

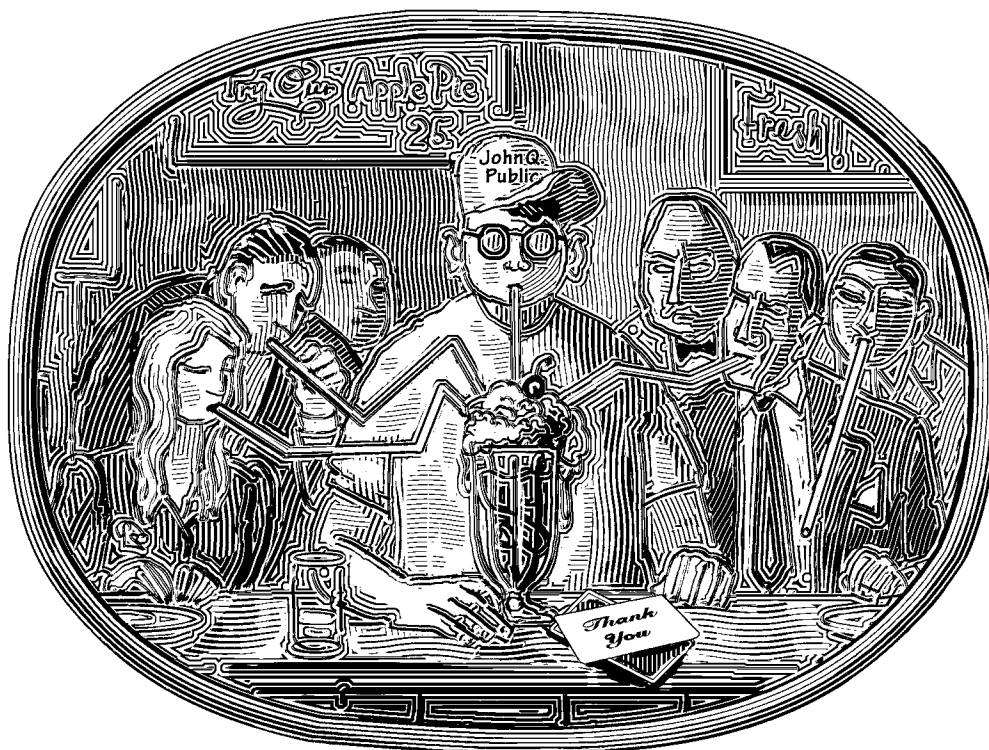
Book Review by Christopher DeMuth, Sr.

OUR CORRUPT GOVERNMENT

A Republic No More: Big Government and the Rise of American Political Corruption, by Jay Cost.
Encounter Books, 408 pages, \$27.99

Saving Congress from Itself: Emancipating the States and Empowering Their People, by James L. Buckley.
Encounter Books, 102 pages, \$19.99

By the People: Rebuilding Liberty without Permission, by Charles Murray.
Crown Forum, 336 pages, \$27



HAS THE AMERICAN EXPERIMENT failed? Editorial pages tell us that our government is corpulent, gridlocked, and partisan, but several important books contend the problems are more dire and fundamental. In 2012 Michael Greve argued in *The Upside-Down Constitution* that modern governance inverts the framers' design. Last year, three books offered equally grave diagnoses. Their titles—*Is Administrative Law Unlawful?* by Philip Hamburger; *Political Order and Political Decay*, by Francis Fukuyama; and *The Rule of Nobody: Saving America from Dead Laws and Broken Government*, by Philip K. Howard—raise the possibility our government is lawless, decadent, and out of control. If the founders' Constitution can no longer be restored through the sort of incremental, pragmatic reforms that Americans do well, it seems we face a stark choice: a constitutional reordering more fundamental than any undertaken since the 18th century, or a future

of economic decline, political upheaval, and diminished liberty.

Now, three more exemplary books augment our deliberations: *A Republic No More: Big Government and the Rise of American Political Corruption*, by Jay Cost, a talented political analyst and staff writer at the *Weekly Standard*; *Saving Congress from Itself: Emancipating the States and Empowering Their People*, by the distinguished federal judge and former U.S. senator James L. Buckley; and *By the People: Rebuilding Liberty without Permission*, by the eminent social scientist and American Enterprise Institute scholar Charles Murray. All are splendid—imaginative, edifying, rousing; highly informed and vigorously argued.

Each begins with James Madison and his republican system, substantially but not perfectly embodied in the original Constitution and Bill of Rights, and defended in *The Federalist*. The federal government, limited to a few

indispensable tasks of nationhood, would be disciplined from the inside by multiple checks and balances, and constrained from the outside by an extended polity, where the sheer profusion of interests would necessitate compromise and moderation. Over time, however, Madison's system was undone by political ambition, popular democracy, and judicial fecklessness. We're left with "institutionalized corruption," according to Cost; where Congress's "ability to bribe the states" has "emasculated federalism," according to Buckley; and with Murray's "end of the American project," brought to us by a "lawless legal system," "extralegal state," and "systematically corrupt political system" incapable of reforming the mess. At this point our authors turn refreshingly pragmatic—not one of them concludes by calling for a new constitutional convention. Their pragmatism, applied to finding a way around the edifice of incorrigible corruption they discern, leads in idiosyncratic directions.

REPUBLIC NO MORE IS THE MOST CAPACIOUS of the three books, presenting a vivid interpretive history of Madisonian decline from the First Congress down to Fannie Mae, Freddie Mac, and the financial crisis of 2008. Jay Cost has a theme and a theory. His theme is corruption, where he begins with the famous distinction, propounded by Tammany Hall boss George Washington Plunkitt in 1905, between “dishonest graft” (bribes, kickbacks, blackmail) and “honest graft” (e.g., purchasing land for cheap near a planned city park that only a few insiders know about). Even Plunkitt’s honest graft is dishonest today—insider trading is illegal, albeit policed much more vigorously in private markets than in government. But legislators and public officials have contrived subtler, more insidious forms of self-dealing, forms often justified with lofty rhetoric about the public interest. Cost defines corruption quite broadly: “when government agents sacrifice the interests of everybody for the sake of a few,” and when presidents and Congresses “distribute scarce resources in ways that run contrary to the public interest.” This corruption is the antipode of Madisonianism: it is the success of factions in turning government to selfish advantage, overcoming the Constitution’s design and assumptions.

Cost’s theory complements his theme. He argues that our government became corrupt because the constitutional scheme, while adequate to the limited national government of few and defined powers that most of the founders envisioned, proved hopelessly inadequate to the actual government of numerous broad powers that emerged quickly and then grew in size and scope over two centuries. In particular, Congress—in part by design (a House of frequently elected local representatives) and in part by necessity (the Connecticut Compromise, which gave every state two senators)—was built to champion state and local interests in the national capitol. For a government devoted to essential, inescapable issues affecting the nation *as* a nation, that framework might have succeeded in harnessing regional interests to national purposes.

But as the government turned instead to financing economic development, regulating private enterprise, and promoting social welfare, the scheme operated in reverse: Congress became an engine for harnessing national programs to local, parochial interests. At the same time, the president—conceived as an aloof, apolitical, nationally chosen head of state, sworn to preserve, protect, and defend the Constitution—was transformed by parties and popular election into a complementary instrument for preserving, protecting, and defending political factions.

The opening chapters of Cost’s story will be familiar to students of the founding period. First, the newborn government, led by the genius Alexander Hamilton and the revered George Washington, plunges immediately into banking, finance, economic protectionism, and the chartering of corporations. These and similarly ambitious projects are eventually embraced by their initial opponents, Thomas Jefferson, Jefferson’s Secretary of the Treasury Albert Gallatin, and Madison. Political parties emerge, a development as unexpected as the subsequent Jacksonian innovation of the democratic presidency. But the theme of corruption and theory of institutional mismatch—both appearing in our earliest days—add an undercurrent of foreboding to developments that many readers will consider, as does Cost, inevitable, necessary, or highly admirable.

THEME AND THEORY THEN PROVIDE tremendous narrative thrust to Cost’s epoch-by-epoch history. The Age of Jackson was our first age of institutionalized corruption, in the form of widespread patronage to mobilize party support for the president and his congressional allies, with commensurate bribery and abuse at the local level. From the corruption-plagued Grant Administration through the Gilded Age, the spoils system was perfected and combined with tariff manipulations and internal improvements to produce powerful local political machines and partisan collusion in Washington between the legislative and executive branches. The resulting corruption was often outright “dishonest graft.” These developments, although typically ascribed then and now to “moral laxity,” resulted instead from the imbalance between the federal government’s powers and its parochial political structure. The desire to overcome moral laxity animated the Mugwumps in the 1880s and the Pendleton Civil Service Act of 1883—but with the decline of patronage came more sophisticated forms of corruption, primarily through business-political alliances in finance, railroads, manufacturing, and agriculture.

The Progressive movement of the early 20th century responded more thoroughly and systematically. It expanded civil service protections, limited business political donations, busted trusts, and championed stricter business regulation and the first protections for workers. Moreover, Progressives confronted the problem of institutional mismatch, particularly in the anti-Madisonian writings of Woodrow Wilson. Domestic government was to be removed from corrupt, parochial legislators and party bosses and placed in the hands

of expert, apolitical administrators and a British-style parliament and president united by popular majority. Once in power, however, the Progressives never followed through with their structural reforms. As a result, their one-sided success in enlarging and entrenching federal power laid the groundwork for worse corruption to come.

Franklin Roosevelt and the New Dealers were unabashed in using Depression-relief programs to reward friends and punish enemies in Congress and in local politics. And they pioneered many innovations—social insurance, income redistribution, promotion of labor unions, subsidization of agriculture, and plenary regulation of industry and finance—that obliterated essentially all remaining limits on federal power. The result was a profusion of new special-interest groups, which New Dealers mobilized for partisan purposes. Their success “professionalized the pathways of corruption,” writes Cost, and with a twist that was the final blow to republicanism—the interest groups now subjugated the parties, congressional leadership, and presidency. His final chapters relate in revolting detail the systematic raids on citizens’ rights and resources in today’s programs of farm subsidies, defense and infrastructure spending, Medicare, corporate taxation, and financial regulation.

COST’S THEME OF CORRUPTION AND theory of misalignment of function and structure are powerful devices for illuminating the manifold depredations of contemporary government. But each has a weakness. First, his concept of corruption is excessively broad. I regard Fannie Mae and Freddie Mac as corrupt to the core, and in two tours in government I have observed several other federal programs that are nothing more than legally sanctioned theft; and I am angered that so many of my fellow citizens are either blasé about such corruption or deceived by the highfalutin cant used to disguise it. Highway spending, corporate taxation, and Medicare involve corruption of a different kind: they are suffused with special-interest favoritism that not only is offensive in itself but also stands in the way of reforms (carefully developed by academics and think tankers) that would make the programs radically more effective in fulfilling important public purposes.

But Cost, as his definition emphasizes, regards *all* instances of political accommodation of private interests as corruption. (In a *National Affairs* essay he even calls for a ban on legislative logrolling.) That is to vilify politics itself, which is futile and also mistaken. Politics always and everywhere consists of assembling practical coalitions to achieve some purpose—



requiring compromise and accommodation among narrower, often conflicting purposes, some of them detrimental to the larger purpose being aimed at. So one cannot condemn the means *tout court*, without reference to the worthiness or urgency of the end; and the ultimate end of politics, to maintain order and security in the face of social conflict, is a worthy one indeed. Cost observes that George Washington Plunkitt “at least...had the decency to admit that he was engaged in graft.” To the contrary, Plunkitt engaged only in “honest graft,” and did not admit to it but rather advocated it. His whole point was that effective government required a certain amount of preferment for those—including himself!—whose cooperation was essential. Standards of conduct have changed but human nature has not. Civil conflict and the need for compromise are permanent conditions. There are no deontologists in political foxholes.

Second, Cost’s theory of institutional mismatch is incomplete. He never ventures to describe the constitutional structure that *would* or *might* prevent a comprehensive federal government from descending into institutionalized corruption. If the Constitution had embraced something like Madison’s initial Virginia Plan—which forthrightly conferred plenary powers on the national government

but also abolished state sovereignty and introduced many devices to keep the central government remote from local interests—would the resulting government have been notably less corrupt? Could the Progressives have achieved that result if they had gone all the way to importing Bismarckian administrative power into American government? Would a parliamentary system, or one where all citizens vote for all federal legislators, reduce the influence of interest groups on program design and administration?

COST’S RETICENCE ON THESE MATTERS is fine...up to a point. He writes as a historian and analyst, not as a reformer, and clearly wants to keep readers of all political stripes on board. His purpose, he says repeatedly, is not to judge whether the growth of federal power was good or bad but simply to demonstrate its incompatibility with Madisonian structure.

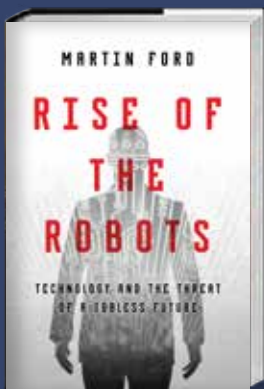
And, in the end, he is bluntly realistic about our current circumstances. He dismisses any possibility of fundamental constitutional reordering, instead suggesting incremental reforms that he acknowledges would be no more than temporary stopgaps. His historical models are civil service reform, direct election of U.S. senators, and the Tax Reform Act of

1986. These remedies for immediate, flagrant instances of corruption were eventually undone as special interests devised new channels of manipulation—but they were beneficial for a time and worthy of emulation. In this vein, he proposes a liberal-conservative anticorruption alliance in his book and, in concurrent essays, an overhaul of party nominating procedures and several congressional reforms, including larger staffs and stricter conflict-of-interest rules for committee chairs.

Yet the depth and pervasiveness of interest-group exploitation Cost so brilliantly documents, and the degree to which it is now accepted and even flaunted in our national capitol, seem out of proportion to his theory of structural inadequacy. An alternative explanation, equally supported by Cost’s narrative, is that the federal government has simply become very big and powerful, and is doing many more things than can be done with tolerable honesty. Lord Acton’s famous axiom about power and corruption has no reassuring codicil about the way power is organized.

COST SOMETIMES SIDLES UP TO THIS explanation. He includes among his violations of Madisonian structure the emergence of a large administrative bureaucracy, which is often “captured” and

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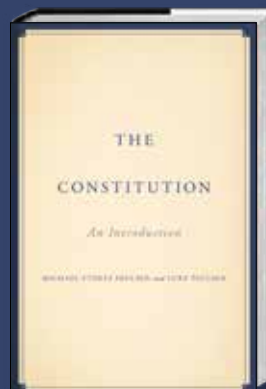


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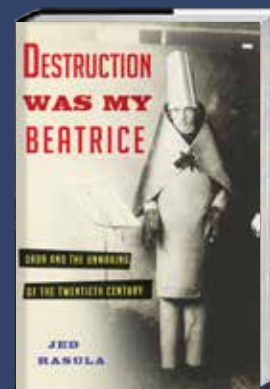


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thereby corrupted by the interests it is supposed to regulate; and the extreme complexity of modern government, which makes it difficult for voters to hold officials accountable for good or bad policies. These features permit him to include Fannie, Freddie, and other instances of corrupt regulation among his exhibits for institutional mismatch. But they don't fit his theory at all, and undercut his resolute agnosticism about big government. The regulatory state is a necessity of comprehensive busybody government, while lack of accountability is one of its inevitabilities. They are artifacts not of a mismatch with the founders' institutional design, but rather of a departure from their animating idea of a limited federal government.

Political scientist Edward C. Banfield argued 40 years ago that corruption is an *inherent* feature of government. Like Cost, he believed fragmented government invites interest-group manipulation and extra-governmental authority structures, such as party organizations and public-private alliances. But Banfield described many other factors that are independent of political fragmentation, grounded instead in the nature of political decision-making and monopoly. These included: fragmented authority *within* government organizations; ambiguous and often conflicting

goals; lack of objective metrics of performance; transitory leadership; inflexible pay scales and inability to punish even egregious misbehavior; captive "shareholders" (citizens); and the powerful lure of non-pecuniary incentives, especially the opportunity to wield power. The importance of these general characteristics is suggested by the prevalence of corruption and interest-group capture in state and local government, such as Plunkitt's Tammany Hall machine, which are free of Cost's mismatch.

To some significant degree, corruption in the federal government is simply a function of its power and purview. Counting regulation as well as direct spending, it distributes \$4-5 trillion each year, 25-30% of the economic production of a nation of 320 million people. A political enterprise this vast, however structured, will manifest a great deal of corruption, however defined, because it will attract innumerable well-financed, relentless efforts to steer its resources toward private purposes. The worthy cause of limiting political corruption cannot be detached from the cause of limiting government.

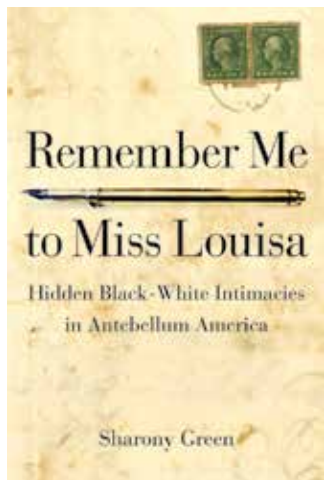
BUCKLEY'S *SAVING CONGRESS FROM ITSELF* is a slim volume, solely concerned with the growth of federal grants to state and local governments. These programs

are not covered separately in *A Republic No More*, but they fit perfectly with Cost's theme of federal entanglement with local issues and interests.

Federal grants-in-aid, measured in 2015 dollars, have grown from about \$110 billion in 1970 to about \$640 billion today. They constitute roughly one sixth of federal spending—behind only Social Security as a spending category, approximately the same as the total spent on national defense and international operations, and much greater than the total spent on the federal government's own domestic operations. They also account for more than 25% of state and local revenues. About half of today's total is for Medicaid and related health programs. Another third pays for schools, food stamps, and related welfare programs. The rest is spread among a thousand categorical grant programs for highways and transportation, local economic development, police and justice, environmental protection and conservation, and the like.

Buckley trains his rhetorical fire on the latter potpourri of federal grants for quotidian local projects. He draws on his Senate experience (1971-77) and on up-to-date examples—the best from reading the local newspaper in his small hometown in upstate Connecticut—to illustrate how federal grants pay for

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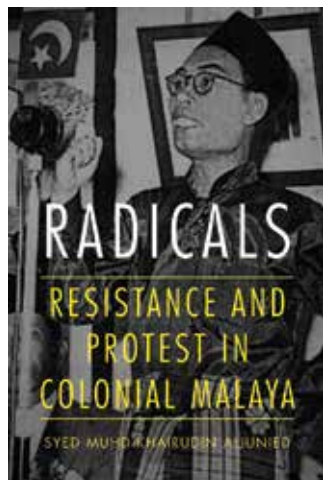
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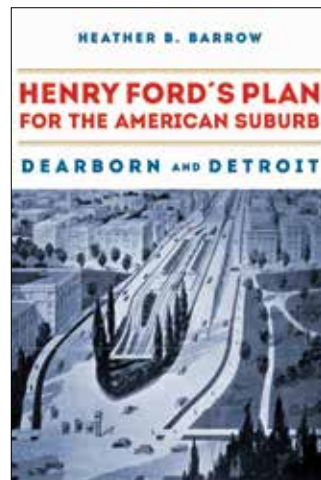
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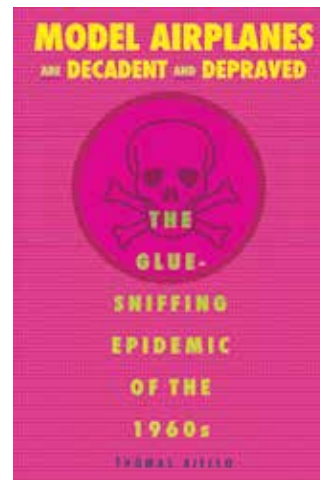
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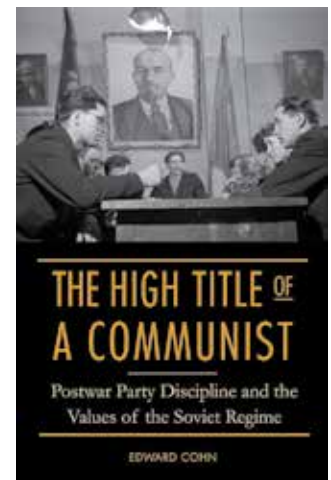
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items better handled by locals. A sidewalk is widened with a grant from the “Federal Safe Routes to School Program”—enacted to fight obesity by encouraging children to walk or bicycle to school. A town with good reasons for replacing a dilapidated single-lane bridge with a new one becomes ensnarled in conflicting state and federal rules that seem to mandate a fancy two-lane bridge—leaving no bridge at all for several years and counting. Many federal micro-grants are for dubious projects that are obvious payoffs for well-placed constituents (projects that would have been denied *any* local funds by George Washington Plunkitt). Buckley recalls that, as a senator, he frequently resisted the temptation to vote for such pork—but not always. A senatorial successor has no such qualms, winning praise in the local paper for involving himself in nighttime bus service.

BUCKLEY TELLS THESE STORIES WITH the gentle good humor for which he is famous. He has a larger purpose: to introduce a systematic account of the financial and political distortions of federal grants and their attendant regulations, including the big-ticket items such as Medicaid. Many counts in his indictment have been well rehearsed elsewhere: needless administrative and lobbying costs of cycling tax dollars off to Washington and back home again; distortion of local priorities to fit the federal grants menu; program proliferation (the children’s obesity initiative is one of 100 surface transportation programs); state and local finances impaired by the many grants that come with “unfunded mandates”; and one-size-fits-all suppression of pluralism and innovation. Buckley details immense squandering of resources and worse—the erection of local bureaucracies devoted to creating rather than solving problems, and everywhere the discouragement of common sense and personal initiative, with especially destructive consequences in our primary and secondary schools.

Interwoven with these critiques are two larger propositions that Buckley advances with particular force. The first is a twist on Cost’s theme of Congress’s parochializing national policy: grants-in-aid, Buckley argues, have parochialized *Congress*, distracting its denizens from urgent national problems such as entitlement reform and debt reduction. Members spend their days meeting with constituents and interest-group representatives, intervening on their behalf with grant-making and regulatory agencies, concocting and tweaking categorical grant statutes, and adding parochial earmarks to spending bills.

They have precious little time for studying and deliberating over matters of truly national importance, and their pell-mell getting and spending exacerbates one of those matters—ruinous federal deficits. The members are on a Treadmill to Nowhere.

Buckley’s second big proposition adumbrates Charles Murray’s theme, discussed below, of federal tyranny. He turns on its head the standard argument *for* grants-in-aid, that the federal government is a superior, lower-cost source of revenue. The federal government, he observes, is superior because it enjoys a much stronger monopoly than state governments. Washington is in charge of the money supply and able to borrow funds cheaply; it is not constrained by balanced-budget requirements, nor does it face interstate “policy competition” for citizens and investments.

BUT THESE FREEDOMS BRING SIGNIFICANT vices. The federal government can borrow profligately and has been doing so for decades. It is much less inclined to terminate failed programs, set priorities, or exert spending discipline. And it is much more susceptible to ideological enthusiasms and grievances, embedded in scores of missionary agencies. So grants-in-aid do more than distort local priorities: they lead states down the primrose paths of over-indebtedness, program immortality, and sustaining causes that have punch in Washington but wreak havoc on the ground. The latter impositions range from union preferences in contracting to the politicization of criminal sentencing, which has led to excessive sentences and over-incarceration.

Buckley has a culprit for the grants-in-aid racket and its emasculation of federalism. It is the Supreme Court’s 1937 decision in *Steward Machine Co. v. Davis*, upholding the Social Security Act’s unemployment compensation program. The decision held that the program was within Congress’s power to tax and spend for the “general welfare” (meaning the welfare of the nation as a whole). On the same day as *Steward*, the Court upheld the Social Security Act’s old-age insurance program in *Helvering v. Davis*. Buckley approves of *Helvering* and thinks it draws the right line between federal and state jurisdictions: old-age insurance addresses a unitary national problem, and treats citizens according to an inherent characteristic that is independent of state program administration. But *Steward* crossed that line, approving a scheme of federal taxation, offsetting state tax credits, and federal grants designed to induce states to adjust their unemployment

policies to suit federal preferences. The decision provided Congress “with an irresistible invitation to focus on state and local issues, thus undercutting the distinction between federal and state responsibilities that lies at the heart of federalism.”

BUCKLEY’S SOLUTION? TERMINATE EACH and every federal grant program in a single stroke. Following a several-year transition to permit program and tax adjustments, only block grants to the poorest states would remain (some redistribution from prosperous to poor states being the only strong rationale for federal transfers). Buckley advances the idea not as a thought experiment but rather as a practical, feasible reform. Legislators today face a collective-action problem in being forced to spend their days on grantsmanship. Acting in concert, they could free themselves of these burdens, significantly reduce deficit spending, and turn to larger and more urgent national problems. And citizens of all political views would applaud the tremendous savings of wasted resources and the unleashing of policy dynamism in state and local government. The reform has something for, well, *almost* everybody—it will “merely appall the political establishment and the private interests that benefit from grants-in-aid programs.”

Jay Cost would be skeptical: Congress’s parochial inclinations were formed in 1787, not acquired in 1937, and it has been bending federal programs to local interests for as long as there have been federal programs. Dealing with hometown street repairs may be drudgery compared to preventing nuclear proliferation, but the local stuff is how members get reelected. Grants-in-aid have become a central device of incumbency protection, and incumbents are the only ones who’ll ever vote on the Buckley Plan. Sensing these problems, Buckley adds two ancillary reforms: term limits and campaign finance reform. He would eliminate all limits on contributions, but require that large ones be made anonymously through registered third parties; this strikes me as much superior to Cost’s idea of placing unique restrictions on committee chairmen.

Buckley also acknowledges the distinctive political importance of Medicaid, by far the largest and fastest growing grant program and category of state spending. Here he has good words for Senator Lamar Alexander’s “Grand Swap”: the federal government assumes total responsibility for Medicaid, while the states do the same for K-12 education. Buckley has his doubts about national Medicaid, but at least the swap would fit his *Helvering-Steward* line and follow his first rule

of accountable federalism: each public exertion should be the preserve of just one level of government.

CHARLES MURRAY'S *BY THE PEOPLE* takes Madisonian decline in a different direction. Its title, of course, is from the poetic invocation of republican government at the crescendo of Lincoln's Gettysburg Address. The thesis of Murray's book is that republican restoration must be undertaken by the people themselves, rather than for them or in their name. Its epigraph might have been (but is not) another piece of presidential poetry, Jefferson's "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."

Like Buckley, Murray believes that the decisive wrong turn was the Supreme Court's acquiescence in New Deal economic activism. He acknowledges the anti-Madisonian antecedents—Hamilton's schemes to stretch the boundaries of federal power, the Progressives' forthright efforts to erase them a century later. But he notes that the 19th century's big nationalist initiatives were exceptional, that the courts generally held the line, and that as of 1930 the federal establishment remained minuscule by today's standards. In Murray's view, the Court's *Helvering* decision was not a defensible constitutional line at all, but rather an unqualified triumph for the previously furtive idea of an unlimited federal spending power—after which, "It was over." The decision was soon complemented by *United States v. Carolene Products Co.* (1938), holding that federal economic regulation was entitled to a strong presumption of constitutional validity, which has in practice proven insurmountable, and *Wickard v. Filburn* (1942), which held that congressional power to regulate interstate commerce even extended to backyard crops grown to feed one's own family. "It is essential to understand the enormity of what happened to the Constitution over the six years from 1937 through 1942," Murray writes. The Court's decisions, and the ensuing revolution in federal regulation and litigation, "transformed the nation." Federal rules, taxes, and subsidies are now so thoroughly embedded in our lives and institutions that restoring the pre-New Deal Constitution would be impossible, even if the Supreme Court were stacked with Madisonian originalists.

Murray also believes, with Cost, that our political institutions have become systematically, professionally, irredeemably corrupt. Corruption—both outright bribery and interest-group favoritism—was confined for most of our history because "the enumer-

ated powers restricted the number of favors within the power of the federal government to sell." In the early 1970s—following a 30-year gestation period—the corruption potential of unlimited federal power suddenly chrysalized in every corridor of government and politics. Congress began commissioning fleets of regulatory agencies, such as the Environmental Protection Agency and the Occupational Safety and Health Administration, with unprecedented discretion and economy-wide power. The courts approved both the delegation of congressional prerogatives to administrative agencies, and the agencies' amalgamation of lawmaking and law enforcement, including criminal enforcement. Congress democratized itself: its restive members dismantled the committee hierarchies and adopted a new electoral strategy—influence peddling through the executive leviathan they had created. Corporations and trade organizations for the first time became politically active, both as Washington lobbyists and as underwriters of political campaigns, which were becoming increasingly expensive

The worthy cause of limiting political corruption cannot be detached from the cause of limiting government.

because of television and costly new polling techniques. The monetization of politics and the professionalization of rent-seeking were orders of magnitude beyond anything seen before. (The first self-identified Washington lobbying firm appeared in 1975; today there are more than 10,000 registered lobbyists.) The federal government is today a "sophisticated kleptocracy"—politicians get rich off government service, access to officeholders must be purchased, and supplicants are routinely shaken down for funds and organizational favors.

MURRAY'S RHETORIC IS SOMETIMES overwrought. Our legal system is seriously flawed, for example, but not "lawless"—the rich and the poor get due justice from our courts most of the time. He sometimes elides important issues, such as why it took 30 years before the Supreme Court's New Deal decisions all of a sudden transformed political practice. And one may quarrel with some of his facts and interpretations—many dispersed interests, such as

environmental and consumer groups, get lots of unpurchased access at the regulatory agencies, where they often prevail over well-heeled corporations.

Yet he advances his case powerfully, with his singular combination of audacious formulation, earnest conversational style, stories from personal experience, history, statistics, thought experiments, and evidence from political and social science. It adds up to a hugely impressive demonstration that interest-group corruption has become thoroughly embedded and routinized in Congress and the White House. So much so, he argues, that fundamental reform from within the system is now next to impossible. He would surely judge Buckley's collective abolition of grants-in-aid as an admirable non-starter.

Murray's analysis, like Cost's and Buckley's, is determinedly nonpartisan. He details the abuses of Barack Obama's White House and Tom DeLay's House of Representatives with equal vigor, and regards the Republicans' embrace of interest-group politics as the clinching reason for not bothering with major reform from the inside. Of course, all three authors are trying to appeal to a broad constituency by arguing that political corruption and government waste are problems that should concern good liberals and good conservatives equally. But Murray has an additional reason for non-partisanship.

FOR HIS ULTIMATE CONCERN IS NOT corruption but rather tyranny (Buckley also touches on this problem, as we have noted). *By the People* is uniquely focused on the growth of the federal regulatory apparatus. Its first epigraph is Alexis de Tocqueville's amazing prophecy of "the species of oppression by which democratic nations are menaced."

The supreme power...covers the surface of society with a network of small, complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate to rise above the crowd.... Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people.

By proliferation of examples, Murray forces readers to reckon with the appalling extent of bureaucratic arrogance and casual trammeling of property and personal rights. Regulators impose picayune rules designed to further their own convenience rather than solve actual problems. They use costly enforcement proceedings to harass those who resist rules the



agency itself acknowledges would produce no benefits in the case at hand. Petty tyranny is a separate problem from interest-group corruption; it seems to be a second-order effect of Congress's establishing missionary regulatory agencies at the behest of special interests.

In the agencies' overreaching Murray spies a populist opening. Madisonians, he acknowledges, are today "an extreme on the political spectrum," at most 10-20% of the electorate (he is thinking of self-identified libertarians and Tea Party supporters). But vastly more Americans—more than 80%—have lost faith in their political system and no longer trust the federal government. A plausible reason is that the government is now trying to dictate solutions to every conceivable social question, often through counterproductive rules of the sort that have inspired centrist Philip Howard's bestselling books. This may have laid the groundwork for popular resistance. The regulatory state, says Murray, only seems strong. In fact, because it is democratically illegitimate, widely disdained, and contrary to America's individualistic spirit, it is weak. His reform coalition comprises not good conservatives and good liberals among members of Congress and other political elites, but rather Hillary Clinton's "everyday Americans."

HE PROPOSES A PROGRAM OF CONCERTED civil disobedience to regulatory commands, funded by private foundations and built on the example of litigation groups such as the Institute for Justice, Pacific Legal Foundation, Landmark Legal Foundation, and Goldwater Institute. These organizations have successfully defended individuals and small businesses on legal and constitutional grounds, overturning municipal restrictions on street vendors operating near established restaurants, state licensure agencies restricting entry into hair braiding, eyebrow threading, and funeral services, and various federal excesses. A recent triumph involved Michael and Chantell Sackett, who were faced with an Environmental Protection Agency (EPA) order to stop building a home on their small residential lot on grounds that it was a protected wetland, and denied any hearing on the matter unless they first paid crushing fines. Represented by the Pacific Legal Foundation, they fought the agency to a unanimous victory in the Supreme Court in 2012 (but only on the matter of receiving a legal hearing, which three years later still has not occurred).

The Murray insurgency would go beyond exploiting legal deficiencies in regulatory dictates to resisting rules that are admittedly

legal but self-evidently stupid. A "Madison Fund" would defend against such rules and reimburse fines when and if defendants lost. (Murray even sees a business opportunity—he wants to "treat government as an insurable hazard.") The aim would be to overwhelm the agencies' enforcement resources—which, he carefully documents, are much thinner than most people realize—with widespread non-compliance with pointless or self-defeating technical requirements. Murray is particularly keen to use enforcement proceedings to publicize imbecilic rules and agency high-handedness in order to pressure courts to adopt more demanding standards of judicial review. His goal is to overlay the regulatory state with a common-law regime of "No Harm, No Foul."

MURRAY'S PLAN IS LESS INCENDIARY than it sounds. Indeed, he calls it "pragmatic." He would exclude rules that forbid acts wrong in themselves (*malum in se*, like rules against fraud), tax regulations (where immediate financial interests are paramount), and rules that "foster public goods classically defined" (which would excuse much of the work of the EPA). His main focus would be rules that infringe on land ownership, personal risk-taking, and especially employment—regulation of hiring, pro-

THE CONSERVATIVE HEART

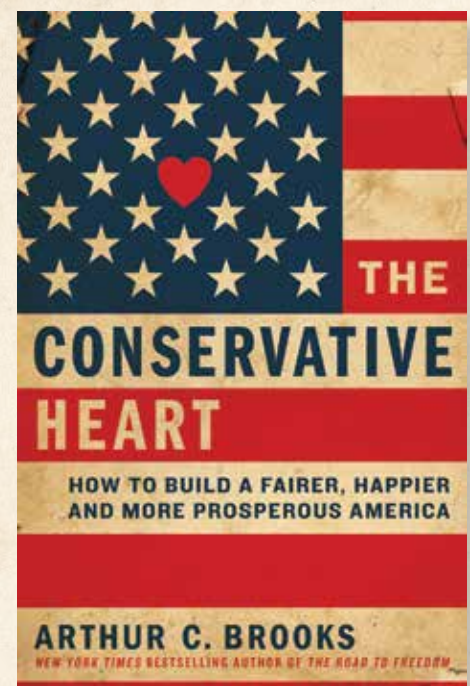
How to Build a Fairer, Happier and More Prosperous America

By Arthur C. Brooks

In *The Conservative Heart*, Arthur C. Brooks, the prominent economist and president of AEI—the leading intellectual think tank on the right—offers a bold new vision for conservatism as a movement for social and economic justice.

Brooks contends that after years of focusing on economic growth and traditional social values, it is time for a new kind of conservatism—one that helps the vulnerable without mortgaging our children's future. In Brooks's daring vision, this conservative movement fights poverty, promotes equal opportunity, celebrates earned success, and values spiritual enlightenment. It is an inclusive movement with a positive agenda to help people lead happier, more hopeful, and more satisfied lives.

Combining reporting, original research, and case studies, and free of vituperative politics, *The Conservative Heart* is an intelligent and compelling manifesto for renewal. Clear, well-reasoned, and accessible, it is a welcome new strategy for disconsolate conservatives looking for fresh, actionable ideas to address the serious problems confronting us today and to reclaim our future, and for politically independent citizens who believe that neither political party addresses their needs or concerns.



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motion, and firing, workplace conditions, and occupational licensure. Implicitly, his citizen deregulators would be individuals and small businessmen.

These specifications severely limit the potential of Murray's revolution. There are plenty of Sacketts around, especially if we include conceded violations of trivial infractions that carry hefty fines (the Sacketts do not concede their lot is a wetland). Experienced regulatory lawyers can tick off many similar examples of innocents sacrificed to bureaucratic stratagems. But these transgressions are marginal to the big regulatory programs, and Murray's scheme depends on mass. Most of those who must follow safety and employment rules they know to be nonsense are engineers or personnel officers in large corporations: their employers' continuous dealings with multiple government agencies make for powerful incentives to cooperate. Programs that impose product safety standards and market entry controls affect most citizens as consumers rather than producers. For most people most of the time, the burden of regulation consists of higher prices for *private* goods, and the lost benefits of forgone job opportunities and misdirected investments—not jackbooted bureaucrats with bullhorns on the front lawn. Beyond the tax code, regulatory burdens are

largely insensible in the daily lives of most citizens qua citizens.

Moreover, the most important recent trend in regulation, which Murray recognizes in his chapters on interest-group corruption, is the increasingly tight alignment of government and business interests. In finance and banking, health care, and communications, civil disobedience may appeal to marginal firms but not remotely to market leaders with an interest in maintaining the collaborative status quo. The Madison Fund is not going to undo Obamacare, Dodd-Frank, or the Federal Communications Commission's new Internet controls.

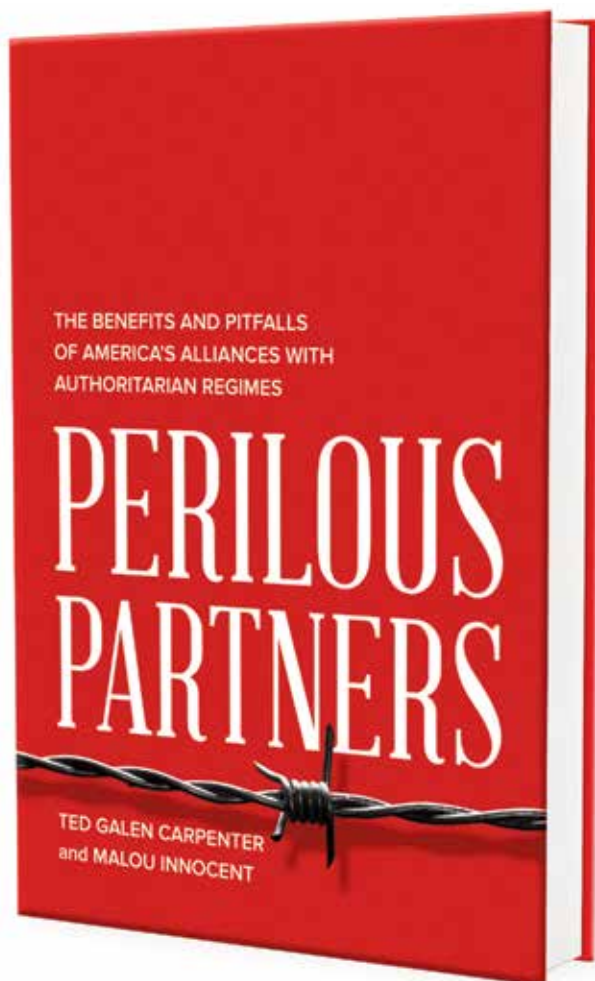
IN SUM, I LOVE MURRAY'S BOSTON TEA PARTY spirit and ingenious strategizing, and I wish the Madison Fund every success, but I doubt that they are a match for the power and resilience of the modern regulatory state. *By the People's* concluding chapters reinforce my doubts. They document, and mainly celebrate, America's growing cultural diversity, wealth, education, and technological prowess. These developments, Murray argues, are making individual freedom increasingly valuable and government regulation increasingly obsolete. Freedom accommodates and protects social diversity. The problem-solving dynamism

of new commercial and social arrangements is making government's relative incompetence obvious to all.

Yet it is these same developments that are powering the proliferation of political causes and the ability of government to respond to them. Wealth and education give every diverse interest the ability to articulate its passion and organize for legal advantage. Information and communications technologies give regulatory agencies manifold capacities for managing "stakeholder" coalitions, issuing rules in subtle forms such as "informal guidance," grappling commercial interests to their own purposes, and monitoring and sanctioning their subjects.

Murray says at one point that we now have a government "of the factions, by the factions, and for the factions," and that is precisely correct. Wealth and technology have made the republic much less extended as a political matter, and dense with factions that no longer moderate each other—for now they can allglom on to the state's coercive machinery with less need for choice or compromise. Our problem, unfortunately, is more one of corruption than of tyranny.

Christopher DeMuth, Sr., is a distinguished fellow at the Hudson Institute.



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