

IN REVIEW

How Governments Enforced Segregation

◆ REVIEW BY DAVID R. HENDERSON

“We have created a caste system in this country, with African Americans kept exploited and geographically separate by racially explicit government policies.” So writes Richard Rothstein in *The Color of Law: A Forgotten History of How Our Government Segregated America*. That’s a strong statement. But Rothstein, a research associate of the Economic Policy Institute (EPI) and a fellow at the Thurgood Marshall Institute of the NAACP Legal Defense Fund, provides much support for his claim. He shows how racist Federal Housing Administration (FHA) policies on mortgages, exclusionary zoning laws, state real estate regulations, geographic placement of government schools, urban renewal, and even federal and state highway policies all combined to relegate black Americans to segregated communities. He also blames restrictive covenants in house titles, making an argument so effective that he brought me, a strong believer in property rights, closer to his viewpoint than I would have expected.

Most of the book is a careful historical look at the policies noted above. He could have made an even stronger case by looking at government regulation of labor markets. Disappointingly, Rothstein does not challenge, but instead embraces, the minimum wage, a law that disproportionately hurts black Americans and *was intended to do so*. He seems not to be aware of this.

Toward the book’s end, he proposes a series of policies, ranging from extreme to moderate, to remedy the damage done by over half a century of destructive government policies. On the more extreme policies, such as large subsidies to black Americans, I find him unpersuasive. One

of his more moderate policy proposals, on zoning, is attractive.

Insuring “black” mortgages / One policy that Rothstein faults is the FHA’s historical unwillingness to insure mortgages for black homebuyers and its opposition to racial mixing in neighborhoods.

In 1941, for example, a real estate agency representing a new development 20 miles west of Newark, NJ tried to sell 12 properties to middle-class black people. They had good credit ratings and banks were willing to lend to them if the FHA would approve. But the agency refused, declaring, “No loans will be given to colored developments.”

Another example: In 1958, a white San Franciscan named Gerald Cohn bought a house in Berkeley and, not ready to move in, rented it to a black man named Alfred Simmons. The FHA then black-listed Cohn, telling him that he would be “denied the benefits of participation in the FHA insurance program.” The director of the agency’s office in San Francisco wrote Cohn to tell him that any application for mortgage insurance that he made in the future “will be rejected on the basis of an Unsatisfactory Risk Determination.” Naturally, the FHA had no way of knowing whether Cohn would be a bad risk in the future. Instead, the agency was, rather blatantly, communicating its displeasure with Cohn’s renting to a black man.

These were not isolated cases. The FHA’s 1935 underwriting manual for real estate agents states, “If a neighborhood is to retain

stability it is necessary that properties shall continue to be occupied by the same social and racial classes.” The manual also states that natural and artificially established barriers would protect a neighborhood from such “adverse influences” as “inharmonious racial groups.” Although those last three words were excised from the 1947 edition of the manual, it still recommends valuations based on “compatibility among the neighborhood occupants.”

Exclusionary zoning / Another segregating measure Rothstein documents is exclusionary zoning.

He notes that in its 1917 *Buchanan v. Warley* decision, the U.S. Supreme Court overturned an explicitly racial zoning ordinance in Louisville, KY. The Court “ruled that racial zoning ordinances interfered with the right of a property owner to sell to whomever he pleased.” In response, those who wanted segregation employed a number of tactics. One was, believe it or not, to ignore the Supreme Court ruling, as the West Palm Beach, FL government did from 1929 to 1960.

A more common tactic was to use zoning to forbid all but single-family houses. Most black people could not afford them. In St. Louis, writes Rothstein, Harland Bartholomew, a full-time planning engineer, proposed rules “to prevent future multi-family, commercial, or industrial structures from impinging on single-family neighborhoods.” So if single-family houses in a neighborhood “had deeds that prohibited African American occupancy,” this “made it almost certain that the neighborhood would be zoned ‘first-residential,’ prohibiting construction of anything but single-family units and helping to preserve its all-white character.”

Another measure by the St. Louis zoners was to permit polluting companies, nightclubs, liquor stores, and prostitution houses in black neighborhoods but not in white ones. Rothstein doesn’t explain clearly why this would reinforce segregation. Presumably, what he has in mind is that allowing these other uses would reduce the value of houses, making them more attractive

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to black people who, presumably, could afford less. One can certainly see his point with polluting companies and, most likely, prostitution houses. But with respect to liquor stores and nightclubs, it's not clear to me *which* group was unfairly harmed: blacks or whites. I live in a mainly white city that didn't allow liquor stores until the late 1960s and still doesn't allow nightclubs. That makes my life worse, not better.

Realtors and schools / One way that state governments enforced housing segregation was with regulations on the conduct of realtors. Real estate boards, writes Rothstein, “expelled brokers who sold to African Americans in stable white neighborhoods.” Without the power that state governments had given to real estate boards, those brokers could not have been expelled. This happened not just early in the 20th century, but much later also. Rothstein tells of a case in Sarasota, FL in 1963 in which a real estate board expelled a member for selling to a black doctor in a white neighborhood.

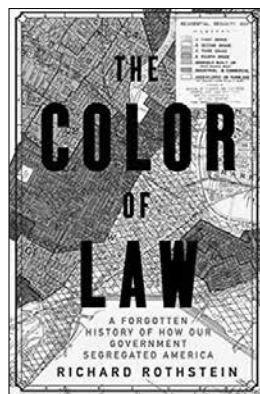
Local governments also segregated with their decisions on where to locate government-owned schools. Just after World War I, for example, local governments in Atlanta closed schools for whites “if they were in zones designated for future African American residence, and schools for African Americans were closed if they were in zones reserved for whites.” This school location policy hurt whites as well as blacks. The Atlanta School Board, dealing with an overcrowded situation in a mixed-race area, built a new junior high school for whites in the far northern suburbs, prompting white families to move to that area and, therefore, causing more segregation.

Subsidizing whites / Local governments sometimes used government subsidies combined with eminent domain to dis-

place people and then build housing for whites only.

One such major project in 1942 was the 9,000-unit Stuyvesant Town complex in east Manhattan. New York City's government “condemned and cleared eighteen square city blocks” and then transferred the property to Metropolitan Life Insurance Company, even though the company explicitly intended the housing for “white people only.”

The apparent good news is that in 1950, New York's state legislature passed a law “prohibiting racial discrimination in any housing that received state aid in the form of a tax exemption, sale of land below cost, or land obtained through condemnation.”



The Color of Law: A Forgotten History of How Our Government Segregated America

By Richard Rothstein

345 pp.; Liveright Publishing, 2017

So Met Life agreed to lease some apartments to black people. Here's the problem: During World War II, New York City's government had imposed rent control as what was then described as a temporary measure. But the policy ended up not being temporary. Rent controls keep rents below market levels, causing shortages and discouraging mobility. So there were few apartments available for black people.

Governments also used highway placement policies to run interstate highways through urban black communities. While it is not completely clear why this would cause more segregation, what is clear is that losing their homes to eminent domain would reduce black households' wealth and make it even more difficult for them to buy homes in middle-class areas. One haunting photo in the book is of poor black children in Miami looking on as the first wrecking balls destroyed a black neighborhood to make way for I-95.

Restrictive covenants / One way that developers assured home buyers that they would be able to live in neighborhoods without races or ethnic groups they wanted to avoid was the use of restrictive covenants.

I had always thought that such covenants, although personally offensive, should be legally allowed. I think people should be able to decide, by voluntary contract, whom they live next to. Anyone who buys a property and signs the deed is agreeing to whatever conditions are in the deed.

But Rothstein, who opposes restrictive covenants, has moved me a little closer to his position. How? He points out that local governments often “aggressively promoted such covenants.” In 1943, for example, the city attorney of Culver City, CA instructed air raid wardens that when they went door to door to make sure families turned off their lights in the evening, they “should also circulate documents in which homeowners promised not to sell or rent to African Americans.” That was wrong for two reasons: the government was taking advantage of people while they were most fearful, and, more important, it was none of the government's business.

Minimum wage / My major disappointment with the book is that Rothstein could have made his case even stronger by discussing how minimum wage laws hamper the economic development of relatively unskilled black people.

Rothstein references a section of *An American Dilemma*, the 1944 classic on race in America by the late Swedish economist and Nobel laureate Gunnar Myrdal. In it, Myrdal tells how the U.S. Employment Service, a federal agency, refused to enroll black people for skilled work. But that agency was tiny and the harm it did does not come close to the harm the federal government has done with its minimum wage. The person who laid this out eloquently was none other than Myrdal, just 21 pages earlier in his book. He wrote:

But it has been mainly [black workers'] willingness to accept low labor standards which has been their protection. When government steps in to regulate labor conditions and to enforce minimum standards, it takes away nearly all that is left of the old labor monopoly in the “Negro jobs.”

IN REVIEW

It was well understood from the time of the federal minimum wage in 1938 until the late 1950s that one major goal of minimum wage proponents—many of whom were union officials representing white unions—was to wipe out competition from black people. For instance, in 1957 during a hearing on the federal minimum wage, here's what a U.S. senator from a New England state said in defense of the minimum wage:

Of course, having on the market a rather large source of cheap labor depresses wages outside of that group, too—the wages of the white worker who has to compete. And when an employer can substitute a colored worker at a lower wage—and there are, as you pointed out, these hundreds of thousands looking for decent work—it affects the whole wage structure of an area, doesn't it?

That senator was John F. Kennedy, who understood one of the main purposes of the minimum wage. It's possible Rothstein is not aware of this history. As noted, he's a research associate of EPI, which strongly advocates for higher minimum wages. I've never seen EPI address the sordid history of support for the minimum wage.

What to do? / Rothstein's absence of a critical view of the minimum wage carries over to his proposals to remedy the large amount of segregation that remains in America. He advocates returning minimum wages to their historic level. He clearly means that the minimum wage should be raised substantially, not realizing the damage this would visit upon black youths trying to get into, and make their way up in, the labor market.

Rothstein also advocates other policies that he admits are extreme. One is to have the federal government buy up, at market values, "the next 15 percent of houses that come up for sale in Levittown" and then "resell the properties to qualified African Americans for \$75,000, the price (in today's dollars) that their grandparents would have paid if permitted to do so." Put aside the unintended consequences, one of which would be huge discord in the black

community when only a lucky few would get the properties; this proposal is unjust. To pay for these subsidies, Rothstein advocates taxing regular taxpayers, almost none of whom are responsible for these policies.

To the charge that his proposal is a form of social engineering, he replies that desegregation "would attempt to reverse a century of social engineering on the part of federal, state, and local governments that enacted policies to keep African Americans separate and subordinate." Good point. But that doesn't mean that his proposals are not social engineering.

His main rebuttal is that "too few whites were terribly concerned with that kind of social engineering, and it's a bit unseemly to make that objection now." Really? Because our grandfathers didn't

object to one form of social engineering, we can't object to another? That's weak.

To his credit, Rothstein does propose one policy that I can totally support: "a ban on zoning ordinances that prohibit multifamily housing or that require all single-family homes in a neighborhood to be built on large lots with high minimum requirements for square footage." He understands that such supply restrictions drive up the price of housing, a situation that has reached crisis proportions for blacks and whites alike on both coasts.

What federal, state, and local governments did to segregate black Americans in the last century was horrible. It's important to help the descendants of those victims. But it's also important to not victimize other innocent people. R

The Sordid History of Veterans' Benefits

◆ REVIEW BY GEORGE LEEF

America's first and arguably still greatest welfare pressure group was not the poor or the unemployed. Rather, it was military veterans, who figured out when the nation was still a fledgling how to extract wealth from the state. After all, what plea works on more people than, "We fought and bled for you, so now you owe us"?

In *Paid Patriotism*, George Mason University economics professor James Bennett takes a long, highly critical look at the history of veterans' benefits: cash payments, medical care, hiring preferences, and more. It's an overwhelmingly sordid tale, but one that the author tells with enthusiasm (and often laced with sarcasm).

Bennett doesn't dispute that soldiers who have been wounded in U.S. wars (of which he obviously thinks we have too many) deserve to be treated and, as far as possible, made whole by the government. But he insists that we should draw a distinction between those unfortunates and the great majority in our military, who

have never even heard a shot fired in anger, much less sustained a battlefield injury. Today, any kind of military service qualifies one for a smorgasbord of lifetime benefits whose costs spill red ink the way Gettysburg spilled blood.

Pensions on the United States / One of the first acts of our new Congress was a 1792 law declaring that "any person called out into the service of the United States who was wounded or disabled while in actual service ... shall be taken care of and provided for at the public expense." That was perfectly reasonable, but as Bennett notes, "that phrase *while in actual service* will be a barrier that once breached is damnably hard to restore." In that respect, the dike

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began to crack in 1805 when Congress amended the pension act so that benefits were extended to veterans who, later in life, became unable to earn a living, even though they had been hale and healthy at the time of their discharge.

Then in 1818 a great fissure opened when, Bennett writes, “a mixture of gratitude, patriotism and shrewd lobbying” led to enactment of the Revolutionary War Pensions Act. The romantic image of the suffering old soldier caused Congress to legislate that men claiming to have served in the war and attesting before a federal judge to their inability to provide for themselves qualified for a pension. The bill was pushed by President James Monroe, and his congressional allies said the costs would be minimal. Besides, the Treasury held a surplus and what better way to spend it than to assist the nation’s heroes?

That piece of generosity did not turn out as expected. There was a flood of applications, many of them transparently fraudulent. Even after weeding out some of the latter, the cost of veterans’ pensions went from 1.5% of the federal budget in 1818 to 16% by 1820.

Rather than learning a lesson from that experience, in 1832 Congress again extended benefits—full pay for life for Revolutionary War vets—leading to a new cascade of claims, many of them dubious. A daring opponent of this bill, Rep. Thomas Bouldin (Va.), stated that the expansion of military pensions led “a large portion of the people of the United States to look to the Treasury as the unfailing spring from which they were to receive every good. The poor, instead of being relieved in their own neighborhoods, were pensions on the United States.” His words would prove to be extremely prescient.

Not only did the government’s pension generosity drain the Treasury, but it also opened up sectional antagonism between the North and South. A large majority of

the pensioners lived in the northern states, but the federal government’s revenues came chiefly from tariffs, which were borne disproportionately by the South. Thus, the government’s generosity toward the soldiers (and claimed soldiers) of the Revolution helped to fuel the country’s next great war.

Benefit of politicians (and others)/ Whereas the government waited decades after the Revolutionary War to start paying military pensions (as well as for veterans of the War of 1812 and the Mexican War), the Civil War prompted almost immediate action: an 1862 law granting benefits to disabled Union soldiers (or their widows if killed). The cost of those payments rose steadily as the war progressed, but Pension Commissioner James Baker stated that they would peak in 1872, then begin to decline. What Baker failed to consider was that politics would keep ratcheting up the number of soldiers eligible and the generosity of the payments.

The crucial year was 1879, when the Arrears of Pensions Act was passed, in effect backdating pensions for thousands of Union army veterans. Its cost was estimated by its Republican proponents at around \$20 million. Opponents, however, saw it as a far more expensive vote-buying scheme. The *Cincinnati Commercial*, for example, wrote, “This great pension fraud amounts to a scheme to confiscate and parcel out the money in the Treasury for the benefit of local politicians.” That view proved correct, as claims (including a great many for widows, minors, and dependent relatives) poured into the Pension Office at an unprecedented rate.

Bennett quotes a contemporary observer, a minister, who noted the effect of the gusher of federal money on veterans: “Their organizations for mutual aid and fellowship were turned into political machines not for the promotion of public ends, but for the

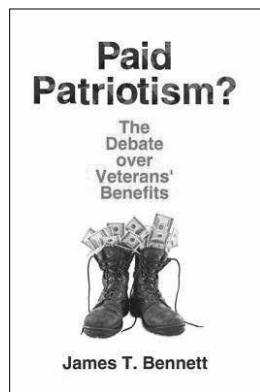
one purpose of political plunder for the personal profit of the members.”

From that time until the present day, veterans groups lobbying for benefits would take center stage. In the 1880s, the heavyweight was the Grand Army of the Republic (GAR), which allied itself with the Republicans and would work ceaselessly to increase payments to veterans and their family members. In 1870, only 5% of Union veterans were receiving a pension, but thanks mainly to the GAR, that figure was 93% by 1910. Crucially, the need for a war injury to be eligible to collect was eliminated. “In its pursuit of loot,” Bennett writes, “the GAR played the patriotism card often and without shame.”

One result of the GAR/Republican alliance was pressure to keep tariffs high. Tariffs were still the main source of federal revenue and the GAR wanted vast amounts of money to flow into the Treasury to pay the ranks of Union pensioners. The nation’s protectionism was therefore not just a matter of bad economic theory; it was also driven by the GAR’s success in pushing the idea that America was eternally and infinitely indebted to the “boys in blue.” Spending finally peaked at over 41% of federal outlays in 1893.

Beyond pensions/ World War I yielded its share of military preferences and pension follies. One innovation was in giving veterans a huge boost on civil service exams. Vets had to be hired even if their scores were substantially below those of non-vets. As a result, by 1923 34% of all new civil service employees were veterans. Also, the government made the fateful decision to establish Veterans Administration hospitals across the nation. Their construction was rife with corruption and the problems with long waits and bad care remain to this day.

At the end of the war, Congress, feeling the inevitable pressure to help the millions of soldiers and sailors being mustered out, enacted a “bonus” for them. It wouldn’t be payable, however, until 1944. When the Depression hit, demands for immediate payment of the bonus became insistent. In the summer of 1932, thousands of “Bonus



Paid Patriotism: The Debate Over Veterans' Benefits

By James T. Bennett
282 pp.; Transaction Publishers, 2017

IN REVIEW

Army” marchers descended on Washington, DC to press their case. Just as the soldiers were starting to drift away in political defeat, the government overreacted, first with local police and then, after bloodshed, federal troops under Gen. Douglas MacArthur. Newsreel footage of troops rousting impoverished vets out of their pitiable encampments caused an uproar. Knowing that President Herbert Hoover would take the blame, his opponent in that year’s campaign, Franklin D. Roosevelt, gleefully exclaimed to an aide, “This elects me.”

World War II, of course, brought a fresh round of demands for benefits for the men and women in uniform. Beginning in 1943, the two big veterans’ organizations, the Veterans of Foreign Wars and the American Legion, vied to push a new bill through Congress. The VFW wanted the traditional sort of postwar cash payment, but the Legion won this contest of political entrepreneurs by proposing a set of new, immediate benefits in what came to be called the G.I. Bill of Rights, a name that Bennett calls “a stroke of public relations genius.” Who would dare oppose it? (Oddly enough, FDR was not enthusiastic, preferring to treat vets not as a special class but merely as recipients of the state’s general welfare system.)

Under the bill, the government would help veterans by giving them up to 52 weeks of unemployment benefits, making them eligible for home, farm, and business loans through the Veterans Administration, and providing subsidies for vocational training or college.

The educational aspect of the bill has been hyped enormously, Bennett writes, with “nostalgia-crusted encomia.” Supposedly, the G.I. Bill deserves credit for boosting the U.S. post-war economy because it opened up opportunities for talented people who would otherwise have remained undereducated. Bennett’s attack on this sacred cow, alone, is worth the price of the book. Of the minority of vets who made use of the educational subsidies, the majority did so for vocational training, which had been around before the war, but not with free government money. Many vets, he writes “received training allow-

ances to teach them to do things they’d been doing ably since they were ten years old.” Moreover, there was a huge amount of fraud in these training programs.

As for those vets who used their benefits for four-year colleges and universities, most would have attended anyway, continuing a trend toward increasing higher education attendance that had been in progress since the 1920s. The great effect of the G.I. Bill, Bennett argues, was not that it made the American workforce more skilled and capable, but that it enriched colleges as never before. Administrators quickly realized that they could raise tuition, and did so. All that the G.I. Bill actually accomplished was to start the unwholesome trend of Americans needing to acquire a college degree for work that had previ-

ously been done mainly through on-the-job training. The economy didn’t get a boost—just the higher education sector.

Since the initial G.I. Bill, we have had many amendments that always ratchet up the level of “generosity” toward the men and women who enter the military. Now the prospect of heavily subsidized college, a lifetime of low-cost medical care, hiring preferences, and other benefits are the major recruiting tool for the armed forces. The costs are prodigious and rising, but there is no reason to believe they will decline because, Bennett notes, “no one ever lost a congressional race by being too solicitous of veterans’ demands.”

And that’s why the book doesn’t close with an upbeat solution to this gigantic problem. There isn’t one. R

Public Interest or Powerful Interests?

◆◆ REVIEW BY BRUCE YANDLE

Do you ever wonder why the Federal Communications Commission persists in making political allocations of radio and TV broadcast licenses instead of auctioning off those rights? And why the FCC has the power to regulate broadcast content? If you think you have those explanations, then why during the Carter

administration did the FCC move to award cellular licenses by auction? Or why did the 1996 Telecommunications Act usher in a requirement that V-chips be implanted in all post-2000 TV sets so that parents could limit or control their children’s viewing of “violent” programs? And why did Ted Turner seem so delighted by this, yet the V-chip solution never seemed to work? And what about satellite broadcaster SiriusXM; why is it required to broadcast nationwide and not allowed to offer regional or local services?

Are you curious about how and why Lady Bird Johnson gained the rights to

radio and television broadcasts in Austin, TX and what was the quid pro quo? What about “wireless” data, the communications system that many early experts thought would at best become a valuable niche market, but instead has formed a new bedrock for millennial culture and global communication? Would you like to know how and why the FCC opened the regulatory barn gate for wireless, so to speak, and let the horses run? What happened to the regulators’ previous heavy hand? Is it gone or was this just a temporary lapse of regulatory judgment?

Here, I offer a sample of teasers for the material presented in this delightfully written and heavily documented history and analysis of U.S. telecommunications policy,

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written by Clemson economist Thomas Hazlett. (Full disclosure: I formerly was dean of Clemson's School of Business and Behavior Sciences and I hold an emeritus title at the school.) *The Political Spectrum*, which reflects Hazlett's career-long study of and participation in communications policy-making, is packed with fascinating stories buttressed with more than just casual references to industrial organization and public

The electronic spectrum has not, in and of itself, physically constrained the growth of telecommunications, though that is the justification for its regulation.

choice economics. He brightens his story with discussions of common law contracting, property rights, and potential market solutions that could be used to allocate communications access. Interestingly, the rent-seekers' preference for command-and-control regulation that emerged for spectrum management parallels almost exactly what emerged with environmental regulation. Cartel-forming technical standards quickly replaced common law-accommodated market forces based on property rights.

Property rights and public interest / The story Hazlett tells begins with late 19th century communications technology breakthroughs and ends with the 21st century wireless revolution. Throughout, there is one common theme: The electronic spectrum through which communications are transmitted has not, in and of itself, physically constrained growth and expansion of telecommunications, although that is a popular justification for federal regulation. As Hazlett explains, it is politics not physics that limits human communica-

tions capabilities.

Nonetheless, no less than the U.S. Supreme Court chose to assert the opposite. Hazlett writes:

The idea that radio services did not conform to legal or economic norms was formalized in law under Justice Felix Frankfurter's key 1943 Supreme Court opinion in *NBC v. United States*.

The case resolved a legal challenge to the FCC's Chain Broadcasting Rules brought by the largest such network, the National Broadcasting Company (NBC). Regulators had imposed various

limits on the agreements made between radio stations and networks that sold them programs. NBC argued that this exceeded the authority of the Commission, which was to police airwave interference while leaving broadcasters free to create (or buy) their content.... NBC lost.... Observing "certain basic facts" about radio stations, the Court wrote that "the radio spectrum is simply not large enough to accommodate everybody who would like to transmit."

As Hazlett explains, the Court confused excess demand that results when markets are not allowed to function (as when rights are not auctioned) with technical relationships. He argues that the problem contemplated by the Court would have been resolved if markets had been allowed to allocate broadcast rights.

Earlier in the book, after giving a brief synopsis of radio and television regulation, he describes the regulatory process this way:

Here lurks a template for the creation of communications policy. Government identifies a problem and takes measures

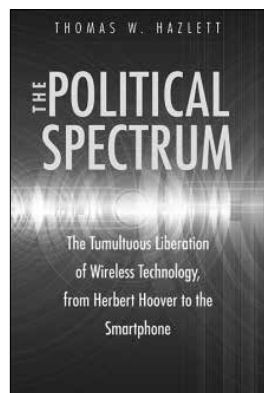
to address it. The [asserted] market failure is misdiagnosed, and the regulatory "fix" reflects political bargains with powerful industry incumbents. Barriers to entry are created. The "public interest" is asserted. When the purported solutions is finally abandoned, more robust market forces assert themselves. Government proudly claims that its policy is a success. The cycle repeats.

As one who always enjoys a good "Bootleggers-and-Baptists" story of regulation (in part because I coined that term in the pages of *Regulation* in 1983), I appreciate the notion that regulators would find ways to feather special interest nests while at the same time claiming to serve the public interest. I note that Hazlett likes this sort of analysis, too: Chapter 9 is titled, "Baptists, Bootleggers, and the LPMF [Low-Power Frequency Modulated]."

The book is organized chronologically, moving from early to the most recent major regulatory episodes. Yet for those who cannot enjoy the luxury of embarking on a sustained read, the book offers an advantage: each chapter can stand on its own. To top it off, Hazlett is a talented storyteller, a trait each chapter demonstrates.

While there are several strong contenders for the book's best chapter, I found myself rereading, "Spectrum Policy as if the Future Mattered." It is here that the reader receives a summary of key thoughts, an explanation of how markets and property rights may continue to improve spectrum allocation, and how the economic way of thinking can offer valuable guidance along the way.

Who might gain from reading Hazlett's book? Obviously, those engaged in the world of policy formation and analysis will value its contents, as will teachers and students of politics and government regulation. But then, there are countless individuals who enjoy reading a good account of how the world works. They should welcome this book, too. Highly accessible, delightfully written, and strongly organized, it should be read and discussed widely. R



The Political Spectrum: The Tumultuous Liberation of Wireless Technology, from Herbert Hoover to the Smartphone

By Thomas W. Hazlett
329 pp.; Yale University Press, 2017

Reining in the Deep State

REVIEW BY THOMAS A. HEMPHILL

Philip Hamburger, the Maurice and Hilda Friedman Professor of Law at Columbia University Law School, has written a pamphlet for general consumption that distills the essence of his Hayek Prize-winning scholarly book, *Is Administrative Law Unlawful?* (Manhattan Institute, 2014). In the tradition of American pamphleteer

Thomas Paine, Hamburger believes that he needs to inspire everyday Americans to declare independence from what he considers “the civil liberties issue of our time.” He argues that, just like the American colonists who revolted against the tyranny of the British Crown, 21st century Americans must overthrow the administrative excesses of the “deep state”—the rule of government bureaucrats—and the subsequent restrictions of their constitutional rights to liberty and due process.

Constitutional problems / When it comes to the threat from the administrative state, Hamburger is unmoved by the “economic critique” of administrative power, which is the argument that such control of the economy is undesirable because it is inefficient. It’s more than that, he writes:

The economic critique does not address the breadth of this danger. Indeed, it tends to protest merely the degree of administrative regulation, and it thereby usually accepts the legitimacy of administrative power—as long as it is not too heavy-handed on business.

Given this observation, he is not surprised that “economic criticism has not stopped the growth of administrative power.”

To explain the “administrative threat,” he turns to the legal critique:

The legal critique more fully addresses the problem than does the economic protest, for although much administrative power is economically inefficient, all

of it is unconstitutional. And this legal objection is central, because it confronts administrative power on its own terms—on its pretension to bind Americans in the matter of law.

Hamburger argues that administrative power is not built on the use of coercion, but on legal obligation. Moreover, the U.S. Constitution is clear on where authority lies in the three branches, with such power to make laws located in the Congress and judicial power in the federal courts. Administrative power evades many of the Constitution’s legislative and judicial processes, and hence procedural rights of Americans.

For the reader to better understand this danger, he discusses the English absolutism of the 17th century, specifically that of King James I. His “administrative power,” exercised through bureaucratic “prerogative” tribunals and commissions (that era’s versions of administrative agencies), most famously including the Star Chamber and the High Commission. The former was partially founded on statute and the latter was entirely founded on statute, both exercising absolute power “in ways that have come back to life in America.” This absolute or “extralegal” power, says Hamburger, “can be understood as an evasion of law,” while this administrative power “has flowed around the Constitution’s pathways of power and even around formal administrative pathways, thus creating a cascade of evasions.”

He deftly provides examples of modern American “soft absolute power” by citing various actions of the Obama administra-

tion. For instance, the Affordable Care Act (ACA) has agencies issuing binding rules, i.e., “exercising legislative power,” on the nation’s health care system. Such rules are justified by what Hamburger refers to as the fiction of the “intelligible principle” whereby agencies are “merely specifying what Congress has enacted.”

He also cites the Clean Power Plan, an Environmental Protection Agency rule designed to reduce greenhouse gas emissions by establishing emissions standards for existing power plants. Hamburger contends that the EPA, through its issuance of the Clean Power Plan, has simply interpreted an ambiguous section of the Clean Air Act.

Another example of this soft power: federal agencies have the legal authority to interpret statutes, and even their own rules, in the form of “guidance”—again, making law. They also can suspend laws using letter waivers, such as the “mini-med” waivers issued under the ACA. These agency waivers to affected parties were not authorized under the ACA, but unilaterally excused the affected parties from complying with some statute or regulation, thus placing the parties above the law.

Hamburger takes the reader on a concise intellectual journey through how the U.S. Constitution bars administrative (extralegal and absolute) power (Articles I and III), delegation, and waivers, and also discusses the Necessary and Proper Clause and federalism. He also addresses the U.S. Constitution’s guarantees of procedural rights, including due process, the reduction of constitutional guarantees to mere options, and substantive rights, arguing that administrative power “ignores all of this.”

He further addresses procedural deprivations in the courts when judges hear appeals from administrative adjudications, including judicial bias in deference to agency interpretation, deference to agency fact-finding (and the concomitant loss of jury rights and judicial bias), and judicial bias even after holding agency acts unlawful. All of this results in what he refers to as “the double violation of such

rights, both administrative and judicial.” Lastly, he touches upon the jurisdictional boundaries, noting that the “preeminent qualification concerns the states,” but other, lesser qualifications include local governments, the nation’s borders, and military law, all confined “to edicts that bind or unbind.”

Hamburger argues:

These jurisdictional qualifications are not merely exceptions but valuable boundaries to the Constitution’s principles. By leaving room for administrative power in the states, localities, at the borders, and so forth, these limits allow Americans to establish strong principles against extralegal power in the U.S. Constitution.

He further argues that the most effective way to understand how administrative power threatens civil liberties is by evaluating it through the prism of equal voting rights. He suggests that there is a strong corollary between the expansion of voting rights for African-Americans and women, and the “shift of legislative power out of Congress and into administrative agencies.” Progressives, such as Woodrow Wilson, were concerned that such newly enfranchised groups would reject their “reforms,” thus the Progressives embraced administrative governance. Administrative governance would transfer legislative power from an elected body representing the “enfranchised masses” (including accountability to local, regional, religious, and other distinctive communities) to a “knowledge class,” resulting in a “further step away from the people and into the hands of a relatively homogenized class.”

Reclaiming constitutional authority / Is it practicable to abandon administrative power? Addressing the issue of complexity (a justification for the executive branch

issuing administrative rules), Hamburger concludes that Congress has the ability to write statutes that are as “complex” as any agency rule. Echoing legal scholar Richard Epstein, he also questions whether a complex society truly needs complex rules. As to the question of how the courts would handle the vast amount of adjudication that is currently handled by agencies, he argues that the overwhelming volume of such adjudication is “merely the ordinary and lawful exercise of executive power.”



The Administrative Threat

By Philip Hamburger

64 pp.: Encounter Books, 2017

Concerning the value of impartial administrative expertise, he is not convinced that the “knowledge class” in these agencies has greater expertise than the industries they are entrusted to regulate. Most importantly, “although experts can be valuable for their specialized knowledge, they usually cannot be relied upon for decisions that take a balanced view of the consequences.”

What is to be done about “administrative power [that] crushes the life and livelihood out of entire classes of Americans?” Hamburger’s

policy recommendations include, first, that Congress should reclaim its administrative power and bar judicial deference to agencies on questions of law, abolish administrative law judges and replace them with real judges, and remove immunity from agency administrators. Second, he would require that the executive branch agencies send their rules to Congress for their adoption. Third, Americans must persuade judges to do their duty, uphold the law, and especially the Constitution.

His policy recommendations are spotted as a “wish list” that ostensibly is part of the current Republican agenda. Yet I am not convinced that the Republican-controlled Congress is on board with “fully reclaiming” such administrative power. Consider, for example, the Regulations from the Executive in Need of Scrutiny (REINS) legislation, which would require

Congress to approve every new major regulation (meaning a regulation with compliance costs of \$100 million or more) before the rule can take effect. REINS passed the House in January but it is still awaiting Senate approval. Congress has gradually ceded many of its “legislative” responsibilities to the executive branch, and many lawmakers seem happy to avoid that difficult work.

A positive indicator, however, is the current Congress and the Trump administration have successfully employed the 20-year-old Congressional Review Act to withdraw 14 rules adopted in the final months of the Obama administration. Moreover, in the first six months of the Trump administration, the White House’s Office of Information and Regulatory Affairs has approved significantly fewer major rules and dramatically fewer minor rules than the previous three administrations during their respective first six months in office. (See “Deregulation through No Regulation?” p. 4.) So elected officials are making some progress in over-seeing the regulatory state.

Concerning the judiciary, the most effective way to “persuade” judges to uphold the Constitution is to appoint judges who already reflect this judicial philosophy in their opinions. As Hamburger adroitly explains, the federal judiciary clearly shows deference (bias) to agency interpretations and fact-finding—even after holding agency acts unlawful! This is where the Trump administration and the Senate can play a critical role in gradually changing the federal judiciary’s philosophy on the limits of administrative power.

A remarkably easy read for the non-lawyer, Hamburger’s book makes a convincing case that American constitutional liberty and procedural justice have been in slow, troubling decline as a direct result of the expansion of the deep state’s regulatory power. *The Administrative Threat* is a clarion call for Americans to recognize the ever-increasing power of the federal administrative leviathan—and do something about it.

Hard Cases and Economics

◆ REVIEW BY PHIL R. MURRAY

Law is fertile ground for economic thinking. Harold Winter, the author of *Issues in Law & Economics* and an economics professor at Ohio University, explains that the main goal of his new textbook “is to provide my students with a thorough economic analysis of the issue, with emphasis on what current researchers have to say about the theoretical, empirical, and policy aspects of it.”

Although the intended readers are students, the book is challenging. The issues relate to “the big four” areas of law and economics: “property, contracts, torts, and crime.” There is also a bonus chapter on behavioral economics and the law.

Poletown and property rights / To begin, Winter shares his methodology:

1. Identify the theoretical tradeoffs of the issue in question.
2. If possible, empirically measure the tradeoffs found in step 1.
3. Advise social policy based on steps 1 and 2.

He introduces issues with a question and an actual court case. Take this question on property law: “Should eminent domain power be available to private companies?” To answer it, he cites the 1981 case *Poletown Neighborhood Council v. City of Detroit*, in which the Supreme Court of Michigan ruled the city could take residents’ property and give it to General Motors for industrial development. (See “Before *Kelo*” Winter 2005–2006.) “The power of eminent domain is to be used in this instance,” Winter quotes from the majority opinion, “primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community.” Given the influence of General Motors, the author of a minority opinion observed, “One is left to wonder who the sovereign is.”

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Various reasons support the use of eminent domain. The first is that transactions costs may preclude a wealth-enhancing transfer of property from private citizens to government officials. “When this occurs,” writes Winter, “a nonmarket solution, such as eminent domain, may be necessary to facilitate the transfer.” He expresses caution: “Eminent domain power is not magically invoked—its use requires potentially substantial administrative costs.” Imagine, for example, the costs that would occur if private citizens resist eminent domain proceedings.

Government might also wield eminent domain in order to acquire property at lower cost. This justification is objectionable because if a court sets just compensation below what property owners are willing to accept, that’s a good deal for government officials (and taxpayers) but a bad deal for property owners. The author does not expect a private corporation to refrain from goading government officials into using eminent domain on its behalf in order to acquire property at lower cost. If a government abuses its power of eminent domain on behalf of a private corporation, “this may very well lead to moving a resource to a lower-valued use.” That’s wealth destruction and bad policy.

Breaching contracts / To introduce contract law, Winter asks, “Should the courts encourage contractual breach?” To answer it he cites the 1911 case *Acme Mills and Elevator Co. v. J.C. Johnson*. Acme Mills agreed to buy wheat from Johnson for \$1.03 per bushel, and also provided him bags for transporting the crop. After receiving

the bags, Johnson breached and sold the wheat to another buyer for \$1.16 per bushel. Acme took Johnson to court, seeking compensation.

The court declared, “The measure of damages is the difference between the contract price and the market price.” Given that the market price was no more than \$1 per bushel, there were no damages, aside from the \$80 the court ordered Johnson to reimburse Acme for the bags.

Why, if the market price was no more than \$1 per bushel, was Acme paying \$1.03 and supplying bags? Why did the other buyer pay \$1.16? Winter doesn’t address those questions; instead, he posits a “simple example” to think about damage remedies. He supposes that you want to buy a collector’s edition of a book, and you are willing to pay \$500 for it. You put \$50 down and plan to return with the balance. Between now and then, you pay \$75 for a bookstand to display the book. But when you return to the bookstore, “the seller informs you he no longer has the book” and repays your \$50.

Given that the seller breached, does he owe you anything? Winter considers three remedies:

Expectations remedy—compensates the breached-against party so that he is in the same position that he would have been in had the contract been performed.

Reliance remedy—compensates the breached-against party so that he is in the same position that he would have been in had he never entered into the contract in the first place.

Restitution remedy—returns to the breached-against party any benefits he conferred on the breaching party.

In order to calculate damages according to the *expectations* remedy, Winter assumes that you value the book and the stand at \$800. By buying the book and stand, you would have increased your wealth by \$225 on net. The author states, “The expectations remedy sets a monetary damages amount of \$300,” which would cover the

cost of the stand and the \$225 increase in wealth that you didn't achieve. If a court uses the *reliance* remedy, damages would be just \$75, covering the cost of the stand (ignoring the \$50 the book seller already returned). According to the *restitution* remedy, there would be no damages because the seller returned the \$50 deposit. Winter adds that in the *Acme Mills* case, the court used the restitution remedy.

Initially, one senses that breaching is wrong and the law should curb breaching by penalizing those who do so. But it's straightforward to conceive of situations in which breach is acceptable. Is there any way the seller of the book you wanted could sell it to the second buyer with your approval? Yes. Had you bought the book, your net gain would have been \$225. Plus, you'd want \$75 for the stand. So if the seller gives you more than \$300, you'd allow him to sell to the second buyer. Breaching in this situation is both efficient and moral because the seller procured your consent.

A "fully specified contract" eliminates breaching. By anticipating "every possible contingency that can occur" and negotiating a mutually advantageous solution, a fully specified contract cannot be breached. Returning to the scenario with the book, you and the seller could agree to an amount you'd require in the event that a second buyer comes along and is willing to pay a higher price. But it is highly doubtful that the parties to a contract would foresee all circumstances and negotiate solutions to them, which is why, according to Winter, fully specified contracts "rarely exist in the real world." Contract specification provides benefits and costs; the marginal benefits of additional specification might be less than the marginal costs.

Torts / Much of the book reviews empirical studies. Consider this question from

tort law: "Do doctors perform more C-sections when faced with increased medical malpractice liability pressure?" Winter cites six studies in order to answer that question. Four answer in the affirmative.

One concludes the opposite: doctors faced with less risk of liability delivered more babies by C-section. The sixth shows that liability risk does not influence the decision to perform C-sections.

One reason these studies produce different results is that they measure medical malpractice risk in different ways: insurance premiums versus the presence of various tort reforms. Although contradictory empirical results can be frustrating, we should expect them. "It is not uncommon to find a substantial body of evidence that supports a particular

hypothesis," Winter warns us, "only to discover an alternative substantial body of evidence that refutes the same hypothesis." The author appears to welcome divergent empirical findings for what we can learn from them.

Crimes and punishment / Turning to the last of the big four areas, criminal law, economists assume that potential criminals compare the expected benefits to the expected costs of a prospective crime and then decide whether to commit it. Winter articulates the economist's perspective:

The idea behind rational crime analysis is not that the criminals sit with pen and paper and explicitly calculate the costs and benefits of their actions. There may even be a large number of criminals who barely pay any attention to the future ramifications of their current behavior. All that is needed to motivate rational crime analysis is that some criminals respond to changes in crime enforcement strategies.

Therefore, raising the cost of committing

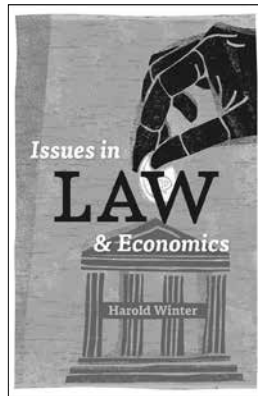
a crime should induce potential criminals to commit fewer crimes. This is the "deterrent effect." Researchers who investigate the deterrent effect encounter the stumbling block of "*reverse causation*." When a police force expands, the probability of arrest increases and crime declines. That is a deterrent effect. But a researcher might observe positive correlation between the number of police officers and crime because rampant crime causes the authorities to increase the ranks of a police force. Isolating the two effects requires a crafty researcher.

An early research strategy used to investigate this issue made use of the fact that politicians often expand police departments before elections. If crime subsequently decreases, that shows a deterrent effect. Although this technique uncovered a deterrent effect, Winter calls it "small" and considers it possibly dubious according to another study.

A subsequent research strategy observed changes surrounding an "extreme event." In the wake of a terrorist strike in Buenos Aires, government officials increased the police presence. The research shows that "car thefts fell by nearly 75 percent, a substantial impact." These researchers admit the possibility of a "displacement effect," whereby greater police protection around terrorist targets causes crime to increase elsewhere. A second study detected a weak displacement effect. Most of the studies Winter summarizes confirm that a greater police presence causes crime to decrease.

Property rights / Winter does not discuss the infamous 2004 case of *Kelo v. City of New London* in the chapter on eminent domain, but he does discuss it in the chapter on behavioral economics and the law. Both *Kelo* and *Poletown* involved a government seizing private property and conveying it to another private party. The difference is that *Kelo* provoked more public "outrage" than *Poletown*.

Winter summarizes a study that explains why eminent domain draws the public's ire. One source of resentment is



Issues in Law & Economics

By Harold Winter

233 pp.; University of Chicago Press, 2017

IN REVIEW

that government offers of “just compensation,” as required by law, are usually below the lowest price that property owners are willing to accept because the latter amount reflects sentimental value. A second source of resentment relates to the reason why the government is taking property, to whom it is giving the property, and the type of property it is. For example, taking idle land to remove a dangerous curve on a highway might be popular, but taking an elderly couple’s residence and giving it to a large, profit-seeking corporation would be unpopular. (Note that the latter example is similar to *Kelo* and *Poletown*, and does not explain why *Kelo* caused more anger than *Poletown*.)

The authors of Winter’s cited study designed experiments to understand people’s resistance to eminent domain. According to Winter, they found that the number of years someone has owned a property has more to do with the owner’s propensity to sell than whatever the buyer intends to do with it. “Once it becomes known that the government will step in to aid the private developer through the use of eminent domain power,” they also found, “subjects typically vehemently oppose the taking (but this effect is not found to affect willingness-to-sell values).” This surprised me because I expected property owners who “vehemently oppose the taking” to be less inclined to sell. Another problem is that it is unclear whether the “subjects” in these experiments actually owned property; if not, the decisions they made had nothing at stake. Actual property owners might make decisions differently.

Conclusion / Faced with a tradeoff between covering more of the author’s analyses in brief and fewer in depth, I chose the latter when writing this review. Cases related to the Coase theorem and empirical studies of racial discrimination in criminal law are among the other issues readers will encounter.

Readers of *Issues in Law and Economics* will learn that hard cases illuminate economics, and that Winter’s analysis is good economics. R

Buchanan the Evil Genius

◆ REVIEW BY ART CARDEN AND PHIL MAGNESS

Duke University professor Nancy MacLean’s *Democracy in Chains* is a curious book. While it is published by a trade press, it is the work of a distinguished historian. Its provocative thesis is that the late economist (and Cato distinguished senior fellow) James McGill Buchanan was an “evil genius” who drew up blueprints for a new oligarchy. The book has received enthusiastic attention from National Public Radio and other media outlets, and it was listed as one of Oprah Winfrey’s “must reads.”

MacLean explains that her thesis is the product of her unique archival work with Buchanan’s papers, and she spins from them an exciting (by the standards of intellectual history) and breathless tale of a hard-hearted son of the South aligning with segregationists and working to maintain white supremacy in response to the 1954 *Brown v. Board of Education* decision. Buchanan’s work eventually caught the attention of Charles Koch, and Buchanan became the intellectual architect of “the radical right’s stealth plan for America.” His legacy is a path of Koch-funded destruction extending from Pinochet’s Chile to the North Carolina legislature.

Problem is, it’s not true.

In a long review essay that will appear in the *Independent Review*, MacLean’s Duke University colleague Michael Munger calls the book a work of “speculative fiction,” and we agree. The author’s credentials and the book’s positive coverage might lead the unsuspecting reader to conclude that the story is true in substance if not in every minor detail. That reader would be badly misled.

The book is filled with errors and misinterpretations that would have been easy for MacLean to avoid. Duke’s political science department is home to the current (Georg

Vanberg) and two former presidents of the Public Choice Society, a group of academics devoted to the theory of government and political action that Buchanan pioneered. One of those past presidents is Geoffrey Brennan, who was Buchanan’s coauthor on some of his most influential work, like *The Power to Tax* and *The Reason of Rules*. The other past president is Munger himself, and he reports that MacLean did not contact any of the three. Duke is also home to the Center for the History of Political Economy, and its director is Bruce Caldwell, an authority on F.A. Hayek, who influenced Buchanan and helped found the Mont Pelerin Society. MacLean made no attempt to contact Caldwell. There is no evidence in *Democracy in Chains* to suggest that she attempted to contact any of the small army of Buchanan students and coauthors who are still active. Given David Levy and Sandra Peart’s recent book *Escape from Democracy* (see “The Discontented Animal,” Summer 2017)—as well as their own work with the Buchanan papers—and Richard Wagner’s new study of Buchanan, this is a surprising oversight by someone ostensibly committed to understanding Buchanan’s ideas.

MacLean’s substance and style suggest that she isn’t *actually* interested in understanding those ideas. Her own sources seldom if ever support her harshest allegations about Buchanan and his fellow travelers.

She makes no mention of his support for high estate taxes, for example. This put him squarely at odds with most classical liberals; it is hardly the position a flunky of the plutocracy would take, and it’s also hardly a position that plutocrats would sup-

ART CARDEN is a professor of economics at Samford University. PHIL MAGNESS is an economic and political historian at George Mason University. Both authors are affiliated with organizations that currently receive or have previously received support from Charles or David Koch, as has the Cato Institute.

port if they want to maintain dynasties. The tax idea isn't central to Buchanan's written work—it was a policy idea he floated from time to time in discussion—but it's at odds with MacLean's thesis and the sort of thing that would have come up in conversation if she had walked across campus to visit her colleagues or just sent them an email. This omission contradicts her portrayal of Buchanan as an agent of the ruling elite and should, we think, make us more skeptical of how she handles her evidence.

Calhoun conspirator? / MacLean's unfamiliarity with Buchanan's work extends into her depiction of his philosophical roots. Specifically, she devotes substantial energies to portraying him as an intellectual heir to John C. Calhoun and, more directly, the Southern Agrarians. Calhoun was infamously the leading pro-slavery theorist of the 19th century and the Agrarians—a group of scholars who led a southern literary revival in the 1930s—counted numerous segregationists in their ranks. Both examples are highly convenient to MacLean's efforts to paint Buchanan's reputation with the broad brushes of racism and segregation. It is helpful to recount her telling of each case to see how she connects them to Buchanan.

Early in the book, she depicts Calhoun as the “intellectual lodestar” (p. xxxii) of public choice, and she does so by citing his somewhat similar interest in the function of constitutional voting rules as a constraint upon majoritarian impulses. This observation is neither a smoking gun nor original to MacLean. A simpler, non-devious explanation is that both Calhoun and Buchanan, though writing in different eras and using dramatically different analytical tools, were both expanding upon a common source: James Madison's theory of constitutional federalism—a theory that, it's worth not-

ing, is especially timely amidst today's surge of populism and nationalism.

MacLean opts for a conspiratorial interpretation, though, in which Calhoun assumes the role of an unspoken ur-text to *The Calculus of Consent*. Her portrayal immediately encounters a substantial evidentiary obstacle: Buchanan does not appear to have ever cited, referenced, or commented upon Calhoun in his academic career of over half a century. He does, however, make frequent references to Madison.

Undeterred, MacLean enlists a six-degrees-of-separation game to shoehorn Calhoun into Buchanan's system of thought. She offers an incomplete reading of Tyler Cowen and Alex Tabarrok's 1992 paper, “The Public Choice Theory of John C. Calhoun,” which notes Calhoun's

and Buchanan's distinct but sometimes similar developments of Madisonian theory, as further evidence of the conspiracy.

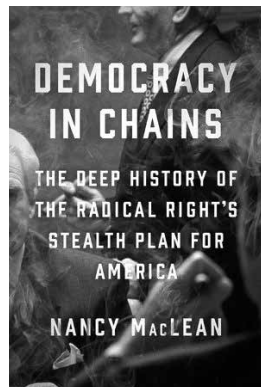
Perhaps aware of the flimsiness of this argument when taken alone, she next notes that the libertarian economist Murray Rothbard discussed Calhoun's emphasis on the conflict between the taxpayers and the taxed in his own 1960s work. While Rothbard supposedly demonstrates a libertarian affinity for Calhoun at the time Buchanan was developing his theory, MacLean either neglects to note or—more likely—is unaware that Buchanan and

Rothbard were each quite critical of the other. Rothbard in particular panned the very book that MacLean cites as an esoteric dialogue on Calhounism, writing in a commentary that “I am so out of sympathy with James M. Buchanan and Gordon Tullock's *The Calculus of Consent* that I don't think a particularly detailed critique to send to them would be worthwhile.” In the end, the link that MacLean posits between Buchanan and Calhoun simply isn't there.

Her purported linking of Buchanan to the pro-segregation Southern Agrarians is even weaker. A casual reader of her book could easily be led to believe that the Agrarian poets played a direct and formative role in Buchanan's own intellectual journey through college and into academia. Although his lack of financial means led him to study at what was then a small public teachers college in his hometown (and today is Middle Tennessee State University), MacLean asserts that the Agrarians were “a cultural project that attracted James Buchanan” to want to attend Vanderbilt, where several of them taught. There is nothing, as far as we are aware, suggesting that Buchanan was ever “attracted” to the Agrarians' “cultural project,” and she cites no evidence to support this contention.

Buchanan described himself as having socialistic leanings prior to encountering Frank Knight at the beginning of his graduate studies at the University of Chicago, which makes an earlier affinity for these deeply conservative literary critics unlikely. But MacLean's argument is not rooted in any actual evidence. She claims that the Agrarian poet Donald Davidson was “the Nashville writer who seemed most decisive in Jim Buchanan's emerging intellectual system” (p. 33). Davidson, she alleges, provided the source of Buchanan's oft-enlisted concept of the Leviathan state in his academic writings and a recurring interpretive framework for public choice skepticism of government. Again, though, she offers no evidence to establish Davidson's alleged influence on Buchanan.

Of course, the Leviathan metaphor derives from the English philosopher Thomas Hobbes. MacLean acknowledges that in passing, but then credits Davidson with introducing a “new and distinctive” use of the term to assail the growing federal government in the post-Civil War era, and particularly its intrusions upon “state's rights” and other coded language for segregation. However, Davidson is nowhere to be found in Buchanan's *Collected Works*; Hobbes, by contrast, is cited frequently. The evidence—actually, the lack



**Democracy in Chains:
The Deep History
of the Radical Right's
Stealth Plan for
America**

**By Nancy MacLean
368 pp.; Viking, 2017**

IN REVIEW

of it—does not support her narrative that places Buchanan amidst the resistance to *Brown v. Board*.

MacLean cites Buchanan's autobiographical collection *Economics from the Outside In: "Better Than Plowing" and Beyond* (originally "*Better than Plowing" and Other Personal Essays*) as one of her sources. Chapter 9 of the book is a collection of quotes Buchanan liked and had written down in notebooks. None of the quotes come from Calhoun, Davidson, or any of the Southern Agrarians. It isn't because Buchanan was particularly shy about his literary tastes; in several places he mentions the poet Thomas Hardy. Indeed, there is more evidence in Buchanan's written work and in the interviews of which we are aware to substantiate a claim that "the most decisive" writer in Buchanan's intellectual system was western novelist Zane Grey than to substantiate MacLean's claim about Davidson. The men who MacLean tells us are behind the curtain simply aren't there.

MacLean's majoritarianism / MacLean also charges that Buchanan was not an empiricist. In a narrow sense, she is correct. He employed a largely theoretical style that reasoned from starting principles, such as a constitutional rule or a stated assumption about voting behavior. From this position she leaps to the conclusion that public choice ideas are unsupported empirically. But an empirical study appears in the very first issue of the journal that became *Public Choice*, and Buchanan the theorist inspired legions of empiricists. In a 2012 appreciation of Buchanan that appeared in the *Journal of Economic Behavior and Organization*, Elinor Ostrom—a Nobel economics laureate and as fine an empiricist as there has ever been—wrote, "There is substantial empirical work now that strongly supports his ideas." On the basis of this empirical evidence, we reject MacLean's hypothesis that there is no empirical evidence to substantiate public choice theory.

MacLean's own majoritarianism places her argument well outside mainstream constitutional theory. This much is par-

ticularly apparent in a lengthy tangent where she assails checks and balances as "an all but insuperable barrier to those seeking to right even gross social injustice" (p. 224). There is a grain of truth to this observation. Historical wrongs such as slavery and segregation do reveal faults in our constitutional system, but this affirms the importance of public choice contributions to understanding and ameliorating these conditions.

MacLean misses this insight, offering instead an aggressive appeal to a peculiar

In Buchanan's collection of favorite quotes, none come from Calhoun, Davidson, or the Southern Agrarians. MacLean's bogeymen aren't there.

populism that aligns with her own redistributive politics (p. 226). The implicit rejection of a basic Madisonian principle in MacLean's political ideal is odd given her frequent depictions of Buchanan's constitutionalism as a conspiracy to undermine "American democracy." Unfortunately, she offers no evidence that the populist alternative she prefers would produce better results. In fact, she glosses over the role that populist majorities played in some of the worst injustices of our history: segregation, discrimination against homosexuals, and the drug war, to name a few. These injustices speak to one of Madison's and Buchanan's larger points: without constitutional mechanisms to protect them from politically entrenched and powerful government actors, political minorities are vulnerable to abuse and exploitation under the cover of law.

MacLean also interprets the classical liberal tradition in light of a false tension between capital and labor. A more sophisticated analysis—like those done by many economists, including those inspired by Buchanan—shows that (for example) labor unions increase the incomes of some workers at the expense of others. Thomas Leonard's 2016 book *Illiberal Reformers*

is in this sense a necessary corrective to *Democracy in Chains*. (See "Progressivism's Tainted Label," Summer 2016.) *Illiberal Reformers* shows the ways in which some of the very same labor market interventions that MacLean celebrates were historically motivated by explicit racists who sought to keep African-Americans, immigrants, and the poor out of the competitive workforce.

MacLean does not allow for the possibility that labor markets might have worked as competitive models predict, a possibility firmly supported by the evidence sum-

marized by, for example, Price Fishback in a 1998 *Journal of Economic Literature* paper. In another example, she cites Charles Dickens (p. 97) as historical evidence for the apparent squalor of early industrial society. She

should consult Deirdre McCloskey's work or virtually any serious quantitative work that has been done by economic historians in the last half-century or more, instead of citing a novelist's work of fiction.

Buchanan and Brown / MacLean's enthusiasm for progressive economic policies leads her into problematic territory, given her thesis. It is no small irony that she appeals to the authority of such figures as Richard T. Ely, John R. Commons, and John Maynard Keynes for their rejections of laissez-faire in a book aimed at painting Buchanan as a closet segregationist and racist reactionary whose ideas gained currency because of backlash against *Brown*. Ely, Commons, and Keynes were all outspoken eugenicists who incorporated this position into their own respective assaults on laissez-faire in human reproduction.

For a decision that was supposedly decisive to Buchanan's intellectual program, *Brown* is conspicuously absent from his work. The ruling does not appear in the index to his *Collected Works*, nor is it discussed in *Economics from the Outside In*. One would expect evidence of at least some link in light of the *Democracy in Chains* promotional material that emphasizes the *Brown*

angle. Munger has obtained the relevant documents MacLean cites to support this charge and he argues in his *Independent Review* article that they are inconsistent with her interpretation.

Attacking scholarship / MacLean criticizes the Thomas Jefferson Center for Studies in Political Economy, the former academic center at the University of Virginia where Buchanan and many of his colleagues once worked. Indeed, it was an unorthodox place in an orthodox academy. But if we are talking about “stealth plans” to undermine ideas, she lets pass with little comment the fact that the Jefferson Center scholars were effectively pushed out as a result of a secret internal investigation finding fault not with their scholarship but with their politics. Buchanan and colleague Ronald Coase would go on to win Nobels in economics, and there is widespread agreement that another colleague, Gordon Tullock, should have won one. In a book about deep histories and conspiracies, she is remarkably uninterested in the politically oriented purge of a group that included two future Nobel laureates. Given her emphasis on funding as a litmus test for the veracity of one’s ideas, she does not mention the support Buchanan and other public choice scholars have received from (for example) the National Science Foundation.

Speaking of Tullock, she quotes the verdict that his research record was “undistinguished” when he was denied promotion to full professor at the University of Virginia. While it is true that Tullock did not have a degree in economics (and, in his telling, he only took one real economics course), he had four books to his credit by the end of 1967: *The Calculus of Consent*, *The Politics of Bureaucracy*, *The Organization of Inquiry*, and *Toward a Mathematics of Politics*, as well as three papers in the *Journal of Political Economy*, two in the *American Economic Review*, one in the *Quarterly Journal of Economics*, and papers in *Oxford Economic Papers*, the *Western Economic Journal* (now *Economic Inquiry*), and other publications. “Undistinguished” is not the word we would use.

MacLean’s readings of Buchanan’s works are also fraught with trouble as scholars and commentators have recently pointed out in blog posts for *Bleeding Heart Libertarians*, the “Volokh Conspiracy” blog at the *Washington Post*, and elsewhere. Her misreading of Buchanan’s paper, “The Samaritan’s Dilemma,” is an example. She treats it as a repudiation of compassionate ethics and indignantly scolds Buchanan for discussing “exploitation by predators of his own species.” The paper is far more complex than this, and it isn’t really about the biblical parable of the Good Samaritan at all. (Buchanan writes that he uses the term “Samaritan” because he couldn’t think of anything better.) Rather, Buchanan analyses the structure of a general problem: no decent person likes to see other people suffer and most likely experiences a great deal of pain at another’s misfortune, but the indiscriminately benevolent give others incentives and opportunities to take advantage of them. He goes on to discuss the importance of general rules as it is often easy in the short run to simply capitulate to the difficult child or grade-grubbing student.

That MacLean misses Buchanan’s meaning—or is at least does not communicate it clearly—is evident from the way she treats a passage of his about a parent spanking a child. Here is MacLean: “Buchanan used as an analogy the spanking of children by parent: it might hurt, but it taught ‘the fear of punishment that will inhibit future misbehavior’” (p. 143). Now here is Buchanan:

A family example may be helpful. A mother may find it too painful to spank a misbehaving child (“This hurts me more than it does you”). Yet spanking may be necessary to instill in the child the fear of punishment that will inhibit future misbehavior. ... Even when she fully discounts the effect of her current action on future choice settings, the mother may still find it too painful to spank the misbehaving child. (*Collected Works of James Buchanan*, vol. 1, p. 335)

From the way she portrays Buchanan

throughout, one might get the impression that the person experiencing the “hurt” she describes is the misbehaving child. From Buchanan’s context, however—and what makes this such a powerful contribution—the pain is felt by the mother who does not want to experience the “short-term utility losses” that come from punishing her child even when it is to the child’s long-run benefit.

Pinochet / No exposé on the alleged free-market conspiracy would be complete without a prominent appearance from Chilean strongman Augusto Pinochet, a thug who in 1973 overthrew the government of the democratically elected Salvador Allende, ruled the country with an iron fist, systematically abused human rights, and later implemented free-market reforms under the supposed direction of Milton Friedman and the “Chicago Boys.” To hear MacLean tell it, Buchanan had a hand in writing Chile’s 1980 constitution under the Pinochet regime and, in Buchanan’s 1981 address to the Mont Pelerin Society, provided ideological cover for Pinochet’s anti-democratic junta government. Again, if she had taken the time to walk across campus, she would have learned a different story.

Citing work by Andrew Farrant and Vlad Tarko, Munger points out that “Buchanan had essentially no role in the writing of the Chilean Constitution and in fact was critical of the regime and its actions.” He goes on to write of that constitution:

The people of Chile needed help escaping from the military regime. A constitution must foster a move to democracy, and free and fair elections, but also avoid a military coup. It would serve no one to have had a constitution that allowed an immediate transfer of power, and a Truth Tribunal had been convened, followed by arrests of top military officers. That is frustrating, because they clearly deserved it. But the only way to get from military regime to functioning democracy was the way they did it.

IN REVIEW

MacLean spins the opposite story. At one point she accuses Buchanan of providing “in-person guidance” to the Pinochet regime (p. 157), before immediately transitioning into a list of its arrests, political assassinations, and other acts of brutality. The juxtaposition is plainly intended to tar Buchanan with those crimes, even as she has no actual evidence linking the two. Her footnotes are illustrative of the scholarly deficiencies of this chapter. To document the Pinochet regime’s brutalities she cites an assortment of easily accessible newspaper articles and secondary literature about Chile, not one of which mentions Buchanan. She then pivots to Buchanan’s attendance at a weeklong academic conference in Chile where he committed the offense of speaking to other economists who worked for the Chilean government. The “archival” finds she enlists to demonstrate this nefarious collaboration include such items as a common thank you note for a lunch at the conference (p. 161) and the fact that some of Buchanan’s books were translated into Spanish in the early 1980s (p. 157).

MacLean then pivots right back to Pinochet’s authoritarian thuggery to implicate Buchanan, by association, in the same. What she does not do, though, is perform even a cursory review of the existing literature on the tensions between the Pinochet regime and classical liberalism. John Meadowcroft and William Ruger’s 2014 article in the *Review of Political Economy* is an excellent starting point on this subject. In particular, it documents how Buchanan’s eschewing of politics and his individualist notion of liberty chafe with both the Pinochet regime and other classical liberals—Hayek among them—who could be legitimately criticized for negligence or credulity in their own treatments of the Chilean dictatorship. As with other examples though, MacLean appears to be fundamentally uninterested in investigating Buchanan’s ideas, let alone accurately portraying them.

Conclusion / MacLean extends no scholarly charity to Buchanan, Tullock, or the

entire subfield of public choice economics. Instead, she treats them with contempt. *Democracy in Chains* was an opportunity for serious cross-disciplinary inquiry, but that opportunity was missed.

Instead, the book is the perfect symbol of these times, fumbling the facts and ignoring ideas in order to titillate one’s tribe, provoke the paranoid, and exclaim that The End is Nigh. The book makes no serious contribution to our understanding of public choice theory or the evolution of classical liberal ideas in the late 20th century. We fear, though, that readers will come away from critical reviews like this one *even more convinced* that there is an insidious conspiracy. And indeed, maybe the truth is out there. But *Democracy in Chains* certainly isn’t it. R

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The Handicapper General

◆ REVIEW BY PIERRE LEMIEUX

Matters at the intersection of philosophy, politics, and economics are more complicated than what immediately meets the eye. This is illustrated well in *Philosophy, Politics, and Economics*, a 662-page anthology edited by Jonathan Anomaly, Geoffrey Brennan (both of Duke University and the University of North

Carolina), Michael Munger (Duke), and Geoffrey Sayre-McCord (UNC). Anomaly and Sayre-McCord are philosophers and Brennan and Munger are both political scientists and economists.

The book is obviously geared to college PPE (Philosophy, Politics, and Economics) programs, which use the three disciplines to analyze social life and political power. In their introduction, the editors explain

that, in their view, such programs must provide a learning experience that is both integrated and yet respects the different approaches of the three disciplines. The basic questions are: How can individuals live peacefully and productively in society? How should we organize political authority (if any is necessary)?

Philosophical adventures / It is not easy to review an anthology containing 66 articles and nearly as many different authors who often defend contradictory theories. The

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readings—typically academic articles or book excerpts—cover a wide range of theories, from Plato, through modern political thought (notably Thomas Hobbes and John Locke), up to Friedrich Hayek, Gary Becker, and James Buchanan. Libertarianism, which occupies a strategic place in the selections, is also challenged by intelligent thinkers. The anthology is not for the faint of heart who believe they have already found the eternal truth.

The oldest text in the book is Plato's *Crito*, written around 360 BCE. It is considered one of the first philosophical defenses of absolute political authority. In the dialogue, Socrates has been condemned to death and his friend Crito is trying to persuade him to flee Athens. Socrates refuses, explaining that "your country is to be honored more than your mother, your father, and all your ancestors. ... You must either persuade it or obey its orders, and endure in silence whatever it instructs you to endure."

Although not far from Socrates on this particular point, Hobbes (also part of the anthology) adhered to an individualist methodology, which was unknown to the Ancients and would soon support the modern conception of liberty.

Methodological individualism is the backbone of modern social, political, and economic analysis. In their 1982 article "An Economic Theory of Military Tactics: Methodological Individualism at War," Geoffrey Brennan and Gordon Tullock explained that the study of military tactics has to start with the fact that "the *ultimate* unit of analysis is always the individual" (emphasis in original)—as good a short definition of methodological individualism as one can find. "Armies," the two authors continue, "must be analyzed as collections of independent individuals who are, in some sense, as much at war with one another and their own leaders as they are with enemy forces." Looking at individual incentives is the only way to understand how, for example, decorations and rewards are crucial for motivating soldiers to risk their life and body integrity. This is why heroic soldiers are eventually

removed from the direct line of battle and put into safer jobs.

Market failures / Several selections of the anthology deal with "market failures"—mainly externalities and public goods—using both standard economic analysis and game theory. Contributors such as Tyler Cowen, Jonathan Anomaly, David Friedman, John Hampton, Elinor Ostrom, and Samuel Bowles and Herbert Gintis show that many of these problems can be solved by voluntary cooperation, although some areas such as national defense remain problematic.

Philosopher David Gauthier explains how rational individuals are able to adopt strategies and dispositions (such as honesty and justice) that allow them to solve so-called "prisoner dilemmas" and thereby obtain the benefits of cooperation. But fellow philosopher Gregory Kavka then argues that one cannot will an intention, as opposed to willing the object of the intention, if the reasons for the intention don't match the reasons for its object. A person cannot form the honest intention to cooperate if he knows that he will want to defect when it becomes profitable to do so. Gauthier replies that rationality (in his sense) implies commitment; a person who respects his commitments *can* commit to drink a toxin (borrowing from an elaborate thought experiment proposed by Kavka) and he knows he will do it when time comes.

The anthology contains excerpts from John Rawls and Robert Nozick. Rawls argues that rational parties to a social contract would adopt principles of justice affirming equal individual rights and, subordinately, limitations of inequalities so that they will benefit the least advantaged. Nozick counters that a Lockean entitlement theory of justice is inconsistent with the distribution pattern that a Rawlsian

state must continuously reestablish—because, for example, baseball or rock-music lovers voluntarily pay to enrich their idols. People, argues Nozick, are entitled to what they appropriate without coercion.

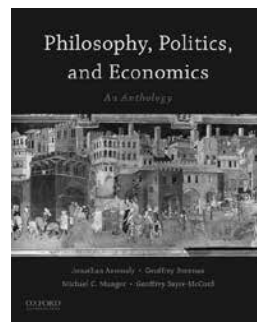
These are complex topics. For example, Nozick argues that the restitution principle (to correct past offenses against just entitlements) can justify redistribution. "One *cannot* use the analysis and theory presented here to condemn any particu-

lar scheme of transfer payments," he writes (emphasis in original); "past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them." Even in the sort of minimal state advocated by Nozick, some redistribution may be required, which of course opens a Pandora's box. Life is full of Pandora's boxes, which man cannot resist opening.

As soon as issues of morality and justice are raised, one cannot avoid the question of whether laws should always be obeyed as Socrates argues in the *Crito*. Many articles in the anthology have a bearing

on this issue, but the only other one that directly addresses it is *Harrison Bergeron*, a delicious short story by Kurt Vonnegut. In it, a "U.S. Handicapper General" is tasked with imposing handicaps on anybody who could otherwise tilt the equal playing field. Bags of birdshot are attached to the bodies of the strong. Regular noises from a compulsory earpiece interrupt the thoughts of the too-intelligent. George Bergeron, the hero's father, rhetorically asks his wife as they watch TV, "The minute people start cheating on laws, what do you think happens to society?"

Government failures / Public choice theory, the great discovery of the mid-20th century, is well represented in the anthology. Markets are not perfect of course, but neither is the state—that is, political and



Philosophy, Politics, and Economics: An Anthology

Edited by Jonathan Anomaly, Geoffrey Brennan, Michael Munger, and Geoffrey Sayre-McCord

662 pp.; Oxford University Press, 2015

IN REVIEW

bureaucratic processes. In other words, government failures are at least as prevalent as market failures. Although this idea now looks obvious (at least to many people), it did not become so until public choice economists formulated it. It is based on the rather simple assumption that politicians and bureaucrats are, like the rest of us, guided mainly by their self-interests. As Buchanan said, it amounts to viewing “politics without romance.”

This analysis of politics with the tool of economics owes much to Anthony Downs’s classic 1957 article (reproduced in the anthology) “An Economic Theory of Political Action in a Democracy,” as well as his book on the same topic. Many of Downs’s analytical results anticipate their further development by public choice theorists: “Some men are more important than others politically, because they can influence more votes than they themselves cast”; the ordinary citizen’s “incentive to become well informed is practically nonexistent”; “it is rational for every individual to minimize his investment in political information.” Therefore, the typical voter remains rationally ignorant of politics; he votes blind. “Ignorance of politics,” Downs explains, “is not the result of unpatriotic apathy; rather, it is a highly rational response to the facts of political life in a large democracy.”

The anthology presents fascinating discussions by Michael Huemer, Geoffrey Brennan, Loren Lomasky, Jason Brennan, and Sayre-McCord suggesting that there is no moral duty to vote, although there may be a duty for the ignorant not to vote.

Downs observed that

men are much more likely to exert direct influence on government policy formation in their roles as producers than in their roles as consumers. In consequence, a democratic government is usually biased in favor of producer interests and against consumer interests.

He cites protectionist measures as an example—a very current problem, indeed.

A whole chapter of the anthology is devoted to the technique of cost-benefit

analysis. Steve Kelman of Harvard University provides an “ethical critique” of cost-benefit analysis. It is, in my opinion, one of the few weak articles in the book: the author does not seem to really understand what he criticizes. A more credible critique comes from Elizabeth Anderson, a philosopher at the University of Michigan, who argues that the technique cannot be used for higher goods of intrinsic value, which can only be evaluated by democratic

The calculations of costs and benefits provide only fragile estimates that offer multiple opportunities for biases, especially for government bureaucracies.

deliberation. The question that a student of public choice theory would ask is, who decides what are the higher goods with intrinsic value, Trump voters or a general assembly of politically correct snowflakes? David Schmidtz, a philosopher at the University of Arizona, provides a more enlightened and instructive critique.

Many problems remain, besides the well-acknowledged fact that the individuals who pay the costs are typically not the ones who reap the benefits. Environmental fetishes often intrude in discussions about cost-benefit analysis. The actual calculations of costs and benefits, based on a forest of assumptions, provide only fragile estimates that offer multiple opportunities for biases, especially for government bureaucracies with lots of resources. Have you ever heard a government announce that one of its pet projects will be abandoned because cost-benefit analysis has shown no net social benefit? On the contrary, its bureaucrats or outside consultants seem to always come up with an analysis justifying the projects. (See “The War on Consumer Surplus,” Spring 2017.) It is true, though, that the theoretical precision of the method puts *some* constraints on governments.

Price gouging / The last chapter of the

anthology deals with a host of practical applications: prostitution, sex and the family, drugs, organ rationing, sweatshops, and price gouging—again with a good balance of libertarian and non-libertarian arguments. In general, and despite the level playing field, I believe libertarian arguments win the debates. The only selection I didn’t find useful is an economically confused plea for sweatshop regulation by Mathew Coakley (Warwick University) and Michael Kates (Georgetown University).

The case of price gouging is neat and interesting. Munger reports on the disturbing case of a 1996 hurricane in North Carolina. Enterprising ice sellers were arrested as they sold at higher prices something that hurricane victims could not otherwise obtain and for which they were obviously happy to pay more. These same customers applauded when their suppliers were led away by police before their eyes! “They clapped,” Munger writes in disbelief.

As Munger explains, after a disaster has hit, “the only way to ensure *low* prices, and large supply, to buyers is to allow sellers to charge *high* prices, the highest they can get” (emphasis in original). Otherwise, prices will stay up for longer. The only other option is for government to effectively control prices, which would result in real shortages and generate arbitrary waiting lines to allocate the scarce goods.

Philosopher Jeremy Snyder argues against this sort of price gouging in times of disaster. In his opinion, it shows a lack of respect for others, namely the poor. For that reason, price gouging is immoral and should be prohibited or, at least, merchants should voluntarily eschew it.

University of San Diego philosopher Matt Zwolinski provides a master counter-argument. It cannot be immoral for entrepreneurs to sell at higher prices things that people could not otherwise obtain (at the same time and place); these price gougers do not in any way worsen the situation of

their customers compared to the latter's alternatives if the former were not there. If there is no attempt at price gouging, Zwolinski points out, the consequence will not be "equitable access"; supply will be even tighter and it is doubtful that the poor will get more.

Bottom line / Before I conclude, I hope the reader will forgive me an unspeakable grumble. Anyone should be at liberty to write as one wishes, with the benediction of his godly editor. And it is normal that language adapts to change and fads. I also believe that formal equality of individuals, whatever their color, sex, or forehead

shape, is more than a fad. Yet English is now written in a way that may soon render barely readable any writer published more than 20 years ago. Talking about a given voter A ("Consider for example citizen A"), one of the anthology selections uses both pronouns "she" and "he," a disconcerting sex change that occurs within a single paragraph.

Regarding the contents of the anthology, the bottom line is the book is a well-conceived crash course in philosophy, politics, and economics. It is a must for PPE students. After reading it, they will be very street-wise about the world in which they live. R

simplistic notions implanted in people's minds, government would have adopted a host of regulatory and tax policies to relieve suffering and make America a more equal nation. Interestingly, Kwak doesn't reach the parallel conclusion that assumptions about the benefit of such interventions are likewise simplistic and unreliable.

If his thesis seems like an attack on economic theory, that's because it is. He derides writers such as Henry Hazlitt for arguing that the world obeys economic laws. Theory, Kwak maintains, has been overthrown by data. We can only discover the effect of different policies by looking at studies after implementing them, and if any study finds an apparently beneficial result—even if that study conflicts with a larger body of empirical work—that's adequate justification for the policy. Naturally, he points to outlier academic studies finding little or no harm from minimum wage increases and little or no benefits from tax cuts to make his case that the world is too complicated for mere theory.

Undermining FDR / Where does economism have its roots? They're found in the ideas of economists who have argued that free markets lead to the most efficient use of resources to satisfy the desires of consumers

and, equally important, that coercive interference with markets will have predictable and generally harmful consequences.

Kwak displays a superficial familiarity with those economists. Throughout the book, he mentions Adam Smith, Ludwig von Mises, Friedrich Hayek, Milton Friedman, and others. All of them opposed the sorts of interventionist policies that he thinks are now necessary to restore fairness: trade restrictions, minimum wage laws, strong labor unions, high taxes on the wealthy, and so on.

But he never ventures a

When Economics Isn't On Your Side

◆ REVIEW BY GEORGE LEEF

If you were to ask people who have taken an undergraduate economics course what they think of raising the minimum wage, you would expect them to express at least some reservations, saying the increase could hurt employment for low-skill workers. That concern, according to University of Connecticut law professor James Kwak, would

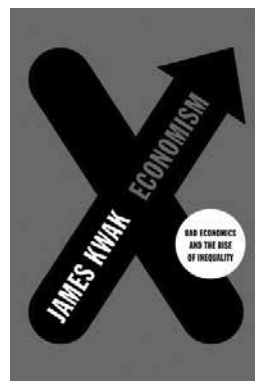
exemplify the harmful phenomenon he calls "economism." When people make decisions on what he deems complex policy questions based on their having absorbed some of the "simple" concepts from Econ 101, that is a bad thing. In his view, the United States is being held back from addressing what he believes is our crucial issue—rising economic inequality—because economism has indoctrinated so much of the population.

The "elegant model" of supply and demand, Kwak writes, "rests on a set of highly unrealistic assumptions. The definition of a competitive market requires that all suppliers offer the same product—there are no differences in features, quality, or anything else—and each competitor is so small that its behavior has no effect

on overall supply."

Because the model of a perfectly competitive market is unrealistic, Kwak argues, it follows that the basic teachings derived from it are not reliable policy guides. Hence we really can't be sure about what the effect of a mandated wage increase would be, and so it's wrong to instruct impressionable students that there are any necessary implications from it or other interventionist policies.

In short, learning the basic principles taught in Econ 101 is an instance of the old adage that a little learning is a dangerous thing. If it weren't for these



Economism: Bad Economics and the Rise of Inequality

By James Kwak

237 pp.; Pantheon Books, 201

IN REVIEW

direct assault on their ideas. Rather, his contention is that their theoretical notions, while not necessarily wrong, have been pulled out of their books and impressed into the service of rich Americans who were unhappy that the New Deal had slightly reduced their share of national wealth and wanted some means of fighting back. If, for example, Charles Koch cites Milton Friedman on the benefits of deregulation in an op-ed, that's bad old economism at work: using simple, merely theoretical ideas to tear down our regulatory apparatus so Koch's companies can gain.

In Kwak's version of history, America had settled into a comfortable and relatively fair economic equilibrium under the enlightened policies of Franklin Delano Roosevelt, which sensible Republicans continued under Eisenhower. But then a few people on the far right decided that the New Deal's big administrative state was an obstacle to their wealth maximization. They created a movement to counter it, a movement centered around the anti-interventionist arguments of Smith, Mises, et al. Thus was economism born. It takes "simplistic" economic concepts and repackages them in op-eds, videos, and radio commentaries designed to get Americans to believe that free markets are always good and government interference with them is always bad.

In making his argument, Kwak is relentlessly uncharitable toward his opponents. They're mean-spirited people, all about money for themselves, never about principled economic and philosophical arguments against government coercion. Yale social scientist and noted libertarian intellectual William Graham Sumner is tarred with the false claim that he was indifferent to the poor, who just "deserved it." Leonard Read, founder of the Foundation for Economic Education, was just a business executive looking for ways to put business back on top, not a man with a deep philosophic commitment to liberty. Americans who oppose the minimum wage merely want to keep down labor costs for business. And those who argue for tax cuts do so only because their deep pockets

could hold a few more dollars.

Kwak can't even resist a dig at two Nobel laureates who provide ammunition for the practitioners of economism. He writes of Hayek and Friedman, "Both were well versed in the complexities of various markets, even if their political sensibilities constantly colored their economic assessments." I don't think I have ever before seen the intellectual sincerity of Hayek or Friedman called into question, but Kwak feels the need to suggest that they were part of the right-wing cabal against the Golden Age of progressivism.

Against debate/ Kwak claims that he isn't trying to say who is right and who is wrong

Instead of promoting deeper discussion, the book encourages leftists to believe that free market arguments are just masks for greed.

in such policy debates; he only wants deeper and more enlightened discussion. But given his dismissiveness of first principles on the pro-market side of these debates, it's hard to take this claim seriously. He never indicts any of the equally simple arguments that come from progressives. For every instance of "economism"—let's say a *Wall Street Journal* editorial arguing that raising the minimum wage will increase unemployment—it's easy to find one of simple progressivism—say a *New York Times* op-ed declaring that taxes should be raised on the "wealthiest 1 percent" as a matter of basic fairness. Only the former appears to bother Kwak; simplistic appeals that help advance the policies he likes occasion no complaint.

Whatever effect the book has will be to encourage true-believing progressives to say "Well, that's just economism for you" any time they encounter an argument that's premised on supply and demand, incentives, efficiency, or other foundational concepts of economics. Instead of promoting deeper discussion, the book encourages leftists to believe that free market argu-

ments are just a mask for greed.

Besides the book's tactic of impugning the motives of those who argue for freer markets and less interventionist government, Kwak's work is open to two obvious objections.

First, is it true, as he says, that basic supply and demand analysis is so drummed into American students that they reflexively oppose government interventionism? Demonstrating that would seem to be crucial to Kwak's case, but he never bothers to try. In point of fact, only a rather small percentage of Americans ever take an economics course (very few colleges require them) and as George Mason University economist Daniel Klein has shown,

many economics professors are not free-market enthusiasts. So among the minority of students who do take Econ 101, many are taught in a way that gives more attention to alleged market failures and the need for inter-

vention than to the adverse consequences of tampering with prices. And in the rest of the college curriculum, students are far more likely to be imbued with egalitarian and statist ideas than to hear anything that reinforces supply and demand theory from Econ 101. If "economism" affects American thinking, its effect is far, far smaller than Kwak would have us believe.

The second obvious problem is that despite the supposedly gigantic barrier of economism, the United States has kept right on increasing the power of the state to interfere in markets. Economism did not prevent the Affordable Care Act from passing; it didn't keep Congress from raising the minimum wage in 2007 or keep Seattle from raising it to \$13 per hour last year; it didn't prevent ethanol subsidies or steel tariffs; it didn't keep states from enacting laws against price gouging. Nor has the government repealed any of the laws that people ostensibly infected with economism have long railed against. The Davis-Bacon Act? Still on the books. The Department of Education? Still there.

In short, Kwak vastly overstates the power of economism to dictate policy. He declares that it prevents Americans from even considering a single-payer national health policy, but many politicians and policy advocates have put forth that idea and it has been widely discussed. Most Americans seem to have concluded that single-payer would be a big mistake. That isn't because "economism" is so dominant; it's because the case for a federal health care monopsony is so poor.

Conclusion / What this book boils down to is the author's complaint that the world of policy debate doesn't operate to his satisfaction. "With economism," he writes, "there are only implicit assumptions and asserted conclusions. When commentators and politicians say that a higher minimum wage will increase unemployment ... they often do not realize that they are making contested claims about how the economy should be organized and how its output should be distributed."

Yet, writers who rely on economism are just as apt to know they're making "contested claims" as progressive writers are to know that they're doing so when they advocate interventionist, redistributionist policies. People on any side who seek to shape public opinion couldn't possibly include and respond to every objection that has been lodged against the positions they advocate. The realm of policy debate is (thankfully) still an even field of battle and Kwak's lament that "economism" gives greedy right-wingers an unfair advantage is risible.

In the end, what does he want? He wants his philosophical allies to develop "a new, compelling narrative about how the world works." What would that entail? To break the grip of economism, he wants to fight the idea that "the overriding objective should be to have more and more stuff." He praises Amartya Sen for saying that we should care about "the richness of human life" and not just "the richness of the economy."

Fine. Let Kwak and anyone else make that case any way they can, even if those

advocates don't bother to acknowledge when they're making "contested claims" and ignore the counterarguments about the tradeoffs their preferences would require.

In fact, writers have been trying to sell

people around the world on a "less is more" philosophy for thousands of years. They haven't gotten far. Perhaps Kwak's next book will argue that Americans should change to a sharing ethic because we have enough stuff. R

Pride in Staying Out of Jail?

REVIEW BY DWIGHT R. LEE

The new book *Read My Lips: Why Americans Are Proud to Pay Taxes* is a report on how average Americans with rather modest knowledge of public finance feel about paying taxes. Written by Vanessa Williamson, a fellow in governance studies at the Brookings Institution, the book's objective is to convince readers that Americans are proud to pay taxes, and to explain why.

In the preface, Williamson states that she is regularly told that "Americans hate taxes ... [and] are angry ... and intrinsically anti-government." But this, she says

has become a truism without the benefit of being true.... To be a taxpayer, Americans believe, is something to be proud of. It is evidence that one is a responsible, contributing, and upstanding member of society, a person worthy of respect.

She offers preliminary support for this belief by citing political scientists who have "reviewed decades of survey data to conclude that a majority of Americans, including a majority of Republicans and the affluent, not only favor 'concrete government programs targeted to jobs and wages, educational opportunity, and protections against illness and deprivation' but would be willing to pay higher taxes to fund these efforts."

The book's introduction continues with background on American attitudes toward taxation and the connection Americans feel between paying taxes and their place in the community. She also discusses how

she acquired the primary support for her case from open-ended interviews with 49 Americans plus an independent survey of another 1,000, both from diverse samples.

In this review I will try to give a representative summary of the many comments by Williamson's interviewees and her discussion of those comments. Let me say upfront that I see little indication that the people she interviewed or who responded to the survey are proud to pay taxes. Indeed, she deserves credit for putting in plenty of evidence inconsistent with her thesis of taxpayer pride. But she seems resistant to seeing such evidence as undermining her argument.

For example, she dismisses anti-tax attitudes as reflecting personal flaws by saying they "are often tied to anger that minority groups might benefit from public spending." Also, after stating that "the paperwork [required to pay income taxes] is extremely arduous," she makes the bizarre argument that

there are reasons to think that an arduous taxpaying process is a good thing. It might encourage taxpayers to think what government provides. To the extent that the income tax awakens Americans' sense of connection to their government, its inconvenience may be a price worth paying.

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IN REVIEW

I accept the accuracy of the survey indicating that people say they are willing to pay higher taxes for government programs, and I accept that this could indicate pride in paying taxes. But I do so with a caveat: public choice economists have pointed out that many voters are motivated to vote for paying higher taxes because it allows them to feel proud of themselves at effectively zero cost. The reason for the miniscule cost is that the probability that an individual vote will determine an election's outcome is effectively zero, and voters know this. How one person votes almost never creates a financial obligation. The same, I submit, is true of answers to surveys. The pride may be real, but it is so cheaply acquired that it doesn't seem significant enough to justify Williamson's thesis.

Forgetting their pride? / In the first chapter, titled "Pride and Prejudice and Taxes," we hear mostly from the people Williamson interviewed, along with some comments from the author.

The chapter begins with three questions from Williamson, each answered by a different interviewee. In response to "When I say the word 'taxes' ... what do you think?" one respondent replied: "The cost of sort of running the country and maintaining a culture, infrastructure of our country. The cost of being an American." In response to, if you were writing a book on your views of taxes, "what would be the most important chapter?" another respondent answered: "I would think social responsibility, things we all owe each other as members of a functioning society.... The fact that I really think more people should take more responsibility for making sure that we're all okay as opposed to just ourselves." In response to "How do you feel when you're filling out your income taxes?" a third respondent said: "Like I am doing my part in supplying the needs and to help pay for the things in this country that are needed.... It's my civic duty and that I am responsible for paying taxes."

The chapter continues with Williamson informing us that "around four in five Americans see taxpaying as a moral

responsibility" and that "over 90 percent of Americans agree" that "it is every American's civic duty to pay their fair share of taxes." Additional statements follow from interviewees on how they feel about taxpaying, such as "a responsibility to each other"; connects us to "basic considerations" for others such as "don't steal" and "don't kill your neighbors"; makes me think that "you can't expect some guy like me, who's an individual, to do everything on his own"; every individual is a "member of the group," so taxpaying is "a responsibility to everyone else, and also to yourself"; "people in authority are in place because God put them there," and so their laws should be followed; taxes pay for "the benefits of living in a society; and "it feels good to be able to contribute."

Obviously, these comments are heavily influenced by a sense of identity with and connection to one's community. But Williamson correctly points out that "one's community extends only so far." She continues that "many Americans draw a distinction between the people ... to whom they feel a sense of shared obligation and those who fall outside their self-defined community," with the most likely outsiders being immigrants, minorities, and those seen as not paying taxes. Many are not happy about paying taxes to be spent on certain groups. As one of Williamson's interviewees delicately expressed it, "Our president [Barack Obama at the time] wants us to keep up the million (sic) of illegal aliens in our country or at least keep their kids here and feed them and keep them up with tax payers money that should be used to pay our country debts but is instead used to keep up Obama's cousins."

Williamson cannot be happy with many of these statements, and she creates credibility by including them. Yet she remains undeterred in believing that those who fulfill their obligation to pay taxes "take pride

in their contribution to the public good." She concludes the chapter by saying: "My interviewees describe the taxpaying obligation as ... a belief in their fellowship with others in the community. To be a taxpayer is therefore a source of pride."

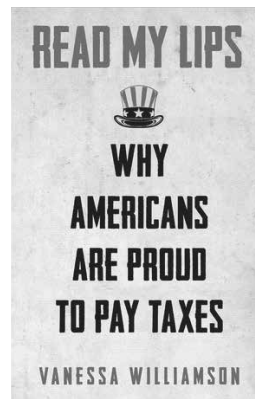
Statements like these began to puzzle me once I realized that nowhere in this

chapter did any of Williamson's interviewees use the words "pride" or "proud." The only mention of "pride" is in the chapter title and by Williamson in the above two quotations. Maybe later, I thought, the interviewed taxpayers will mention for themselves their pride in paying taxes. As Williamson states in her introduction, an advantage of interviews is that "they allow respondents to easily express the strength of their opinions."

Ignorant on foreign aid? / In the second chapter, there is some mention of how taxpayers feel about themselves,

but more about how they feel about people who are believed to not pay taxes. In the chapter's opening quotation, when asked how he feels about being a taxpayer, a respondent states, "I like the fact that I am contributing in that way (to economic growth) because there are so many who aren't." "Anger at these supposed non-taxpayers is rampant," Williamson writes, followed by more statements from her interviews similar to the ones in the first chapter. For example, a South Carolina independent's first response about taxes was about "stupid people who don't pay any." Another interviewee says that "one must earn not only an income but an income of a certain level before one really qualifies as a taxpayer."

These and other interviewee statements set the stage for Williamson to highlight a key theme in this chapter. She emphasizes accurately that almost all American adults pay taxes. Yet people typically think of only



Read My Lips: Why Americans Are Proud to Pay Taxes

By Vanessa S. Williamson

304 pp.; Princeton University Press, 2017

income taxes when taxes are mentioned, which (because of the high percentage of Americans who don't pay income taxes) helps explain why the public (particularly Republicans, according to her data) overestimate the number of nontaxpayers. Even many of the relatively poor seem to think of themselves as taxpayers only reluctantly, despite being aware of their financial burden from sales taxes.

The third chapter examines how people want their tax dollars to be spent. There are no real surprises in this chapter, but there is an interesting insight indicating taxpayers are not as uninformed as commonly thought. People like spending on local projects that are visible (such as roads, schools, and public safety), with transfer programs receiving more mixed support—except for Social Security and health care—provided that the recipients “earned” their benefits.” There are clear partisan differences between Democrats and Republicans on spending for such things as science, health care, and national defense. But the level of support from those in both parties is more favorable when tax money is going to “people with whom they feel a strong sense of shared interest” and “those who are chipping in for government’s costs.”

A common example of the rational ignorance of voters is that they greatly overestimate federal expenditures on foreign aid. Based on her interviews, however, Williamson argues such foreign aid estimates are not unreasonable because they are based on “the tendency of Americans to think of foreign aid in military terms,” a plausible tendency since “American military interventions are often described in terms that sound a lot like foreign aid.”

Williamson led astray? / In the fourth chapter, which considers attitudes about progressivity, Williamson has another opportunity to compliment her interviewees. She points out that most of them approve of the progressive tax code. However, she believes “the complexity of the tax code [has led] Americans (and some of those she interviewed) astray” by convincing them that a flat tax with few loopholes

would increase the share of taxes paid by the rich. She clearly believes the rich are not paying enough taxes and that they would pay a smaller share under a flatter, simplified tax code.

Yet, both evidence and theory suggest that Williamson is the one being led astray on this, not her interviewees. The 1986 Reagan tax reforms lowered tax rates dramatically and eliminated a lot, though hardly all, tax loopholes. As a result, the wealthy began paying a larger percentage of federal income tax. The excess burdens of taxation and rent seeking (two concepts never mentioned) that would be reduced by reestablishing the Reagan reforms are

Reestablishing the Reagan reforms would reduce the excess burdens of taxation and rent seeking that are now creating harmful economic distortions.

currently creating economic distortions and waste that are harming the poor, the wealthy, and those in between.

The last chapter of Williamson’s book that I consider in detail concerns wasteful government spending. She “asked only one question about waste, but interviewees [spontaneously] talked about this subject a great deal.” They blamed government waste on politicians’ perks, pork (special interests), inefficiency, and overpayments, with the most cited examples being money being spent on disliked programs. She once again believes her interviewees have been led astray on this topic, arguing that scholars “have expressed astonishment at Americans’ estimate[s] of government waste, ... [which] often approach 50 percent [of the federal budget].” She adds that “a 2013 Congressional hearing put waste, fraud, and abuse at 7 percent of the federal budget.” Williamson continues to express skepticism of public opinion on government waste by informing us that “most people simply do not think of ‘government waste’ the way that experts do.” Yet the reader is never informed of what experts think about government waste. She never refers to any work by public choice

economists, who would be more sympathetic to the interviewees’ view of the size of government waste.

There is another mention of “pride” in this chapter, again by Williamson. She states that “the interviewees’ sense of pride as taxpayers is often tainted by the thought that the money is wasted.” That’s not powerful support for her thesis about taxpayer pride.

Staying out of jail / Williamson’s concluding chapter solidified my initial suspicion that her research really doesn’t make the case that Americans are proud to pay taxes. No doubt many will say they are when asked by earnest pollsters, and some of them probably do feel that way. But I doubt that such pride is intense enough for many to move it very far from the bottom of the list of things they are proud of. If pride

was mentioned explicitly by any of the 49 Americans who Williamson interviewed, she failed to include it in her book.

She seems remarkably immune to the thought that people pay their taxes because governments are fully prepared to make their lives miserable if they don’t. This is reflected in her closing statement that

taxpaying allows us to demonstrate our commitment to the community and to the country. It is the investment of a people in the shared task of self-governance. By these lights, it is no wonder that so many Americans see it as a badge of pride.

Given the penalties that befall nonfilers, it seems odd to describe taxpayers as being “allowed” to pay their taxes.

Let me admit that any pride I feel about paying taxes is overwhelmed by my pride in staying out of jail. I cannot speak for others, but as for me, if the government *allowed* me to reduce my taxes as much as my taxpaying pride permitted, my first question would be, Are negative taxes allowed, or do I have to accept the corner solution? **R**