In Review

Food For Thought
Reviewed by Tim Stonesifer

THE OMNIVORE’S DILEMMA: A Natural History of Four Meals
By Michael Pollan

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

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

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

King Corn

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

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

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

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

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

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

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

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

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

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

This increased government presence in the market set off a response by a few organic true believers who chose to opt out of the encroaching $11 billion “Big Organic” movement. But from unnecessary safety and packaging standards to a rule that requires animal processing facilities to have a bathroom set aside solely for the use of government inspectors, those trying to run an organic family farm today face an uphill battle. Congress’ imposed organic standards have caused valuable local farm knowledge to be lost. An hour spent in the Whole Foods store provides shoppers myriad scenes of animals living care-free, country lives, and lyrical narratives about organic vegetables on picturesque hillside. Yet the requirement is that the animals have “access to the outdoors.”

However, what can’t be replicated through such artful prose and clever marketing is seeing first-hand where dinner comes from, and knowing exactly how it was grown or raised. To many, such personal involvement is a good first step.

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

KNOW YOUR FOOD A journey through The Omnivore’s Dilemma — from the corn field to the supermarket, and from the woods to the table — is one that will turn you into the organic parents of wild animal milk and organic vegetables on picturesque hillsides. This increased government presence in the market set off a response by a few organic true believers who chose to opt out of the encroaching $11 billion “Big Organic” movement. But from unnecessary safety and packaging standards to a rule that requires animal processing facilities to have a bathroom set aside solely for the use of government inspectors, those trying to run an organic family farm today face an uphill battle. Congress’ imposed organic standards have caused valuable local farm knowledge to be lost. An hour spent in the Whole Foods store provides shoppers myriad scenes of animals living care-free, country lives, and lyrical narratives about organic vegetables on picturesque hillside. Yet the requirement is that the animals have “access to the outdoors.”

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The Return of Jimmy Carter

Reviewed by Richard L. Gordon

A DECLARATION OF ENERGY INDEPENDENCE: How Freedom from Foreign Oil Can Improve National Security, Our Economy, and the Environment
By Jay Hakes
292 pages; John Wiley & Sons, 2008

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

Jay Hakes has accomplished the dubious distinction of preparing by far the best-researched effort in this realm and now heads the Carter Library and Museum. Thus, his presentation of energy history from the start of the Nixon administration to the Clinton administration and now heads the Carter Library and Museum. This, not surprisingly, the book views the Carter years as a golden age from which we unwisely retreated. That is the key problem with the book.

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

INSIDE Hakes divides the book into two main parts, the first of which defines the supposed problem. The first three chapters are his presentation of energy history from the start of the Nixon administration onward. That is followed by four overwrought chapters on the overriding issues: the military implications of oil dependence, global warming, the “Magic and Limits of Market-Based Solutions,” and ideological blunders. The book’s second part offers “solutions”—stockpiles, more fuel-efficient automobiles, alternative fuels, electric vehicles, energy taxation, conservation, and “Hail Marry” (his term). Hakes errs in more than the usual ways. His first security concern is supply disruptions. In this, he blows his case before he even gets going, killing the cause of energy independence. A short supply disruption once a decade is hardly justification for insanely costly energy independence. He, moreover, shows no recognition of the alleged macroeconomic externalities that provide the only potentially valid market-failure justification for intervention in a crisis. By doing so, he ignores the government-failure problem that precludes optimum market response to crises.

Irrevocable hatred of windfall profits prevents firms from realizing, among other things, the profits in a shortage period that would justify optimal inventories (and, as President Obama fails to note, optimal levels of investment in production capacity). The public inventory about which Hakes is so enthusiastic suffers from restrictions on disposal also because of enmity toward the windfalls that stockpiles would make. His solution of an independent supervising body to oversee stockpiling has numerous defects. It harkens back to the vision of benevolent, omniscient experts—a vision loved by advocates of intervention and discredited by many impartial studies. Hakes’s claim that such experts could operate as impartially as the Federal Reserve ignores how rules, rather than discretion, have become popular in the literature on monetary economics.

Hakes does eventually recognize that the ability to alter trading patterns precluded limiting the supply losses to the supposed target countries.

In his Carter-period discussion, Hakes badly distorts the explanation of oil use decline from 1978 to 1983. In particular, he rightfully notes that a large and permanent part of the drop was the broad discontinuation of the use of oil to generate electricity. He wrongly attributes the shift to coal- and nuclear-fueled generation to federal mandates, ignores the rise in gas-fired generation that energy legislation unwise tried to prevent, and seems unaware of increased exports, recorded in reports to the U.S. Energy Information
Agency, of coal-fueled Midwestern electricity to the Middle Atlantic states. Moreover, Hakes attributes residential and commercial reductions in oil use to conservation measures and ignores the shift of consumers to natural gas. He says nothing about the large decline in industrial oil use.

The dependence chapter largely discusses the invasion of Iraq as an alleged consequence of dependence. The global warming chapter is a routine presentation of the case for urgent action, he does not advocate as strongly as beyond Al Gore in 1992. A central fault of the book and the whole literature on energy independence is the neglect of the underlying economies. Hakes is particularly vulnerable because he purports to deal with that economics. His chapter on the free market recognizes the virtues of the market, but follows them with dubious assertions that conservation mandates make the market easier to decontrol. He credits the nuclear power program with making a contribution to this. He then employs the canard that free-market economists ignore the existence of externalities. The reality is that free-market economists are more skeptical than Hakes about the level of prevailing externalities. He does not help matters by including foreign-government ownership of oil as an externality instead of simply a monopolistic market failure.

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Writers of this ilk betray their inadequacies by level of knowledge and depth in understanding. Hakes’ most problematic is the economic howler that “the reluctance of OPEC producers to increase output rests less on fears of oversupplying the market than on a desire to keep prices from falling.” Were the EIA properly staffed, eight years there should have made him aware that prices and quantities supplied have a one-to-one relationship.

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Power Communication

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

Deregulation, innovation and market liberalization have a one-to-one relationship. That alteration is too small and of too unclear impact to justify intervention, action on a single commodity at the regulatory commission level is not the best way to deal with redistribution. Moreover, even if regulators had efficiency-raising public interest objectives, they lack the ability to attain those ends. Finally, rent-seeking forces may lead to pursuit of less desirable objectives. Some subsequent writers have expanded on this view and, in particular, suggested that the presumption of natural monopoly was unjustified. Northwestern economist L. Lynne Kiesling’s thought-provoking new book, Deregulation, Innovation, and Market Liberalization adds to this literature. She takes up the classic debate in public utility economics over the optimum way for suppliers to interact with consumers — that is, to use real-time pricing and other mechanisms to moderate competition.
INSIDE
The book’s introduction concentrates on its unifying theme that the concept of regulated natural monopoly is ill-suited to dealing with industries that experience rapid technical progress. That flaw has become intolerable in an era when such change could profoundly increase power industry efficiency. Chapter 2 provides an all-too-standard capsule history of the industry, its regulation, and the relevant theory. Kiesling’s history is mostly solid, but it has a few standard but still bothersome flaws. The most important of these is her failure to discuss the forms of price discrimination that can produce efficient outcomes in a natural monopoly and that are usually employed, and stressing what she recognizes as impractical: the loss-minimizing elasticity-based markups beloved by many theorists. Her thumbnail description of the industry sticks too heavily to an entity-count approach. Such a technique underplays the fact that the industry is dominated by the generation, transmission, and distribution by the private sector, which has far fewer participants than the public and cooperative sectors. (Moreover, the count of private firms, as usual, is boosted by reliance on sources that treat subsidiaries as separate operations.)

In Chapter 3, she deals with the desirability of decentralized decisionmaking and the need to design institutions that facilitate such decentralization. For the first part of the discussion, she invokes the arguments in favor of decentralization that are advanced in Austrian economics; she uses new institutional economics for the rest. The treatment is too long for an academic audience, but it may not be lucid enough for the nontechnical audience. However, it does convey the essence of the argument. The remaining chapters present her case that communication between utilities and their customers will promote large efficiency gains. These chapters are what justify attention to the book. The discussions examine the implications of interactions with consumers for resolving the critical problems of the electricity industry.

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

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

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

The book is clearly an effort to provide an elucidation for non-specialists of the case for a less regulated, more flexible electricity market. The discussion is kept at a level appropriate for such an audience. It is too bad that this publication is a $130 book directed at academic libraries. Any effort to break from the assertions that regulation is desirable is welcome. One such as this, which thoughtfully presents and justifies some interesting alternatives, is particularly helpful. One would hope at a minimum that the electricity regulation establishment would be inspired to depart from its cavalier neglect of such arguments.
Laws Trumping Laws

Reviewed by Paul H. Rubin

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

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

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

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

A LOOK INSIDE

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

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

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

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

Reviewed by Jeremy Lott

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

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

Jeremy Lott is an editor at Capital Research Center and author of The Warm-Bucket Brigade: The Story of the American Vice Presidency (Thomas Nelson, 2008).

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

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

ACTORS AND INCENTIVES To get a rough understanding of the current debate, imagine a U.S. branch of federal-state legal relationships. Because it has become illegal to transport many items across state lines either at all or without the express permission of bureaucrats who believe the international antiquities market is tantamount to theft, museums used to be able to purchase antiquities from international dealers or fund archaeological digs and keep about half the items found, through a system known as “partage.”

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

Archaeologists, once well-funded, now have to scrimp for funds, and some of the practices they have endorsed make their discipline less effective. Cuno points out that the Rosetta Stone was salvaged from building material, sold through an antiquities dealer “unprovenanced” — without a documented history of where it was lawfully produced or are made more expensive, so that some consumers do not use those products. We do not see the harmful effects on those consumers.

In sum, this book is a rather lengthy guide to an important if fairly obscure branch of federal-state legal relationships. This branch of law is now under extreme pressure and is likely to change in important ways. The book explains these issues. However, readers should keep in mind that Professor McGarity does not view these issues through either law-and-economics or libertarian lenses. Nonetheless, the book is sufficiently objective that readers with these preferences can understand the issues.
fully excavated along with the chain of
sale. That would render it highly suspect, 
if not useless, to archaeologists today. Yet 
without it we might never have translated 
anthropic Egyptian hieroglyphs. Imagine the 
whole field of Egyptology, stillborn.
The new regime has hurt most of the 
players on our spectrum. Museums have 
had their ability to put together new 
collections much diminished. Scrupulous 
dealers and collectors are lumped in with 
the less scrupulous ones. They face suspi-
cion and onerous regulation. Those willing 
to skirt the laws can make a good deal of 
money clandestinely digging up antiqui-
ties to sell to unscrupulous collectors, who 
have greater incentive to keep them well 
out of the public eye. The money makes 
archaeologists even more likely to have 
their sites looted. You could even make a 
good case that states have been hurt by 
protectionist cultural property laws. After 
all, many of the museums in poor coun-
tries today are filled with artifacts that 
were dug out of the ground and docu-
mented when partage was allowed.
Cuno acknowledges some ill effects of 
this setup, but he remains more interested 
in making the case that the laws them-
selves are unjustified. He argues that mod-
ern nation-states are interested in cultur-
al protection laws for what he takes to be 
very bad reasons: nationalism and mili-
tarism, chiefly. This is not wholly con-
vincing, but the author does come up 
with some fun examples to argue his 
point. He reveals, for instance, that one 
Chinese firm that routinely spends huge 
sums to purchase Chinese antiquities 
abroad and bring them back to China is 
an offshoot of a Chinese arms manufac-
turer — The Poly Group — that was spun 
out of, and still has close ties with, the Chi-
inese army. It appears the modern Chi-
nese military still attaches great impor-
tance to those Qing Dynasty bronzes.  

Still-Relevant — Perhaps 
More So

Reviewed by David R. Henderson

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

Why write a review of a book that was first published in 
1944? Because it’s still relevant today. Friedrich Hayek wrote *The Road to 
Serfdom* during World War II to warn the 
West that intellectuals and policymakers 
in traditionally free countries, including 
Britain and the United States, were repeat-
ing the journey that their counterparts in 
totalitarian countries, especially Germany 
and Italy, had traveled before the war. The 
message resonates amidst today’s 
War on Terror, return to regulation, ener-

gy plans, financial sector bailouts, and 
successive economic “stimu-
lus” packages.

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

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

DISTORTIONS

Take the word “privi-

leged.” Hayek points out that the word was 
originally used to talk about special treat-
ment that some people received simply 
because of their status. Hayek notes, for 
example, that the right to own land had, at 
one time, been reserved for the nobility. 
That was privilege. But the term, writes 
Hayek, came to apply to anyone who 
owned property, even though virtually 
every adult’s right to own property had 
become widely accepted. We see some-
thing similar today. Those who have a 
great deal of wealth are called “privileged,” even if 
they earned their wealth without using any political 
pull. Those who are poor, 

on the other hand, are called 
“underprivileged,” even if 
their being poor has noth-

ing to do with having less 
than the average amount of 
privilege. Hayek understood 
that such distortions in 
meaning matter.

And consider the following passage:

The younger generation of today 
has grown up in a world in which 
in school and press the spirit of 
commercial enterprise has been 
represented as disreputable 
and the making of profit as immoral, 
where to employ a hundred peo-

ple is represented as exploration 
but to command the same num-

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

One of Hayek’s chapters that speaks most to today is his “Why the Worst Get on Top.” In it, he explains why the politicians in a totalitarian system will try to be the most ruthless people in society. One reason he gives is “that it is easier to argue on a negative program — on the hatred of an enemy, on the envy of those better off — than on any positive task.” We see this even in non-totalitarian countries with a large amount of government control, such as the United States. Think about how Al Gore, for example, extolled “the top one percent” of the income distribution during his 2000 presidential campaign. Hayek quotes the late University of Chicago economist Frank Knight’s memorable statement that “the probability of the people in power being individuals who would dislike the possession and exercise of power is on a level with the probability that an extremely tender-hearted person would get the job of whipping-mastet in a slave plantation.”

Again, to some extent, this applies even to semi-free countries such as the United States. The last U.S. president I remember who had any reluctance about exercising power was Ronald Reagan. Every president since seems to have loved power.

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

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

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

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

Of course, many important things today are different from the way they were when Hayek wrote. Included in the list must be the messianic devotion to “environmentalism” and the U.S. government’s willingness to intervene in other people’s disputes around the world and even, as in the case of Iraq, to start such disputes. Is it time for an advocate of freedom to write a new Road to Serfdom??
he writes, “would permit more of the pro-
ductive potential of the American people to be
realized.” There’s the non-barking dog he
wants us to concentrate on.

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

First, welfare recipients are
strongly deterred from work-

ing by the high implicit tax
tariffs they face on income
earned. Browning walks us
through a typical case: a sin-
gle mother with children who
lives in Pennsylvania. She
is eligible for welfare benefits
under various programs that
amount to $19,217. What
if the woman finds a job and
earns some money? Suppose
she lands a part-time job and earns $5,000
during the year. Is she $5,000 better off? No
— after factoring in the reductions in her
benefits because of her earnings, she ends
up with disposable income of $18,253.

The part-time job actually makes her worse
off. Browning proceeds to show that she
would need to get a job paying $8,000 per
year before she would end up financially
better off than not working and living
entirely at the expense of taxpayers. Even at
that income, her gain is less than $700 for
all the trouble of working.

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

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

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

Social Security is another bad policy
when you consider the hidden costs. What
people see (and politicians make sure they
do) are the checks flowing from the U.S.
Treasury to help Grandpa pay his bills.
What they don’t consider is how much he
would have saved in the absence of Social
Security. What if he had invested his taxes in stocks
and bonds, thus providing more capital for the econ-
omy? Answer: he would enjoy a higher return than Social
Security will pay and the econ-
omy would have grown faster.

Browning estimates that
Social Security has reduced
GDP by 5 to 10 percent. Fur-
ther, the higher rate of return
on private investments would
easily cover the cost of health insurance,
thus eliminating the “need” for another
cost federal program, Medicare.

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

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

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

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

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

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

Browning reads the minds of egalitari-
ans who might downplay the sacrifice
involved here because having more “stuff”
— the GDP loss — isn’t really important. Of
course, some of the increased output would
go to poorer people who would have high-
er incomes if we abandoned welfare, but
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Legislating in the Courtroom

Reviewed by George Leef

REGULATION BY LITIGATION

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

From time immemorial to the 20th century, litigation was about settling a dispute between two parties. A sued B to make him pay for damage, to perform a contract, or to stop B from doing something harmful to A. In the last few decades, however, litigation has turned into a tool of social policy, used by government agencies or private activists in an effort to get courts to rule in a way that doesn’t merely settle a dispute, but makes new law. Activists love this new tool. Some-
Regulation by litigation does away with the element of political compromise and oversight.

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

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

The second case study is that of dust litigation. Dust was first understood to be a hazard for workers in the early 1900s, especially for workers exposed to silica dust. Litigation was threatened for the harms to exposed workers, but was averted by what the authors regard as a sensible legislative/regulatory approach—bringing back injuries under workers’ compensation. The injured would receive almost automatic benefits through the well-established compensation system. But there was a hidden cost that weighs against the EPA’s apparent litigation victory.

Most importantly, lawyers looking to make a killing were kept at bay. However, things would soon change. After a few breakthrough cases where the plaintiffs’ bar figured out how to win asbestos cases (and pocket huge fees), there was an avalanche of asbestos cases filed in the 1970s, ’80s, and ’90s. Many companies were driven into bankruptcy, as courts relaxed evidentiary standards to virtually ensure that plaintiffs would always win. Some workers scooped up enormous fees. Evaluating the regulatory effect of the flood of asbestos litigation, the authors find that it accomplished nothing desirable from society’s point of view. The asbestos industry was killed and there was a great deal of collateral damage without the least consideration of costs and benefits.

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

Regulation by litigation does away with the element of political compromise and oversight.
scrutiny than in the past, thanks to Judge Jack’s revelations. Observing the effects of asbestos litigation, the authors conclude:

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

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

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

Again, the authors aren’t arguing that traditional forms of regulation are necessarily good, but that those forms are far preferable to regulation by litigation. Unfortunately, they see no solution to the rising tide of this sort of regulation, since powerful people will litigate when they want to. Instead, the authors suggest some marginal improvements, such as requiring that proposed settlements be publicized just as proposed rules must be, and that interested parties be allowed to participate in settlement proceedings. The great benefit of this book is that it exposes the way regulation really works, especially regulation by litigation. Lenses coated with rose-colored film are cleaned so that those who want to see regulation clearly can do so. Regulation by Litigation would be a good supplementary text for advanced courses in public policy.

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