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Judge Andrew P. Napolitano

Constitutional Chaos *in* America

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From the publisher

Jeff Deist

Is the US Constitution a suicide pact?

Judge Andrew Napolitano asks this very question in his 2014 book by the same title, and his answer is not comforting: executive authority, usually under the guise of national security, has wildly exceeded any constitutional boundaries. The Judge was kind enough to sit down with us for our cover interview not only about presidential power, but also about unconstrained judicial power. Presidents at least come and go; justices often plague us for decades.

Napolitano pulls no punches in his answers. We cover Trump and the Russians, gun control and mass shootings, Big Tech, NSA spying, the First Amendment, and much more. Napolitano is unafraid to discuss, pointedly, the abandonment of any natural law origins American law once reflected. Courts today act as super-legislatures, creating positive law rather than discovering and upholding our fundamental natural rights. Common law gave way to judge-made law, and the result is judicial anarchy: results-oriented judges reverse engineer decisions to further their political views. And those views usually favor state action, not forbearance, meaning courts often rubber stamp usurpations of our liberty.

In *Constitutional Chaos*, another of Napolitano's books, he sums it up with this memorable line: "Unless you work for it, sell to it, or receive financial assistance from it, *the government is not your friend*. For average Americans today, the state is predator not protector.

Mises Institute readers already know this, of course. Constitutionalism fails because notions about the rule of law, separation of powers, and federalism fail. Government does not constrain itself because it answers to no greater authority.

As the great nineteenth-century political philosopher Lysander Spooner pointed out, the Constitution either authorizes the government we have or fails to prevent it.

So how do we move forward? Napolitano tells us to seek out the remnant — the percentage of any population ready and willing to entertain serious ideas. The Judge sees himself as an educator first and foremost, someone who is unwilling to give up on America and that remnant of people who still care about freedom and civilization. He views his close involvement with the Mises Institute — both as a supporter and board member — as a key part of that role. If you've had a chance to meet the Judge, you know he is enthusiastic and upbeat in his disposition no matter how much legal carnage he witnesses as an expert for Fox News. He exudes a sense of *élan vital*, the term Mises borrowed from French philosopher Henri Bergson to describe an innate and noble drive to improve our condition.

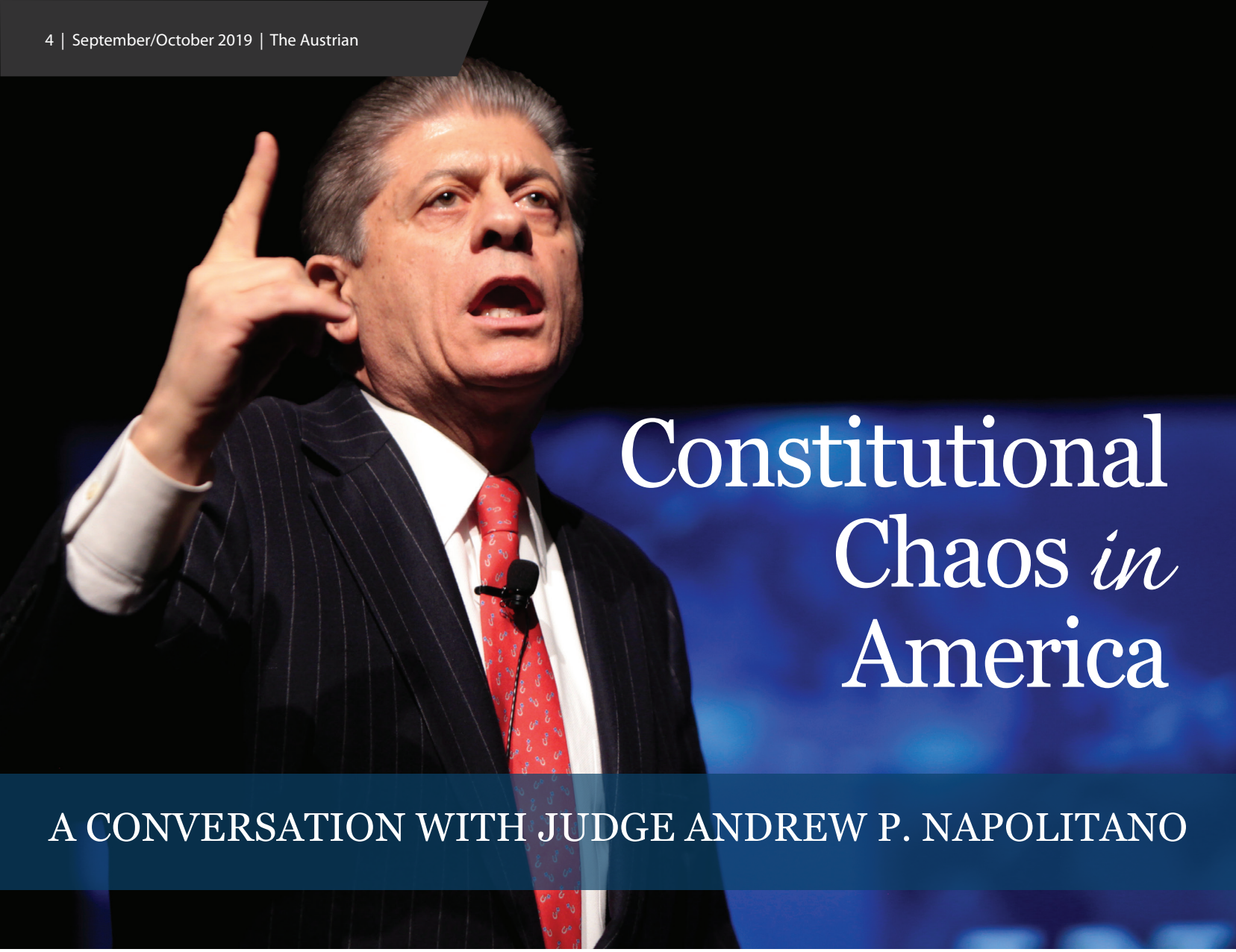
We would all do well to emulate the Judge, and Mises, in this regard.

We also have two important book reviews for you in this issue. Michael Malice's *The New Right* is a fascinating look at the Hail-Mary subset of conservatism that attempts to resuscitate a movement suffocated by the Buckleyite grifters who still nominally control it. The modern Left, complete with its religious "Cathedral" of canonical beliefs, is deadly serious in its ambitions. Conservatism, Inc., which Malice derides as "progressivism driving the speed limit," is not equipped to counter the Cathedral — much less advance its own agenda. Enter the New Right, a loose coalition of groups which use guerilla methods, particularly social media, against a more powerful foe. Malice identifies Murray Rothbard as a godfather of sorts to this coalition; you will have to read the book to decide if you agree. But one thing is clear from Malice's text: Rothbard gains far more purchase with young people today than William F. Buckley, who is nearly unknown by those under thirty.

> *"For there is but one essential justice which cements society, and one law which establishes this justice. This law is right reason, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked."*
>
> — Cicero, *On the Laws*

David Gordon's review of Lindsey O'Rourke's *Covert Regime Change* will make you rush out to find the book (or rush to Amazon). O'Rourke gives readers a devastating account of US efforts to install favored political leaders across the globe and across the decades, from Eastern Europe to Southeast Asia to Latin America. Support for Ron Paul's ideal of non-interventionism grows every day, blurring ideological lines, and Ms. O'Rourke's book is a welcome addition to the literature.

Jeff Deist is president of the Mises Institute.



Constitutional Chaos *in* America

A CONVERSATION WITH JUDGE ANDREW P. NAPOLITANO

Judge Andrew P. Napolitano serves on the Board of Directors of the Mises Institute, and is the Institute's Distinguished Scholar in Law and Jurisprudence. He is Senior Judicial Analyst at Fox News, and former Judge of the Superior Court of New Jersey. He is the author of nine books on the US Constitution, two of which have been *New York Times* Best Sellers. His most recent book is *Suicide Pact: The Presidential Assault on Civil Liberties*.

JEFF DEIST: Judge Napolitano, it's great to speak with you.

Some people, even your fans, think you've been too hard on Trump on the issue of alleged collusion by his campaign surrounding the 2016 election. A lot of libertarians don't think collusion or conspiracy ought to be crimes at all.

JUDGE ANDREW NAPOLITANO: Collusion is Rudy Giuliani's word, which he carefully insinuated into the dialogue. The crime for which the president's campaign was investigated was conspiracy. Was there an agreement between the Russians and the president's campaign to violate federal election law by receiving something of value from the Russians? I join with the condemnation of these statutes, but the analysis to which you refer is based upon the law that exists, not the law I wish it to be. If it were up to me, there would be no such thing as conspiracy crimes because they are thought crimes and word crimes. But, at the present time in our history and in fact, for all of our history, regrettably, an agreement to commit a felony, agreement by two or more people or

two or more entities to commit a felony and a step in furtherance of that agreement, constitutes an independent crime. That's what the president was investigated for. The president has claimed Bob Mueller didn't find any evidence of a conspiracy. On the contrary, he found 127 phone calls in 15 months between Russian agents and the Trump campaign, and conversations about when dirt about Hillary Clinton would come out. That is surely enough to qualify under the statute for conspiracy, but Mueller felt he could not prove the case beyond a reasonable doubt. In the world of freedom, where you and I and people reading this live, conspiracy is a phony crime. For 600 years of Anglo-American jurisprudence, all accepted definitions of crime contained an element of harm. Today, crime is whatever the government says it is.

JD: Do you think he will be indicted and prosecuted after he leaves office?

JAN: Not for the conspiracy, but there's certainly a chance he could be indicted for obstruction of justice, which is taking a material step to interfere with a criminal investigation for a corrupt purpose. If a lawyer files a motion before a federal judge to get the FBI off the lawyer's client's back, that is interfering with the FBI investigation, but it's not for a corrupt purpose. It's to protect the constitutional and fundamental liberties of the client. But if the president of the United States — as Bill Clinton is alleged to have done and Richard Nixon is alleged to have done — tells his underlings to lie to federal investigators or to grand juries, now that is classic obstruction of justice. Again, that, too, is a crime which in the libertarian world wouldn't exist because it's a thought crime and it's a word crime. These are clearly crimes for which people are prosecuted in America under the law as it is, not as I might want it to be. The president qualifies as a potential defendant and likely defendant.

JD: In the wake of two recent horrific mass shootings, you've remained outspoken in your defense of Second Amendment rights. Do you think the *Heller* decision, the notion of gun rights as individual rights, and the larger idea that citizens should have access to the same weapons as government, are in danger? Does the push for gun control worry you?

JAN: It worries me terribly. There's a poem by Herman Melville written right after Lincoln was killed. "Beware the people weeping when they bare the iron hand." That's exactly what's happening now. People are weeping because of the innocent human lives that were crushed by madmen and that weeping may manifest itself in the confiscation of guns. Can you imagine the police coming to your house and saying, "that gun which you lawfully own and safely use, you must give it to us. Somebody else had a similar one, also lawfully owned it, but they didn't safely use it." That's absurd. There's no place for that in American history. The *Heller* opinion you mention (*District of Columbia v. Heller*, 2008), with Justice Scalia writing for the majority, characterizes the right to keep and bear arms as a pre-political individual right. You and I, and people reading this, would call that a fundamental or natural right. Whatever you call it, it is the highest level of protective right known to American law. It's akin to protections for speech and press and travel. The government constitutionally cannot take fundamental rights away because of the harmful actions of others. That is what the Nazis did, punishing innocents.

> The right to bear arms is the highest level of protective rights known to American law. It's akin to speech and press and travel and forums and the development of your personality. The government cannot constitutionally take that away because some others have violated rights.

CONTINUED ON NEXT PAGE

JD: Gun control advocates will argue there is a compelling state interest in avoiding these kinds of mass shootings.

JAN: I'm sure that's what their argument will be. They have to find a less restrictive way to address the compelling state interest than confiscating guns from people who lawfully own them and safely use them. For example, it would be a lot safer for all of us if the citizenry were armed and trained because police cannot respond immediately. These creeps would either think twice or be blown away as soon as they started their slaughter — by the guy standing next to them.

Red flag laws are profoundly unconstitutional. They permit the interference with a fundamental right, the right to keep and bear arms, on the basis of what some judge decides a person might do, that's might, M-I-G-H-T in caps.

JD: A more narrowly tailored approach to gun crime might be "red flag" laws, which you've also criticized recently.

JAN: Red flag laws are profoundly unconstitutional. They permit the interference with a fundamental right, the right to keep and bear arms, on the basis of what some judge decides a person might do, M-I-G-H-T in caps. That "might-do" standard is a profound violation of the presumption of innocence and the due process requirement of proving demonstrable fault. The presumption of innocence requires that when government wants to take away liberty, it must prove its case beyond a reasonable doubt. How can you possibly prove beyond a reasonable doubt that something MIGHT happen? It's an impossible thing to prove. And in terms of due process, the Constitution is very clear. Government has to prove you committed a crime, not that you might commit a crime. When the old Soviet Union finally revealed it used psychiatric testimony against people the government hated — to prove what these people might do, and incarcerate them — Ronald Reagan led the charge against this. Now we have a president who wants to do this. This is a perversion of the protection of our liberties. If the government can take away Second Amendment liberties because it can show a judge how someone might abuse those liberties, then no liberty is safe: speech or religion or travel or privacy or due process. No liberty will be safe if that standard becomes the law.

JD: Speaking of due process, the American Bar Association wants to redefine the notion of consent as it relates to criminal sexual assault. Its proposal puts the onus on defense lawyers to prove consent was ongoing throughout a sexual encounter. This approach borrows a very broad concept of consent from certain university administrative policies and applies it to criminal law.

JAN: That would violate the presumption of innocence. The presumption of innocence has many prongs to it, one of which is that the government prove every element of the crime beyond a reasonable doubt. The defendant does not have to prove consent. The government has to prove that there was no consent. If they put the burden of proof on the defendant to prove anything, then that profoundly violates longstanding American jurisprudence, which imposes all the burdens in a criminal case on the government and none on the defendant. If I allege in a criminal prosecution against me that I used my weapon in self-defense, I don't have to prove affirmatively self-defense. The government must affirmatively disprove self-defense beyond a reasonable doubt, before it can get a conviction of me. That's been the standard in America for 200 years.

JD: Let's consider the Fourth Amendment, which many people think is in trouble. The Patriot Act, civil asset forfeiture, the 100 mile border search exception zone, NSA spying — it seems like a terrible time for

civil libertarians. What are your current thoughts on the Fourth Amendment?

JAN: I think it's in terrible shape. The 100 mile exception zone is profoundly unconstitutional because it's judge-created. It's not in the Fourth Amendment. Most of this began during the drug wars initiated in the Nixon years, when federal judges decided it was better for society to curtail liberties and get drugs off the street than to be faithful to their oaths to uphold the Constitution. There are so many exceptions to the Fourth Amendment in criminal prosecutions that it hardly exists at all. Add the Patriot Act — the so-called Patriot Act — and the USA Freedom Act, which both permit profound violations of the Fourth Amendment on the theory that evidence obtained will be used for intelligence purposes and not for criminal prosecution. Unfortunately, it doesn't work that way. The same statutes that permit violations — such as listening to every phone call and capturing every keystroke — not only permit but *require* information obtained by intelligence agencies to be shared with law enforcement. Any judge who accepts this has violated the oath to uphold the Constitution. Privacy, right now, is the least favorite right of the government. It is an individual and pre-political right — meaning fundamental and natural — but hardly any government anywhere in America treats it as such.

JD: Of course the Patriot Act continues to be reauthorized by Congress, when technically all or portions of it could expire under the original statute.

JAN: It's actually even worse, because they don't even debate it. They don't even schedule time for debate. Congressional leadership just says, "well, this is in the category of everything we have to vote for," and like lemmings they vote for it. Members of Congress are either afraid of what the intelligence community has on them, or they have no concept of the nature and extent of the violation of fundamental liberties the government engages in by following this Act. And the Act itself is really a façade because the NSA doesn't even follow it. The NSA goes ahead and captures all the intelligence it wants, so much intelligence it doesn't have time to sift through it. This intelligence overload doesn't keep us safe. They invade the privacy of anyone they want for any reason they want without telling a judge or even getting one of those facetious FISA warrants. FISA is also a façade, a shield behind which the NSA hides while it profoundly violates the fundamental liberties of everybody in the country. Justice Scalia told me that once the Court itself was being spied on by the NSA. How much worse can you get than that?

Privacy, right now, is the least favorite right of the government. It is an individual and pre-political — that is, fundamental and natural — right, but hardly any government anywhere in America treats it as such.

JD: What about Big Tech? These companies have access to our data, phone conversations, email, texts, you name it. Are they in bed with the state?

JAN: I think they are in bed with the state. They have either been given immunity or they've been threatened or they've been paid for their skills. It's not metadata — it's actual communications. They don't have the time to listen to us as we speak or the time to look at our keystrokes as we press them, but they have all of that stored. They can look at it anytime they want. They want us to think it is metadata, but metadata is who, what, when, where, what number, and for how long — but without content. The NSA captures all the content of everything transmitted on any fiber optic cable in the United States, period. How do I know this? The former NSA official

who invented some of their practices, the courageous Bill Binney, has stated this hundreds of times in public.

JD: We hear about data swept up indiscriminately by intelligence agencies. Let's say the NSA has access to a person's old email archives. Years later that person becomes a suspect in a crime. The email was already sitting there, but now the NSA looks at it. Is that a search?

JAN: That is a search, which can't be done without a search warrant, but what the government does is what's called parallel reconstruction. It will find some fictitious way to justify to a judge how it obtained this information. It will never, ever, ever admit in a public courtroom that it captures all the information all the time. Remember the San Bernardino killers, the husband and wife who committed mass murder at a government office? The FBI went nuts trying to get the cell phone passwords each of them used on their cell phones. All they had to do was call the NSA, but the NSA would never admit to having the passwords. So it was necessary to hire Israeli experts to hack the phone and get the information. Both are unconstitutional, but in fact the government already had that information. It just wouldn't admit it.

JD: You gave a talk a couple of years ago at Mises University on the real meaning of the First Amendment. You were surprisingly upbeat about the relatively robust free speech protections upheld by the current Supreme Court.

JAN: Yes, particularly under the Roberts court. Even horrible things like snuff films (these are horrible films of animals being killed), can be watched as an expression of an idea. It has been the president's wish to curtail the dark side to the internet, but this is protected speech now. The standard is a 1969 Supreme Court opinion called *Brandenburg v. Ohio*, in which the Supreme Court ruled that all innocuous speech is absolutely protected — and all speech is innocuous when there is time for more speech to address or challenge it. That's about as broad a pro-free speech standard as you're ever going to find. It's been the law of the land since 1969. The Court has not adhered to this standard as rigorously with child pornography laws. But with that exception the Supreme

Court since 1969 has been remarkably aggressive in its protection of the freedom of speech.

JD: Speaking of robust speech, do you agree with the Rothbardian-Blockean conception of defamation? Since you cannot "own" other people's thoughts or attitudes or opinions about you, you should not be able to sue for injury to your reputation?

JAN: You're talking about in theory.

JD: I'm talking about in theory.

JAN: I do agree with that. I believe in unbridled free speech and press, but of course, that's not the law that we have today.

JD: Let's say an ostensibly private tech company aggressively de-platforms people for political speech. The First Amendment is not implicated, but should we consider tort or estoppel theories as a remedy against this?

JAN: No. I would like to see people stop using one search engine or company and put together another one that does not de-platform people. I would use the free market to address that. I don't like what Google does to people, but they're not the government. They're a bulletin board. They have the right to post on that bulletin board whatever they want. They can choose their customers and they can choose not to deal with certain customers. That's where the free market comes in. There are obviously barriers to entry, with Google for example. You can't start a competing service overnight, but if Google mistreats enough people, those people will want an alternative. Where there's a demand in the free market, if we had one, there should be capital to address that demand.

JD: You've probably heard different arguments: by not de-platforming people consistently, uniformly, or transparently, tech companies effectively waive or alter some of their terms of service and thus might be liable under contract theory. Or consider where a user relied on the representation of a neutral platform, put time and energy into building up a following, and suffers harm when the platform is suddenly taken away. This is the estoppel approach.

JAN: I understand that argument. I might make it if I were their lawyer. But in my world, forcing a business to accept somebody as a client is government occupation of private property — and it violates many of our basic principles.

JD: But imagine if someone typed "Mises" or "Rothbard" into Google and no mises.org search results show up until the thirtieth page. We could be "disappeared" that easily.

JAN: Yes. Build another search engine.

> The government does what's called parallel reconstruction. It will find some fictitious way to justify to a judge how it obtained information. It will never, ever, ever admit in a public courtroom that it captures all the information all the time.

JD: I want to talk about the Supreme Court itself. After the Kavanaugh debacle, it is abundantly clear — it was already clear — how both sides see the Court as a weapon. It is a political tool, a way to vanquish or bludgeon the other side. Both sides see the stakes as enormously high. Have we crossed the Rubicon when it comes to the Supreme Court and its supposed role?

JAN: Much of the country, including the president, thinks that the Supreme Court is like a legislature. I heard him say it's important for the Republicans to control the courts. That may be a Freudian slip or it may be

ignorance of our system. Yet confirmation battles seem to rage on as if people think that the Supreme Court or the federal judiciary is just another sort of super legislature. It isn't. We give judges and justices life tenure in return for fidelity to first principles, not fidelity to party. Not all judges and justices have been faithful to first principles, and some of them have been political activists on the bench. One would like to think they would be faithful to first principles and not to the demands of a political party.

JD: A lot of people, myself included, think the Supreme Court's outsized power comes from a misinterpretation of the Constitution itself. Judicial review is nowhere to be found in the text of Article III, and the Court is merely supreme over lower federal courts. It is not supreme over the other federal branches, or over the states themselves. But most people see Court decisions as the "law of the land."

JAN: In my world, the Supreme Court and the federal judiciary would not be supreme over the states, other than to prevent states from interfering with fundamental liberties. That's not the way it is. The Supreme Court is superior to everything. If there were no judicial review the courts would be toothless. The whole purpose of an independent judiciary is to be anti-democratic, to preserve the life, liberty, and property of the minority from incursions by the majority. When the Court properly trumps what the legislature or the executive have done in deference to a right articulated or implied in the Constitution, it literally prevents the tyranny of the majority in order to preserve the liberty of whomever the majority targets. That's what we want it to do. The idea that the federal Supreme Court could tell the states how they are to operate beyond keeping them respectful of fundamental liberties, that's pure John Marshall. It hasn't changed for 200 years. It might take acts of secession to get it to change, but I'm with our dear friend, Tom Woods on that: a state court of last resort is competent to articulate what federal law means in that state and it should be immune from interference by the federal judiciary.

JD: We have to grapple with the awful "living Constitution" idea. We might look at Ruth Bader Ginsburg in any particular case before her and say she has a result in mind, often a political result. So she reverse-engineers her decision, using whatever legal reasoning sounds

plausible to justify the result. We think of this as "bad" judicial activism, but you also talk about beneficial "constitutional activism." What is the distinction?

JAN: Ruth Bader Ginsburg is not the only person who does this. My late great friend Justice Scalia was accused, I think quite properly, of doing the same thing: finding an end result, usually a political result, and then looking for some pseudo-constitutional way to get there. That is judicial activism. Constitutional activism, by contrast, presumes the government is wrong. It presumes that the individual is correct, requires the government to demonstrate its case beyond a reasonable doubt, and requires the government to protect fundamental liberties unless those liberties have been waived by an individual's conduct. Stated differently, a constitutional activist is a judge who limits government to protecting fundamental liberties. When it does more than that, when it takes property from A and gives it to B, a constitutional activist will stop the government from doing so. That type of judge exists only in theory and on paper, not in reality. This is because judges have all taken an oath to uphold the law, whether they agree with it or not. Often the constitutionality of a law, strictly speaking, is not challenged before the judge. A variety of tools, allegedly derived from the Constitution, prohibit judges from going beyond the "four corners" of the legal challenge in front of them. This prevents judges from willy-nilly striking down whatever they think or know to be is unconstitutional.

JD: The country is divided, and not just politically. We have deep cultural and social schisms, and real disagreement on things like abortion and guns and free speech and climate science. What is the way forward? What do you see as the best approach to improving this nasty climate in America?

JAN: It is education, like what we do at Mises all year around. Trying to make people realize that their rights are integral to their humanity. Government can only interfere with them when it proves to a jury that a person has given up his or her rights by interfering with someone else's rights. When we explain to people — whether in a basic or advanced way — the case for natural law constitutionalism and Austrian economics, they usually understand it. When we explain the primacy of the individual over the state, the inviolability of natural rights, the reality that only a free market (meaning free from government interference) produces the highest amount of wealth for the greatest number of people, people usually understand it. But none of this is taught in government schools because government schools are not interested in theories that clip the government's wings.

JD: Give us your quick definition of natural law constitutionalism.

JAN: Natural law teaches that our rights come from our humanity, and that all persons exercising human reason will come to a similar conclusion about the investiture of those rights within us. Not everyone will exercise their rights the same way. Some people will use their freedom to do harm, as opposed to good, but all rational people recognize that these rights come from within us. It is the duty of the federal government under the Ninth Amendment to protect those rights, because the Ninth Amendment prohibits all governments — local, state, and federal — from interfering with or disparaging natural rights. The Ninth Amendment is one of those amendments like the Second and the Tenth that the government doesn't want to talk about and doesn't like to rely on. I remind people that when Madison wrote the Ninth Amendment he was going through a transformation

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from being a big government person to a small government person. Madison wrote the Ninth Amendment to assure us that the government would recognize unarticulated natural rights and it would protect them, although things didn't end up as Madison wanted. That, in a nutshell, is natural law constitutionalism: the concept of the existence of unarticulated natural rights residing within each human being, for which government has an obligation to protect the existence and exercise of them.

JD: Did the Constitution at least attempt to codify natural law and protect natural rights, or should we view it entirely as a positive law document?

The person you and I respect a lot, Murray Rothbard, argued that the last time there was freedom in this country, was right after the Revolution was over and before the Constitutional Convention, under the Articles of Confederation.

JAN: It's a positive law document and a triumph of the big government crowd, which kept its powder dry during the Revolution, so to speak. They kept their big government wishes to themselves until after we won the Revolution. The Bill of Rights was added in order to prevent the calling of a second Constitutional Convention, which might have written a new constitution that seriously impaired the power of the central government. But the Constitution itself, with its elastic clauses — which Madison, by the way, claimed are not there — gives powers to government. Madison toward the end of his life sounds like Ron Paul, but not at the Constitutional Convention. He was the same human being, but his thoughts were radically different. The document itself ratified slavery and ratified the slave trade. It permitted the Necessary and Proper Clause to mean needful and helpful, rather than necessary. It gave far too much power to a central government. The person you and I respect a lot, Murray Rothbard, argued that the last time there was freedom in this country was right after the Revolution — before the Constitutional Convention, under the Articles of Confederation. At that time if you didn't like the tariffs and monopolies on Rhode Island, you could walk to Massachusetts where you might get a different version of them, but you didn't have a central government making everything uniform.

JD: What would a better, freer judicial and legal system look like? If Judge Andrew Napolitano could create an improved system, would it reflect a preference for common law over positive law?

JAN: I don't know what it would look like, but I would change some things in the Constitution. I would define "commerce" in the Commerce Clause as the movement of goods over interstate lines between merchants. I would return the word "expressly" into the Tenth Amendment. I would remove the Necessary and Proper Clause and make it very clear that the Constitution limits the federal government only to those powers expressly set forth in it. All other powers not specifically and expressly delegated to the feds reside in the states. Of course the states are no saints; they ran the system of slavery in the United States and absent the Fourteenth Amendment they would trample our natural rights. And there has to be some sort of provision guaranteeing the right to secession, just as we seceded from Great Britain. New Jersey could secede from the Union and my little farming town in northwest New Jersey could secede from New Jersey. The right to secession has to exist. Government has to fear that if it takes too much liberty or too much property, people will resist it and it will go out of business.

JD: I could not agree more, but secession inflames people and brings out faulty arguments.

JAN: There's basically a right to ignore the government. This fits in with the argument that government's only lawful role in a free society is to enforce natural rights. Everything else is some sort of redistribution, a socialist redistribution of assets.

JD: Our audience is particularly interested in libertarian ideas and even anarchism. Your book *Constitutional Chaos*, written in 2004 during the Bush years, depicts a lawless federal government. We worry about citizens behaving badly without rules, but what happens when government itself fails to follow the rules? That seems the bigger threat.

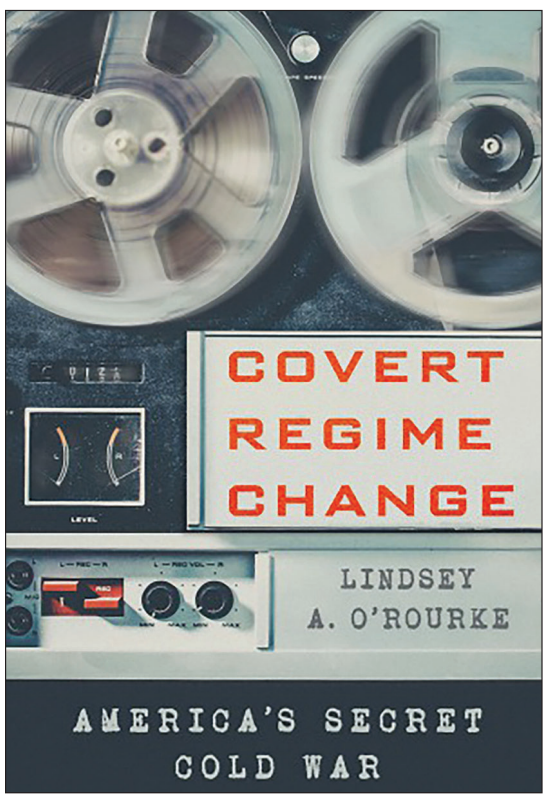
JAN: Government finds ways to protect itself when it violates its own laws. Government makes it very difficult to sue the government. You slip and fall on a lettuce leaf in a supermarket, you can sue the supermarket. But if you slip in the post office, it is very difficult to sue the post office. If you don't go to the right lawyer who knows what hoops to jump through, you find yourself without any recourse. Why? Because the government has protected itself. The most fiercely prosecuted crimes are those that harm the government's prerogatives. They're not property crimes against private individuals. The most fiercely prosecuted crimes interfere with what the government does. Mises is right. Government is essentially the negation of liberty. The whole theory of natural rights is that each individual is sovereign. Each individual has human liberty, and everything the government does, everything from A to Z, is a negation of that liberty. The only legitimate negation of that liberty occurs when government protects natural rights, when it protects A from interfering with the natural rights of B. Then it can interfere with A's liberty to perpetrate that interference. This is a species of the nonaggression principle. What government is legitimate absent consent? One that enforces the nonaggression principle, or one that enforces natural rights and does no more. And does no more.

JD: Very well said, as always. Thank you.

COVERT REGIME CHANGE: AMERICA'S SECRET COLD WAR

DAVID**GORDON** REVIEWS

Covert Regime Change: America's Secret Cold War
Lindsey A. O'Rourke
Cornell University Press, 2018
330 pages



Lindsey O'Rourke has given us a devastating indictment of the foreign policy of the United States during the Cold War and after. O'Rourke, who teaches political science at Boston College, is not a principled non-interventionist in the style of Ron Paul. To the contrary, she sympathizes with the "Offensive Realism" of John Mearsheimer, under whom she studied at the University of Chicago. Accordingly, she does not oppose the efforts of states to increase their power over other states but rather regards this as inevitable.

Her argument is that a key element of American foreign policy has failed to achieve its purpose. The United States has often aimed at "regime change," both overt and covert. The latter type of regime change has been especially unsuccessful, and, to show that this is so, the bulk of the book analyzes in detail a number of instances of covert regime change during the Cold War.

She states her conclusion in this way: "The vast majority of America's overt and covert regime changes during the Cold War did not work out as their planners intended. Washington launched these regime changes to resolve security-oriented interstate disputes by installing foreign leaders with similar policy preferences. American experiences during the Cold War, however, illustrate that this was often quite difficult in practice. Thirty-nine out of sixty-four covert regime changes failed to replace their targets, and because America's role in most of these failed attempts generally did not

remain a secret, they further soured Washington's already negative relationship with the target state. Even nominally successful covert operations — where the US backed forces assumed power — failed to deliver on their promise to improve America's relationship with the target state."

Readers of Ludwig von Mises will at once recall this pattern of argument. Just as Mises argues that economic interventions such as minimum wage laws fail to achieve the stated goals of their proponents, so does O'Rourke maintain that regime change, especially of the covert variety, suffers from the same flaw. Again, just as Mises does not challenge the stated goal of higher wages without unemployment, so does O'Rourke accept the goal of an increase in the power of the United States.

In order to grasp the way O'Rourke reaches her conclusion, we must first understand her use of terms. By "regime," she means "either a state's leadership or its political processes and institutional arrangements." A covert regime change "denotes an operation to replace the political leadership of another state where the intervening state does not acknowledge its role publicly. These actions include successful and failed attempts to covertly assassinate foreign leaders, sponsor *coups d'état*, influence foreign democratic elections, incite popular revolutions, and support armed dissident groups in their bids to topple a foreign government."

We have so far stressed how Mises and O'Rourke argue in a similar way, but now a crucial difference requires our attention. Mises showed by *a priori* reasoning that intervention *must* fail, but O'Rourke does not do this. She says instead that a detailed examination of many cases shows that the covert regime changes *in fact* tend to fail.

A few examples will illustrate how she proceeds. In the beginning years of the Cold War, the United States tried to "rollback" Communist regimes in Eastern Europe through covert operations. "The Anglo-American operations in Latvia, Estonia, and Lithuania ... were doomed to failure from the start. As early as October 1945, MGB (Russian Ministry for State Security) counterintelligence officers captured Latvian infiltrators carrying Secret Intelligence Service (SIS) codebooks and radios. Forcing the infiltrators to collaborate, the MGB was able to provide false intelligence and identify the time and location of future infiltrations. Ultimately, Soviet forces set up two fictional resistance movements, which the United States and the United Kingdom covertly supported until 1954."

Operations in Southeast Asia succeeded no better. Notoriously, "although the 1963 US-backed coup in South Vietnam successfully overthrew [Ngo Dinh] Diem's government, it still did produce the results the planners had hoped for. Contrary to policymakers' predictions, the leaders who took over after Diem were unstable, unpredictable, and incompetent, which in turn hampered South Vietnam's ability to defend itself without US assistance and encouraged the Viet Cong to escalate their attacks."

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Covert regime change was likewise ineffective in Latin America. "To combat the [Dominican Republic's] chronic political volatility, Washington backed General Rafael Trujillo's authoritarian regime after he seized power in a 1930 coup. By the late 1950's, however, US leaders began to question Trujillo's increasingly erratic and brutal rule. Concerned that his regime might spark a popular revolt similar to the one that had toppled Fulgencio Batista in Cuba, Eisenhower authorized a covert campaign to overthrow Trujillo in 1960. But the operation misfired. Trujillo was assassinated in 1961, but his fall brought his equally cruel son to power, which in turn led to a series of coups."

Given this sorry record, the question naturally arises: why did the United States again and again pursue

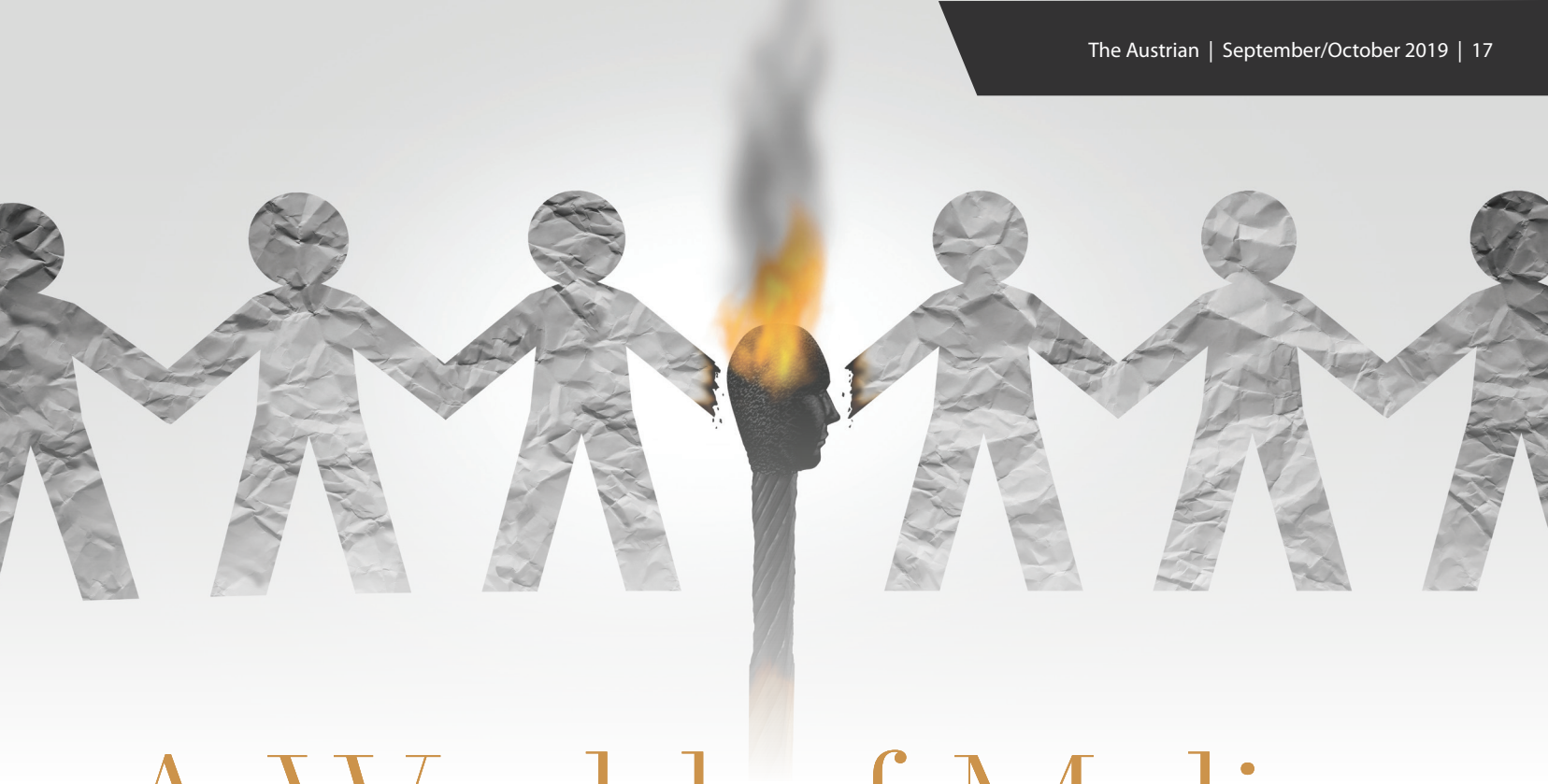
covert regime change? O'Rourke's own explanation is along realist lines: nations see regime change as a way to enhance their power, and the pursuit of increased power is a constant in the international system. "I argue that states pursue regime change for motives akin to the ones that Realist scholars have provided to explain war ... there is no single security motive driving states to intervene, and operations may have multiple overlapping motives. Nevertheless, the security motives that drove the United States to intervene can be grouped into three ideal types: *offensive, preventive, and hegemonic*. Each aimed to increase America's relative power in a different way."

If a key thesis of realist theory is right, though, regime change is unlikely to succeed. "[O]ne of the central tenets of Neorealism is that the specific composition of a state's domestic leadership is irrelevant for explaining its international behavior because great powers behave in similar predictable patterns given their relative share of material power and geostrategic position." If this is true, the newly installed government after a regime change is unlikely to shift its foreign policy in the way the intervening state wants. But states, avid for power, persist in this mistaken policy. (For this argument to work, O'Rourke's claim about the predictable patterns of great powers must apply also to smaller powers, since most efforts at regime change are not directed at great powers.)

O'Rourke criticizes other explanations of the pursuit of regime change, and her criticism strikes at the heart of democratic peace theory, a frequent rationale for an interventionist foreign policy. "According to normative variants of DPT [democratic peace theory], democracies do not go to war with other democracies, because liberal norms shape how democratic policymakers view one another and choose to resolve conflict." If this hypothesis were correct, we would expect a democratic United States to support other democracies. But if covert operations are taken into account, this hypothesis fails. "American covert operations habitually violated norms of justified intervention: Washington installed brutal dictators. It broke international law. It collaborated with many unsavory organizations, including ... numerous groups known to have committed mass killings."

O'Rourke, one gathers, hopes that the United States will learn from the failure of covert regime change and instead pursue the inevitable grasp for power in a more rational manner. In this she resembles her mentor John Mearsheimer, who hopes that America will abandon ideological crusades in favor of "offshore balancing." Those of us who, like Murray Rothbard and Ron Paul, favor a noninterventionist foreign policy will not be satisfied with this. Instead, we need to ask deeper questions. Is the pursuit of power in the international system indeed inevitable? Does it not depend rather on human free choice? If so, the time has come to abandon completely a failed policy. "Why quit our own to stand upon foreign ground?"

David Gordon is Senior Fellow at the Mises Institute, and editor of *The Mises Review*.



A World of Malice

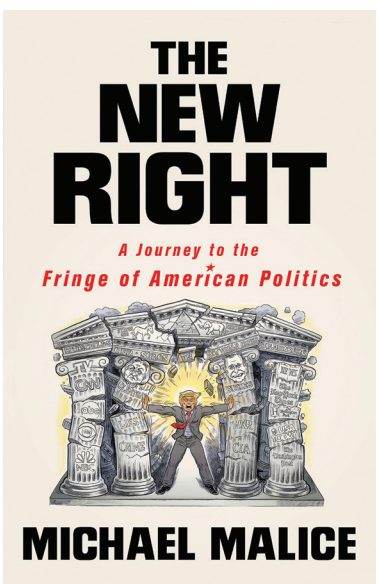
Review: *The New Right: A Journey to the Fringe of American Politics*

JEFF DEIST

Conservatism, Michael Malice famously remarks, is progressivism driving the speed limit. Malice's latest book, aptly titled *The New Right: A Journey to the Fringe of American Politics*, documents a movement of sorts to change this.

Malice is a podcaster, ghostwriter of celebrity books, and author of the truly unique *Dear Reader: The Unauthorized Autobiography of Kim Jung Il*. He is perhaps best known, however, as a highly skilled Twitter provocateur. His vantage point is from the foxholes of social media, but he is not afraid to go out and meet the subjects of his book in the physical world.

A definitive feature of the New Right is its antipathy for Conservatism, Inc., the safe, comfortable form of DC Beltway think tankdom and punditry which never seems to conserve anything but its own jobs and funding. If conservatives won't fight, much less win, they should be replaced by something new. Thus the New Right emerges in the twenty-first century as a response to the abject failure of conservatives to meaningfully oppose the progressive juggernaut, either ideologically or tactically. Baby Boomer Reagan nostalgia is over and done as a political force, replaced by millennial MAGA guerrilla warfare and fully stripped of useless intellectual pretension. Progressivism has its foot on the accelerator, and standing athwart history yelling "slow down" has not worked.



All Points Books/
St. Martin's Press, 2019
309 pages

National Review's departed founder William F. Buckley, Jr., an avatar of this old conservative establishment, is a particular target of the New Right's ire. Malice finds the CIA-connected Buckley not only grossly hypocritical and disloyal in his purges of dissidents, but also ultimately ineffectual: Buckley embarrassingly failed to conserve even his own son Christopher's conservatism, the latter cheerfully announcing in 2008 he would vote for Barack Obama. Buckley's craven search for respectability from the Left yielded nothing, a lesson not lost on Malice and the New Right.

Contrast Buckley with the late Murray Rothbard, treated more favorably in the book. Our readers know Rothbard not only as an architect of modern libertarianism, but also as someone deeply influenced by the "Old Right." Malice considers Rothbard a godfather to the modern conservative uprising, at least tangentially, owing to Rothbard's anti-establishment, anti-egalitarian, and populist views. Yet while the Old Right and the New Right similarly manifest as "diverse and loose coalitions" of groups against the Left, the comparison seems to end there: Rothbard's stable of influences (Albert J. Nock, Garet Garrett, Robert A. Taft) possessed a far more coherent ideology apart from any reactionary opposition.

Still, Malice's inclusion of Rothbard as a modern influence is welcome. And it raises a question: who today is better known among people under 30, Buckley or Rothbard? My bet is on Rothbard, who is still producing "new" books decades after his death and finding far wider reception for his works in the digital age.

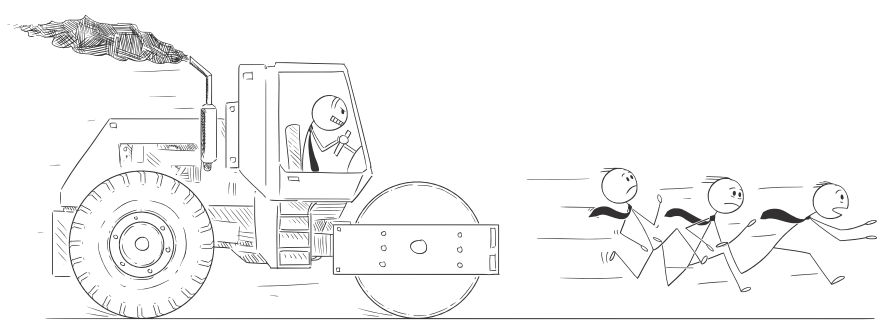
Happily, Malice does not dwell too much on the wildly overhyped "alt-Right," presenting it only as a subset of his larger topic. The alt-Right is mostly a bogeyman for the Left and Never Trump conservatives, and a phony whipping boy for a credulous mainstream. It has no institutions, no money, no benefactors or think tanks, and no political power. It consists mostly of a few thousand outsized voices loudly using social media platforms. The alt-Right didn't elect Donald Trump; a few hundred thousand angry Baby Boomers in a handful of swing states did — many of whom voted for Barack Obama at least once. Malice does not add to alt-Right mythology here.

Since the Right is defined by its reactionary opposition to the Left's relentless advances, the book by necessity is also about today's "evangelical" Left. Malice, like the New Right itself, is at his best when skewering the Left's "Cathedral," demonstrated by the religious zeal shown for pronouncements and opinions handed down from on high by priests in academia and media:

"For the evangelical left, however, the world is defined by what is acceptable, and everything outside this acceptability is wrong and bad. The scales are tipped heavily against anything outside their norms. ... There are approved parameters, and anything else is simply wrong, as 'everyone' (i.e., progressives they associate with and approve of) knows."

Of course those norms and parameters change quickly, often without warning, and thus the Cathedral often savages heretics as readily as conservatives. The Left's religiosity, complete with canonical texts and ever-narrowing range of faith based opinions, is a key point of Malice's argument: debate is passé on the Left, if not verboten. The science is settled, and to hell with those outside the faith. Convert or be cast out.

An important article of faith for the Cathedral is democracy, at least the kind that does not elect Trump or approve Brexit. Malice shows particular skill in a chapter attacking democratic pretenses when he considers the case of Barack Obama's position on capital gains taxes. In the former president's view, such taxes are required on grounds of fairness and equality *regardless of whether tax revenue actually increases and regardless of whether programs funded by such taxes actually hurt recipients.* Outcomes are sometimes irrelevant in the Cathedral, and the author pulls no punches explaining why:



"There are people who explicitly and genuinely would prefer to see *everyone* worse off. It is very rare to see a conservative acknowledge the possibility that the left intentionally prefers what's worse for everyone in service to some higher ideal."

In other words, the Cathedral demands tithes as the price of democracy — and far more than 10 percent. After all, you voted for it. But what if you did not vote for it, in fact? What if you are not a politician or bureaucrat with your hands on the wheel? Who actually carries out the actions decided upon, and who watches over the administrators? How far does this democratic consensus really go? Malice is ready with an explanation to these questions: even in the most direct form of democracy, like a town hall, time and space are limited. Someone must set the agenda. And "an entity that sets the agenda for discussion, recognizes individual speakers, and frames questions for everyone else is an elite. *Elitist rule is inevitable*." This is a nice puncturing of democracy and the "consent" argument, and a high point in the book.

If politicians and professors are the Cathedral's clergy, media figures are its enforcers. Malice identifies one classic technique as the "demand for disavowal," something familiar to many of us. This is a version of guilt by association, and varies only in how many degrees of separation from the Deplorables are required to remain in good standing. The book describes one social media figure popular with the New Right who finds himself interviewed by the decidedly analog-era TV show *60 Minutes*. His twitter feed and videos apparently attract the "wrong" kind of followers, and he is asked on air to denounce them — not to show decency or a change of heart, but to show conformity. Or, as Malice puts it, to "genuflect before the demands of progressivism."

The book contains transgressions, of course, from your reviewer's perspective. An early chapter finds Malice astray in his descriptions of Mises, Austrian economics generally, and Rothbard's contributions to the field. Mises did not "eschew" economic calculation so much as he made the definitive case against the socialist version of it. He was not overly theoretical or philosophical, contra what Malice implies, but rather rooted in theory and axioms as the starting point for a deductive process. Praxeology, then, is not the "basis of human activity" as Malice alleges but rather the science of studying human action.

Similarly, Rothbard's *Man, Economy, and State* was not a rehash of *Human Action* as per Malice, but rather a significant advancement of Austrian theory in several areas. Rothbard's references to social utility in his treatise are couched in economic terms. But utilitarianism did not drive Rothbard's economics, and Malice ignores the construction of a natural law argument for *laissez-faire* in *The Ethics of Liberty*. One senses in the book an impulse to portray Rothbard as a radical, which he was, but not as a tremendously accomplished intellectual and seminal thinker, which he surely was as well. Rothbard was neither a misanthrope nor a gadfly, and random quotes from the 1960s to demonstrate intransigence do not serve the author well.

But these transgressions likely stem from Malice's relatively brief readings of these thinkers, and from his particular focus on Rothbard as a political theorist rather than an economist. Malice is not required to display deep familiarity with either man's *oeuvre* before commenting.

There are other nits to pick. Malice seems not to understand Ron Paul, whose campaigns attempted to build a real movement founded on ideological moorings rather than tactical or electoral considerations — more Barry Goldwater than Pat Buchanan or Ross Perot. Malice also refers, several times, to a mythical WASP power structure which has not existed in America for 50 years. He spends too much time discussing current New Right personalities, memes, and platforms that will appear dated in just a few years, limiting the book's staying power. Whether this was at the behest of his publisher we do not guess. And he seems overly cautious in separating himself from his subjects, making sure the reader knows he is an anarchist rather than a conservative or member of the New Right. But surely "everyone knows" even speaking to the wrong people for research purposes, much less commiserating with them as Malice sometimes does, can only result in a demand for disavowal?

If the author considers these criticisms pedantic, in keeping with the spirit of the New Right, we understand. Yet if the rebels hope to survive and supplant Conservatism, Inc., they should take their cues from the Old Right and strive for intellectual cohesion with strong antiwar foundations. In the age of the amoral, relentless Cathedral, tactics and foot soldiers are important. But so are intellectual supply lines.

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