

| Book Reviews |

Broken Buildings, Busted Budgets: How to Fix America's Trillion-Dollar Construction Industry

By Barry B. LePatner

University of Chicago Press, Chicago, IL, 2007.
208 pages, \$25.00.

REVIEWED BY CAROL A. SIGMOND

Broken Buildings, Busted Budgets is packed with useful information for anyone interested in the construction industry, and it includes an impressive bibliography. Barry LePatner has assembled a vast array of detail about the construction industry to support his argument that better-informed owners equipped with more effective design and construction advisers—together with aggressively pro-owner construction contracts—will improve the construction industry. According to LePatner, implementation of his proposal will result in fewer, better financed, and more efficient construction contractors, which, in turn, will bring about savings in construction costs without loss of quality.

Although I enjoyed learning from the book that Levitt Brothers treated all its employees as independent contractors (which would violate insurance regulations and tax laws today) as well as learning about the history of prefabricated housing, I was frustrated by what I perceived to be LePatner's bias against contractors in assigning them the responsibility for change orders. Change orders are the means by which a property owner and a contractor amend a contract. The contractor usually starts the process by claiming that a condition is different from the one presented by the drawings (and, often, that he will need more money to do the job). But the fact that the contractor starts the process does not mean that he or she is not reacting to a real problem—a problem that may have been caused by an error made by the architect or the engineer. Three major analytical errors in the book bothered me as well: (1) selecting the wrong business model for the construction industry, (2) brushing aside risk avoidance as the defining

principle of modern construction, and (3) overlooking the impact of the ready transferability of construction skills on the construction industry in the United States.

The Right Business Model

LePatner spends some time analyzing the construction industry as a single business and comparing it to manufacturing. His analysis assumes that all construction is merely a set of repetitive actions that need to be properly sequenced. LePatner maintains that specialized construction workers—such as plumbers, elevator mechanics, and masons—simply need to get to the site at the right time to do their work efficiently.

Actually, the construction industry consists of three components: (1) heavy construction (bridges, dams, ports, roads, and the like), (2) residential construction and remodeling, and (3) commercial building construction and renovation. These parts have numerous subparts, such as historic restorations and conversions from residential use to commercial use, to name but two. Furthermore, any construction project is a matter not only of science and engineering but also of art and aesthetics. Therefore, LePatner's decision to select a manufacturing assembly line as the model for construction does not work.

Construction projects actually resemble movie production companies. A movie is made by a group of people who have specialized aesthetic, engineering, and scientific skills and come together to film a script and then go their separate ways when the movie is complete. A construction project is a group of people who have specialized aesthetic, engineering, and scientific skills and come together to execute a design plan and then go their separate ways when the building, road, or house is complete.

LePatner points to construction unions, work rules, and high wages as causes of inefficiency in the construction industry. But the problem with eliminating construction unions is that, if you assume that construction projects are more like movie productions

than like manufacturing on an assembly line, then unions provide a useful mechanism for separating workers by skill and allowing workers to save for retirement and to obtain health insurance.

Risk Avoidance

LePatner brushes off what seems to me to be the defining principle of modern American construction—the parties involved should assume no risk or responsibility. This risk aversion takes many forms, some of which are reasonable, and some not. Unions and the government rightly refuse to allow workers to assume risks of injury, and construction safety is aggressively monitored by the Occupational Safety and Health Administration and its counterparts on the state and local level. (Perhaps our national commitment to worker safety is part of the explanation for the lower productivity of American construction workers on which LePatner comments.) Legislatures and building departments demand fire, earthquake, and, now, terror-safe designs for buildings as well as safety protections for passersby. Owners do not make detailed disclosure of subsurface conditions for fear of being wrong and being asked to pay for the actual cost of underground work. Architects and engineers do not fully develop and coordinate designs to ensure that everything fits. Architects are so risk averse that the central purpose of American Institute of Architects' contracts is the protection of the architect.

LePatner correctly identifies one major problem in the construction industry: "starchitects." Starchitects favor innovative designs over the tried and true. But established designs are faster and less expensive to build, as witnessed by the success of Levitt Brothers, among others major construction firms. Owners, particularly public owners, would help themselves immeasurably to save both time and money by staying with proven designs and eschewing novel ones.

Regardless of whether an owner chooses an innovative design or an established one, until architects assume real responsibility—and therefore risks—for projects, owners will continue

to waste money litigating with contractors after the architect has sidestepped an error or omission in the drawings by blaming the contractor. Owners would be better served by spending money on detailed code-compliant Building Information Modeling designs and insisting on financial and technical transparency from all parties than by preparing for an adversarial relationship with the contractor from the outset. “Loser pays attorney fees and costs” clauses in all the contracts—including those of the contractor, the architect, the engineer, and the owner’s representative—might encourage all parties to be candid with the owner.

Transferability of Construction Skills

LePatner complains about low barriers of entry into the construction business and considers them part of the cause of economically inefficient construction. I agree that there are too many underfinanced construction companies, but, because construction skills are among the most transferable skills in the world and because we are a nation of entrepreneurs, this problem is not going to change any time soon. Neither language, culture, nor the political system has any impact on the formula for cement, the fusion of bricks and mortar, the channeling of water, or the flow of electricity in pipes or cables. An individual trained as an electrician in the Caribbean or as a plumber in Malaysia has the same skills after he or she immigrates to the United States. When the easy transferability of skills is combined with America’s entrepreneurial culture, the result is small construction companies—particularly, but not exclusively, those serving the home building and home remodeling businesses that are constantly starting up. Most of these firms will fail, but a few will survive—at least for one generation.

For anyone who wonders why the construction industry seems beset with corruption, the reason lies in the low barriers to entry and the easy transferability of required skills. Unsophisticated immigrants have always been able to work in construction, but their lack of language and reading skills and the practice of paying them in cash makes immigrant workers vulnerable to ex-

ploitation. Sadly, that is not likely to change any time soon either.

LePatner’s suggestion that the barriers of entry into ownership of construction companies be raised provokes consideration of an important public policy issue. Since shortly after the publication of the Kerner Commission’s 1968 report, which said that the United States was becoming two societies—one black and disenfranchised economically and politically, and one white and mainstream—the construction industry has been used to correct historical inequities. Faced with the stark conclusions of the Kerner Commission, President Johnson’s administration perceived the need to provide opportunities for minorities to join the mainstream economy.

Because construction skills are akin to military skills and are present among the minority community, the Johnson administration was able to mandate significant minority participation in the construction industry’s labor force. Quotas for union apprenticeship programs and hiring on public works projects became the law. But union apprenticeship programs, many of which had been discriminatory, collapsed under the weight of government demands, and the industry lost a key means of training new construction workers domestically. This policy of using construction for advancing social equality extended to the creation of requirements for minority (and later disadvantaged and women) business participation in construction projects. The original idea was that these quotas would create business opportunities for entrepreneurial members of the minority community, but the long-term effectiveness of these programs is still in doubt. History will have to judge whether President Johnson and his administration are heroes or goats—whether the good they did for society as a whole justified the burden they placed on the construction industry.

Some might maintain that LePatner’s model of having fewer and better-financed contractors working for sophisticated, well-advised owners is alive and well in large federal construction projects. Large federal projects, however, are not free from the problems that LePatner identifies, such as change or-

ders that increase the cost of a project. The federal government has arrived at a solution to these problems: it does not engage in an adversarial relationship with contractors but uses equitable adjustments and financial transparency to control costs. Rather than seeking the more adversarial relationship with contractors that LePatner advocates, owners might follow the federal government’s lead and be better served by demanding more complete and detailed designs from their architects and engineers as well as access to contractors’ financial records so as to monitor the actual costs of change orders. **TFL**

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The Microsoft Case: Antitrust, High Technology, and Consumer Welfare

By William H. Page and John E. Lopatka
University of Chicago Press, Chicago, IL, 2007.
347 pages, \$47.00.

The Antitrust Religion

By Edwin S. Rockefeller
Cato Institute, Washington, DC, 2007.
117 pages, \$16.95.

REVIEWED BY CHRISTOPHER C. FAILLE

What do you think of first when you hear the phrase “antitrust prosecution”? If you aren’t especially familiar with antitrust law, but you are a student of U.S. history, you probably think of large-scale cases aimed at breaking up a towering corporate monolith such as Standard Oil, Alcoa, IBM, AT&T, or Microsoft.

What would a cost-benefit analysis say about such cases? First, the analysis would find that the costs are huge, starting with the direct costs to the U.S.

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Treasury and to the corporate treasury of the defendant. Because of the costs to the government, money is spent that could otherwise have been used to pay Peace Corps volunteers, to build bridges, to maintain water purification systems, and to do other more readily defensible things. Because of the costs of antitrust prosecutions borne by the defendant, some aluminum doesn't get manufactured, some computers don't get built, and some telecommunications satellites are left on the launch pad or even on the drawing board.

But, you might reply, *every* law has enforcement costs. Perhaps not on the scale involved in antitrust cases: in the IBM case, 700 days, spread out over seven years, were spent in court. The U.S. government estimated that it spent \$16.8 million (in 1970s dollars) litigating the case.

Furthermore, both sides incur costs that are less direct. For example, if the lead company in a major industry is the defendant in antitrust litigation, the process can have a chilling effect on many other businesses—including the lead company's suppliers, lenders, and customers—who have to guess what the outcome and the consequences of the lawsuit will be for them. The fact of prosecution can also chill innovation within the firm, as decision-makers wonder how any move they make might look in court. Licit practices that resemble whatever the government is challenging may become suspect.

At the end, either the prosecution leads to a finding of liability or it doesn't. If there is no finding of liability, the whole exercise has the futile feel of the abandoned statue of Ozymandias. But even if the government does win a finding that the monolith is an actionable monopoly, then what? There is no reason to think that structural remedies will lead to a more consumer-friendly or worker-friendly industry.

Take the Standard Oil prosecution, for example. The authors of the more scholarly and focused of the two works under review, William H. Page and John E. Lopatka, who are in many respects skeptical of zealous enforcement of antitrust regulations, nonetheless acknowledge that the Standard

Oil action had some merit. Standard Oil enforced a horizontal conspiracy—initially among railroads and later in connection with an emerging pipeline network—that imposed disproportionate transportation costs on actual or potential competitors. Still, by the time a court ordered Standard Oil chopped up into 34 smaller companies, the industry had outrun the remedy. New oil fields to the south and west of the fields that John D. Rockefeller had exploited—coupled with the demand for the resources that, thanks to Henry Ford, was outstripping what Rockefeller could supply—eliminated predatory opportunities.

One can always speculate about what might have been. Maybe, if a prosecution hadn't taken place, Rockefeller would have moved southwest more quickly than he did and preserved his control of the industry—or maybe not. Maybe he would have raised prices higher than he dared in the face of the President Theodore Roosevelt's bluster. Those higher prices might have hurt consumers, but they might also have prompted competition, transportation costs notwithstanding, and made the life of the Rockefeller monopoly briefer than it actually was. Hence, one can spin a scenario according to which the prosecution either (1) helped end the monopoly even before the formal victory (2) or helped preserve it. The point is that large-scale structural antitrust prosecutions impose large and certain costs, both direct and indirect, but the benefits to the public, if any, lie in a haze of might-have-beens.

Such a history has naturally made many policy-makers and adjudicators wary of structural antitrust prosecutions on such a scale. Judge Thomas Jackson, who presided over one of the Microsoft trials, told reporters, "I wanted to stay away from disasters like the IBM and AT&T cases." As a consequence, he used a variety of procedural innovations to streamline his trial. Indeed, the Microsoft litigation went forward in large part because, in many influential quarters, it wasn't seen as a charge up San Juan Hill—as a classic trust-busting move. There was another way to look at the prosecution that suggested some-

thing more limited: it could be considered a "tie-in" case.

To understand this, let's travel back to a simpler time and consider an enforcement action that sounds almost bucolic—like the sort of dispute that might break out in Mayberry, North Carolina, until some homespun wisdom from Aunt Bea settles everybody down. From the early 1930s until the late 1940s, a newspaper known as the *Lorain Journal* was the only purveyor of local news in the small town of Lorain, Ohio. As a result, the paper held a commanding position in the advertising market: if you wanted to sell to the people of Lorain, you had little choice but to buy space in this periodical. This situation probably wouldn't by itself have drawn the attention of even the most zealous of trust-busters. But, then, in the late 1940s, merchants who wanted to advertise in the town discovered that they did have a choice: They could buy time from the radio station, WEOL. To counter that competitive threat, the newspaper initiated a no-fraternization policy, refusing to sell ads to merchants who also bought time on the radio. The authorities challenged this policy, and, in 1951, the U.S. Supreme Court upheld a district court injunction against the policy. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

Note that the remedy applied in this case was rather straightforward and conduct-based. No assets had to be sold and no products had to be redesigned. The lower court had simply ordered the newspaper to stop excluding would-be advertisers who also advertised on the radio. As Page and Lopatka write, this is "the rare monopolization case that nearly all commentators endorse."

Antitrust lawyers call this type of case an "exclusive dealing" case. They also sometimes call it "tying" or a "tie-in" case, because most means of excluding customers in such a case involve the creation of ties between two or more products. This isn't obviously so in the case of the *Lorain Journal*, but Page and Lopatka find two products there—two different sorts of advertising. Newspapers are better than radio at selling "information ads"—the sort

that might include a price list that consumers can clip and save. Radio can't compete with informational ads but is superior for "notice advertisements"—the sort of ads that inform customers that an event, a white sale perhaps, is under way at a specific time ("Wednesday from noon 'til five!"). Presumably, the advertisers who wanted to use both media would have preferred to use the radio for notice ads, while still sending their price lists to the *Lorain Journal*. By refusing to comply with that strategy, the newspaper tied the two sorts of ads together into a package and, on one reading of the matter, that was the gist of the offense. What we might abstract from this is that sometimes a monopolist ties a monopolized good to a complementary good in order to assist its position in the nonmonopolized part of its business.

Edwin S. Rockefeller is the author of *The Antitrust Religion*, a short polemical work denouncing the whole body of antitrust law. I don't know whether he is one of the Rockefellers, but, if he is, it is easy to imagine a distinguished forebear smiling down upon him. The publisher's blurb on the cover of the book—"How blind faith in antitrust has led to confusing and arbitrary enforcement"—says it all. In the course of his denunciation of blindness and faith, Rockefeller doesn't discuss the *Lorain Journal* precedent specifically, but he does discuss exclusive-dealing and tie-in cases generally. He thinks that firms must be allowed to decide how to bundle or unbundle their products as they think best, and that any decisions the courts make in such matters will inevitably prove arbitrary. In this connection, he cites *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), a lawsuit brought by an anesthesiologist who was excluded from a certain anesthesiologists' society after the society had concluded a contract with the hospital district in question. The U.S. Supreme Court found itself asking whether patients consider the provision of surgery and the provision of anesthesiology to be two distinct products or one. Rockefeller believes that the very existence of this litigation—and the seriousness with which the Supreme Court took that question (though the defendants prevailed)—

demonstrate how antitrust works as a religion, overcoming "empirical facts, economic theory [, and] common sense."

But to return to the Microsoft litigation: The government's case is sometimes presented as something very distinct from the prosecutions of Standard Oil, Alcoa, and the like. According to this line of thought, no forced market restructuring was required in this case. Rather, as with the *Lorain Journal*, the case involved a straightforward issue of conduct, and the wrongful conduct could be enjoined, the bundle untied, and the issue of market competition left to take care of itself. The most Lorrainean (to coin a word) aspect of the Microsoft litigation probably involved the company's dealings with Internet access providers (IAPs). Ten of the 15 largest IAPs in North America promised to promote Microsoft's Internet Explorer exclusively and to limit shipments of Netscape's Navigator to a specified percentage of their total software shipments.

Because we have moved from mid-20th century Mayberry to contemporary Seattle with blinding speed, the analogy needs to be spelled out a bit. In the modern case, Netscape is the radio station and Microsoft is the newspaper, giving companies who would happily have done business with both an "us or them" ultimatum. A direct or indirect presence on the Windows desktop is the "monopolized good" (analogous to ads that announce a merchant's price list in Lorain, Ohio), and Internet browsers are the "complementary good" (analogous to the ads that announce events). Microsoft bundled the two to exclude or limit the distribution of Netscape in a way that Page and Lopatka write had no "obvious efficiency justification." It certainly had no such intuitive appeal as does the link between surgery and anesthesiology!

Page and Lopatka's book is full of ambiguities and reaches an end with the classically lukewarm expression: "remains to be seen." Still, on the whole, the authors extend sympathy to the position taken by the U.S. Justice Department in the Microsoft matter so far as it stood on the tying theory. But they object that the Antitrust Division "expanded the case from a sharply fo-

cused attack on tying to a blurry challenge to a host of practices when its tying theory appeared in jeopardy."

In his book, in which ambiguity is banished, Rockefeller tells the reader that the "antitrust community" is more shameless about the tying doctrine than it is about structural reform. On the one hand, the community is "embarrassed about the impossibility of distinguishing competitive business behavior from unlawful attempts to monopolize" and is trying to modernize doctrine there. On the other hand, the antitrust community "sees no need ... for modernizing existing doctrines as to tying" or for studying whether any empirical foundation exists for the concerns this doctrine expresses. According to Rockefeller, "Courts, law professors, and practicing lawyers must assume that statutes enacted by Congress have some meaningful content that can be discovered, even if they do not."

A less contentious, and perfectly accurate, way of making the same point might be this: As long as the American body politic remains ambivalent about the value of a free market, the state will enact statutes that express that ambivalence—specifically, statutes that express the view that competition should be waged but shouldn't be won. As long as those statutes exist, lawyers will think within the boxes they create. **TFL**

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Supreme Discomfort: The Divided Soul of Clarence Thomas

By Kevin Merida and Michael A. Fletcher
Doubleday, New York, NY, 2007. 422 pages,
\$26.95.

REVIEWED BY RICHARD L. SIPPEL

Anita Hill's appearance as a witness late in the Senate Judiciary Commit-

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tee's confirmation hearings on Clarence Thomas' nomination to the Supreme Court was as dramatic an event as any since the surprise appearance of Marlene Dietrich's character in the movie "Witness for the Prosecution." Hill's testimony not only effectively restarted the hearings but also nearly resulted in the rejection of the man who, according to President George H.W. Bush, was the "best qualified" candidate for the position.

Washington Post reporters Kevin Merida and Michael A. Fletcher re-examine the confirmation hearings, at which Thomas, having learned from Robert Bork's experience, decided not to express his opinions about constitutional issues. He even maintained before an unbelieving panel that he had never formed an opinion about *Roe v. Wade*, which was decided in 1973, while Thomas was a law student. This strategy, of course, succeeded. Nevertheless, Merida and Fletcher report what Thomas' recent autobiography confirms: that Thomas continues to think of himself as victim of a "high-tech lynching," particularly by the liberal media.

Merida and Fletcher also cover Thomas' life before being appointed to the Supreme Court and his 16 years on the Court. The authors interviewed numerous people, including 40 lawyers who were clerks during Thomas' tenure on the Court, and they do an excellent job both as investigators and writers.

Clarence Thomas was born in Pin Point, Ga., in 1948. Pin Point, according to the authors, "is a rural settlement of mostly trailer homes sitting on cinder blocks," located 11 miles from downtown Savannah and with a population of 275. "Paved roads," the authors write, "are a relatively recent improvement, and not all the roads are paved." Today, however, the town is marked with "a flimsy blue metal sign" reading "Welcome to Pin Point. Birth Place of Supreme Court Justice Clarence Thomas."

Abandoned early by his father, the future justice was raised by his mother Leola, who worked as housekeeper. When Thomas was only six years old,

his home was destroyed by fire, and he and his younger brother, Myers, were sent to Savannah to live with their maternal grandfather, Myers Anderson. Thomas' sister, Emma Mae, stayed in Pin Point with her mother, and both still live there today. Living in the household of a nurturing grandfather who molded his character, together with nine years in parochial (albeit segregated) schools, were advantages for Thomas, and these would not be his last. His grandfather put him on the road to a series of successes.

Myers Anderson ran a successful fuel delivery business, and Thomas grew up in a comfortable middle-class home. His grandfather was a strict disciplinarian and insisted that Clarence and his brother work after school—"No work, no eat," was their grandfather's rule. After two years of high school, Thomas transferred to a boarding school six miles from Savannah; it was a seminary where he would train for the priesthood. He graduated in 1967 and attended an advanced seminary at Immaculate Conception Seminary in Missouri, where he intended to complete his studies for the priesthood. But he left after his freshman year, the authors write, "enraged by the racism of his fellow seminarians ... and disillusioned with his faith."

Thomas returned home, where he met a nun who had been his teacher in elementary school. She alerted him to an outreach program for minorities at the College of the Holy Cross, a Jesuit college in Massachusetts. He applied, was accepted as a transfer student, and received a scholarship. At Holy Cross, he became active in the campus black student movement. He flirted with radicalism, made his mark as a student leader, studied hard, and graduated in 1971 with honors in English. His academic and leadership record qualified him for an affirmative action scholarship at Yale Law School, which he accepted. The day after graduation, he married Kathy Ambush, a student at a nearby Catholic women's college, and the next semester he started at Yale. The authors do not mention how he bypassed military service during the

Vietnam War.

Thomas attributes his conversion to conservatism to Yale's having marked him as an affirmative action student, which he believed barred him from practicing with a prestigious law firm. He interviewed with several firms but was never offered a job, and to this day he holds Yale responsible for this failure and also holds the school in contempt. He was so embittered that he posted a 15-cent tag on his Yale diploma and touts that as the degree's value to him. Thomas has never returned to Yale or attended a reunion, and he will not permit his portrait to hang with those of other justices who graduated from Yale Law School.

After Thomas graduated from Yale in 1974, he accepted a position with Missouri's attorney general, John Danforth, who was later elected to the U.S. Senate. From there Thomas took a position in the Legal Department of the Monsanto Corporation, left two years later to join Senator Danforth's congressional staff, was appointed by President Reagan as assistant secretary for civil rights in the Department of Education, and was later appointed chairman of the Equal Employment Opportunity Commission. In 1984, Thomas divorced his first wife, Kathy, and assumed custody of their son Jamal. Two years later, the future justice met and married his second wife, Virginia Lamp, an influential Republican political operative. In 1990, President George H.W. Bush appointed him to the U.S. Court of Appeals for the D.C. Circuit, and, in 1991, after Justice Thurgood Marshall announced his retirement, Thomas was selected as his successor on the Court.

Upon reaching the Court, Justice Thomas aligned himself with Justice Scalia. In the first 13 cases in which Thomas participated, he and Scalia cast identical votes, and, according to the book's authors, "[d]uring his first thirteen years on the court, Thomas voted with Scalia 92 percent of the time, the highest correlation between any two sitting justices." Although Scalia has more respect for *stare decisis* than Thomas does, both justices purport to adhere to a rigid "originalism" in inter-

preting the Constitution. Concurring in *Morse v. Frederick* last June, in which the Court held that a high school student could be punished for displaying a banner that said “BONG HiTS FOR JESUS,” Thomas argued that, because, “[d]uring the colonial era, ... teachers managed classrooms with an iron hand,” students today are entitled to no freedom of speech in public schools. Sixteen years on the Court have not mellowed Justice Thomas.

Merida and Fletcher consider why Thomas asks so few questions during oral argument. They quote Tom Goldstein, a veteran Court practitioner, who rejects the possibility that Thomas is uncomfortable in engaging advocates or seeks to avoid confrontation. “Whatever it is,” Goldstein opines, “it is something deep.” Thomas has stated on various occasions that he will not interrupt an advocate when he or she is arguing a case, that the other justices ask a sufficient number of questions, and that as a youth he refrained from speaking in groups because he was criticized for his dialect. Thomas broke his silence, however, in *Virginia v. Black* (2003), in which a state statute that banned cross burning was challenged as a violation of freedom of speech. Thomas, urging the state’s attorney to strengthen his argument defending the statute, said, “Aren’t you understating the effects ... of a hundred years of lynching? This was a reign of terror and the cross was a sign of that.” The majority struck down the statute to the extent that it applied to cross burnings that were carried out without an intent to intimidate. Justice Thomas dissented, admonishing the majority that protection of cross burning as a “zone of expression overlooks not only the words of the statute but also reality.” In that case, Justice Thomas seems to have combined his originalism with a degree of historical realism. How long he desists from asking questions remains to be seen. **TFL**

Richard L. Sippel is the chief administrative law judge at the Federal Communications Commission. The views expressed are his alone and not the commission’s. A version of this review will also appear in Conscience, the journal published by Catholics for Free Choice (www.catholicsforchoice.org).

a nongovernmental organization that advocates women’s issues worldwide.

American Religious Democracy: Coming to Terms with the End of Secular Politics

By Bruce Ledewitz

Praeger Publishers, Westport, CT, 2007. 242 pages, \$49.95.

REVIEWED BY DAVID M. ACKERMAN

In a Nov. 2, 2007, op-ed column in the *Washington Post*, Michael Gerson, formerly the chief speechwriter for President George W. Bush, decried as a “danger to democracy” what he said is “the development of one secular party and one religious party” in America. Such a division, he said, “turns nearly every political disagreement into a culture-war conflict” and “adds jet fuel to the normal combustion of American politics.” The solution to this divide, he asserted, is for the Democratic Party to overcome its apparent disdain for religion and begin to reach out to religious voters in religious terms. “No appeal from Democrats,” he said, “will be effective if the deepest beliefs of religious people are viewed as suspect and their strongest principles are declared a threat to tolerance.”

That is essentially the thesis of *American Religious Democracy*, in which Bruce Ledewitz examines the causes and consequences of what he says is the fall of the wall of separation between church and state. But Ledewitz, a professor at Duquesne University School of Law, does not address this subject as a conservative evangelical. Rather, he writes as a “biblical” secularist for the benefit of other secularists. That perspective is what makes this book intriguing.

The re-election of President Bush in 2004, Ledewitz claims, confirmed that the United States has now become a “religious democracy.” By that he means simply that “a substantial number of voters ... now vote the way they do for what they consider to be religious reasons and ... government policy is changing to reflect their religious commitments.” According to Ledewitz, a conservative form of Christianity, not

secularism, has now become the most significant current in American public life (though not the only one), and secularists must now decide how to come to terms with this new political reality.

Secularism, Ledewitz says, achieved “a short-lived cultural dominance in the 1960s and 1970s.” The “secular consensus,” he claims, rested on three pillars. First, the consensus assumed that religion would decline with modernization. Second, it claimed that “religion and religious doctrine could not legitimately serve as a ground of public ... policy.” Third, as a legal matter, a wall of separation needed to exist between church and state. The intended result of the secular consensus, he says, was to be “a public life without religious language and symbolism.” “Government was to be neutral with respect to religion,” and “religion was to be relegated to the personal and, thus, private life.”

Ledewitz maintains that the secular consensus has collapsed or, with respect to the legal wall of separation, is collapsing. Contrary to the secularization thesis, religious faith has not withered away in our modern, well-educated society. Moreover, voters have decisively rejected the notion that religion should be purely private and not find expression in political debate and government policy. Finally, Ledewitz finds that judicial support for the separation of church and state is rapidly waning. “It turns out,” he says, that “there is a necessary religious element embedded in American democracy that the secular consensus overlooked. That religious element could not ultimately be suppressed.”

Indeed, according to Ledewitz, religious themes are inherent in the country’s political structure and life. The assertion in the Declaration of Independence that “all men are created equal” was a principle, he says, that Western democracy learned from the Bible. Similarly, he claims, our system of checks and balances stems from the framers’ “biblical understanding of human sinfulness.” Also of biblical origin (in *Genesis*), Ledewitz asserts, is the deeply ingrained view that the world was made for human use and

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exploitation. Moreover, he says, American exceptionalism—the view that the United States has a special mission in the world—cannot be understood apart from our Judeo-Christian heritage. Even the assumption embodied in the First Amendment that religious belief must not be coerced is, Ledewitz claims, as much a theological assertion as a political one, and these religious underpinnings of our political system meant that secularism was doomed to fail.

Ledewitz rejects the argument that a religious democracy will inevitably foster political division along religious lines or degenerate into a religious tyranny. But he does explore other possible problems—theological, political, and constitutional. The third of these explorations leads him to examine two challenges that constitutional doctrine poses for religious democracy. He describes the first as a “question of truth”; but more simply, it is a question of whether the Constitution is to be construed as a living document whose meaning may change over time or as a text bound in meaning to the time of its origin. “Religious democracy,” Ledewitz observes, currently has “an unholy alliance with conservative constitutional theory,” because evangelical religious voters like the notion that the authors of the Constitution had no intention of creating or protecting the right to abortion. But once *Roe v. Wade* is overturned, he states, the constitutional tables will be turned, and conservative religious voters will want to argue that the Constitution affirmatively protects the fetus. Constitutional originalism and strict construction will no longer suffice. Ledewitz suggests that, at that point, religious democracy will need to develop a new constitutional jurisprudence based on “something like natural law principles.”

The second constitutional challenge facing religious democracy, Ledewitz says, is how to reinterpret the Establishment Clause. If government neutrality is no longer to be the standard, what should replace it? That is a key question for a range of church-state issues, such as public aid to sectarian institutions, religious exercises in the public schools, the teaching of evolution and

creationism, and religious expression by government. Unfortunately, Ledewitz confines himself to a brief discussion of possible reinterpretations of the Establishment Clause and suggests simply that a reinterpretation under any norm will ultimately permit public communal expressions of religious faith.

The last fourth of the book is the most surprising, because it amounts to a sermon to secularists. Ledewitz tells his fellow secularists how to cope with religious democracy and reclaim the political high ground from conservative evangelical voters. That response cannot be just a renewed secularism, he says, because “[s]ecularism has proven too thin a diet to nourish fundamental concerns” and has been “disastrous for progressive political causes.” Instead, he urges secularists to rediscover religion, especially biblical religion. Don’t be trapped by how fundamentalists portray God, or the Bible, or religious faith, he declaims. Become more learned about the varieties of religious faith. Recognize that the Bible is a profoundly political document that is largely supportive of progressive causes.

Indeed, Ledewitz claims that most secularists “are in fact religious in their orientation to reality.” He says that most secularists, if they think about it, do believe that there is order in the universe, that “our lives have a meaningful shape,” that “the world has a tilt in the direction of the good,” that “injustice is knowable and wrong” and has consequences. All these beliefs, he asserts, are essentially biblical and should be recognized as such. Once they are accepted, he predicts that the disdain that secularists and the Democratic Party feel and express about religion can be left behind and the “false dualism” in American political life between religious voters and secular voters can be overcome. Religious democracy, then, will no longer be defined just by conservative evangelical voters but can expand; and a “religious renewal in American political life” may begin to occur.

Ledewitz is clearly excited about the effect biblical secularists might have on American politics. But on the whole this book left this reviewer unsatisfied for several reasons. First, the

phrase “religious democracy” seems both confusing and simplistic. It neither communicates what Ledewitz says it currently means—namely, the influence of conservative evangelicals on our political system—nor can it evolve to comprehend the diversity and pluralism of the various interests, religious and otherwise, that make up our democracy. Second, Ledewitz seems to think that secularism will, and should, eventually, wither away; but that seems as false a premise as the secularization thesis about religion that he criticizes and as insulting to secularists as Ledewitz says secularists have been to religionists. Third, Ledewitz seems entirely too sanguine that a religious democracy will not precipitate fierce division along religious lines. What he overlooks is that those who claim their politics and policies are dictated by God or the Bible necessarily invite attack on the grounds that their God is false or their interpretation of the Bible is profoundly wrong. Ledewitz himself, for instance, claims that his understanding of the Bible is superior to that of conservative evangelicals. Such debates are both appropriate and fascinating in the proper forums, but if they are carried into the political arena, such debates can become destructively passionate, as they have so often in the past (and elsewhere in the world today). Fourth, a book like this needs a longer historical perspective. Issues related to the relationship of church and state have been a continuing part of the American experience since the first Colonies were founded, and it would have been helpful if Ledewitz had compared our present political and religious situation to past instances of apparent religious dominance or, at least, strong influence. Finally, a fuller discussion of where the constitutional law dealing with church and state is heading, or should head, would have been appropriate. Ledewitz says that political realities dictate that the present interpretation of the Establishment Clause has to change. But he offers little guidance about what that interpretation should look like in his religious democracy.

Nonetheless, *American Religious Democracy* is worth reading. There is

increasing ferment both in politics and in progressive religious communities about how to respond to the assertiveness and political domination of conservative evangelicals. Ledewitz has a unique view of the matter and deserves to be heard in that debate. **TFL**

state.

David M. Ackerman recently retired after serving as legislative attorney with the Congressional Research Service at the Library of Congress. Among his legal specialties is the law of church and

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