposed to alcohol consumption on the Sabbath. In that objective, they are quietly supported by alcohol bootleggers who know that if legal liquor sales are outlawed one day per week, they will be able to make high profits by illegally selling to those who want a drink on Sunday. We get "bootleggers and Baptists" regulation when one powerful group favors regulation for moral reasons and another favors regulation for more sinister — often financial — reasons.

CASES IN POINT Bear in mind that the authors aren't arguing that there are never any positive results from regulation, but only that people should not look at regulation through rose-colored lenses, expecting it to deliver beneficial results every time. Frequently, it does the opposite — especially regulation by litigation. That brings us to their three case studies.

The first is the Environmental Protection Agency's litigation against the makers of heavy-duty diesel engines in 1998. Diesel engines had been subject to federal regulation since the 1970s, and by 1998 the stereotype of diesels as producers of vast clouds of black exhaust had been rendered mostly obsolete by a combination of administrative rulemaking and market pressures for greater fuel efficiency. Although the progress against diesel pollution had been great, EPA officials decided in 1998 to sue the big manufacturers of diesel engines. The ostensible reason for the suit was the allegation that the companies had violated existing regulations because their electronic engine controllers led to excessive emissions under some driving conditions. (In reality, the authors maintain, the EPA's motives were mainly rooted in political considerations, especially Al Gore's anticipated campaign for the presidency in 2000.) The engine manufacturers denied that their controllers were illegal "defeat devices" and said that the EPA had known about and tacitly approved the control technology under negotiated rulemaking in 1995.

> Regulation by litigation does away with the element of political compromise and oversight.

Rather than fight the EPA, however, the manufacturers settled five months after the suit was filed. The settlement's key feature was the manufacturers' agreement to comply, by 2002, with new air standards that were to take effect in 2004. The EPA thus got to claim a victory, but there were unintended consequences. According to the authors, "The October 2002–compliant engines were unpopular with engine buyers because they involved new technology and new designs, were more expensive, and were relatively untested." The EPA could force the manufacturers to rush to market new, marginally improved engines, but it couldn't make truck buyers want them. As a result, buyers increased orders for the older engines (a "prebuy") and purchased more used trucks. The litigation led to a bulge of dirtier trucks remaining on the road, a hidden cost that weighs against the EPA's apparent litigation victory.

The second case study is that of dust litigation. Dust was first understood to be a hazard for workers in the early 1900s, especially for workers exposed to silica dust. Litigation was threatened for the harms to exposed workers, but was averted by what the authors regard as a sensible legislative/regulatory approach — bringing dust injuries under workers' compensation. The injured would receive almost automatic benefits through the well-established comp system, and insurers had a strong incentive to help the firms they insured to minimize the dust problem. Most importantly, lawyers looking to make a killing were kept at bay. However, things would soon change.

After a few breakthrough cases where the plaintiffs' bar figured out how to win asbestos cases (and pocket huge fees), there was an avalanche of asbestos cases filed in the 1970s, '80s, and '90s. Many companies were driven into bankruptcy, as courts relaxed evidentiary standards to virtually ensure that plaintiffs would always win. Some workers received huge damage awards even though they suffered questionable injury; others who clearly were injured (mostly later claimants) got far less. The lawyers scooped up enormous fees. Evaluating the regulatory effect of the flood of asbestos litigation, the authors find that it accomplished nothing desirable from society's point of view. The asbestos industry was killed and there was a great deal of collateral damage without the least consideration of costs and benefits.

The trial bar had hoped to repeat its asbestos litigation jackpot with a new round of silica dust cases, but that now seems unlikely. Presented with mass litigation over claims of silica injury in 2005, federal judge Janis Jack, a former nurse, looked carefully at the evidence and detected skullduggery. She found that the plaintiffs' lawyers had been paying compliant doctors to produce favorable diagnoses on a gigantic scale. Caught red-handed, the lawyers beat a hasty retreat. Silica dust probably won't be the next asbestos because mass screening techniques are apt to be subjected to far more

scrutiny than in the past, thanks to Judge Jack's revelations.

Observing the effects of asbestos litigation, the authors conclude:

> (W)hen private interests do acquire quasi-regulatory power through litigation, it can be much more damaging than when public regulators do. The interests of the asbestos plaintiffs' bar have almost no connection with the public interest at large.... By forcing companies into bankruptcy, the asbestos suits have reduced investment in productive activity and employment. By stretching causation well beyond its normal bounds, asbestos litigation has significantly reduced the deterrence that tort awards are intended to provide.

Finally, the authors turn to the tobacco litigation that led to the 1998 Master Settlement Agreement, resulting in the cartelization of the American cigarette industry, huge payouts to state governments, and much higher prices for smokers. This episode is a good illustration of bootleggers and Baptists theory, with supposed health concerns providing the moral high ground while the bootleggers made off with great amounts of money.

Readers get an excellent short history of the tobacco war going back to the 1950s, a war the industry had been winning until the early 1990s when an alliance of private lawyers and state attorneys general overwhelmed its defenses. (See "Bootleggers, Baptists, and Televangelists," Summer 2008.) At that point, the fervent "Baptists" (anti-tobacco crusaders who wanted a ban on cigarettes) were thrown overboard by the bootlegging attorneys general who engineered the settlement and who were more interested in tapping into a huge stream of tobacco revenues. Naturally, the tobacco companies preferred sharing their profits with politicians to a death sentence, and thus the settlement came about. The authors sum it up this way: "(T)he attorneys general effectively imposed a hidden excise tax on a consumer product and a set of regulations on an industry without first having an open legislative debate or a vote of the state legislatures." It was a bad process leading to a bad outcome. What it boils down to is that a generally lower-income group — cigarette smokers — is forced to pay for extravagant state spending, little of which particularly benefits them.

Again, the authors aren't arguing that traditional forms of regulation are necessarily good, but that those forms are far preferable to regulation by litigation. Unfortunately, they see no solution to the rising tide of this sort of regulation, since powerful people will litigate when they want to. Instead, the authors suggest some marginal improvements, such as requiring that proposed settlements be publicized just as proposed rules must be, and that interested parties be allowed to participate in settlement proceedings.

The great benefit of this book is that it exposes the way regulation really works, especially regulation by litigation. Lenses coated with rose-colored film are cleaned so that those who want to see regulation clearly can do so. *Regulation by Litigation* would be a good supplementary text for advanced courses in public policy. R

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