
BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION

BY CHARLES MURRAY

Reviewed by Jonathan H. Adler*

By the People: Rebuilding Liberty without Permission, starts with a dispiriting premise: “we are at the end of the American project as the founders intended it” (xiii). The federal government has become a true Leviathan, freed from meaningful constitutional restraints and dominated by special interests and a self-interested elite. The legal system has become “lawless” and “Congress and the administrative state have become systematically corrupt” (9). It’s a bracing indictment. Yet all is not lost, for author Charles Murray also believes that we are in a “propitious moment” to, if not reverse course, take steps to preserve “the best qualities of the American project in a new incarnation” (xiii). *By the People* presents a compelling diagnosis and offers a speculative cure.

The fundamental problem, as Murray sees it, is that the growth in the size, scope, cost, and intrusiveness of the federal government is squelching the promise of America for all but a fortunate elite. Even as classical liberal ideas have proliferated in the public square, government has grown to a previously unimaginable size. It’s not merely that the federal budget has increased more than five-fold since 1960 or that the Code of Federal Regulations has grown even faster. Or that, according to the Competitive Enterprise Institute’s latest *Ten-Thousand Commandments* report, the annual costs of federal regulation now top \$1.8 trillion, or nearly \$15,000 for every household in the land. It’s that “federal rules about permissible conduct” touch virtually every aspect of American life, particularly when one accounts for the myriad conditions attached to federal funds (5). Since the 1950s, “the federal government went from nearly invisible in the daily life of ordinary Americans . . . to an omnipresent backdrop today” (7).

With the growth in government has come the erosion of the rule of law. The state’s legal prohibitions are no longer confined to truly bad acts, but extend to all manner of behavior; “so many things have become federal crimes that it is impossible to keep track of them” (33). Your dentist’s office, of all places, is a hotbed of potential violations. Legal defenses remain on the books, but many find legal defense too costly to mount. The tort system and regulatory enforcement routinely bring defendants to their knees, with little regard for actual fault. Those who have done nothing wrong may still find themselves on the wrong side of the law.

Consider the case of the Sacketts, who purchased a small plot of land in 2005 to build a home. In 2007 they were informed by the U.S. Environmental Protection Agency that they had illegally polluted the “waters of the United States” by laying gravel on the site. This was because, in the eyes of the

EPA, the site was a wetland. The EPA presented the Sacketts with a choice: cease all construction, restore the site, and conduct extensive restoration, or else be fined up to \$32,500 each for violating the Clean Water Act and the EPA’s commands.

The Sacketts sought to contest the EPA’s order, maintaining that their property was not a wetland subject to federal regulation, only to be told by the agency and federal courts that they would have to wait until EPA sought to enforce its order, even though the potential fines would continue to accumulate. In 2012 the Supreme Court unanimously rebuked the EPA, but after five years of litigation, all the Sacketts won was the right to challenge the EPA’s actions in court. Had their case not attracted the attention of the Pacific Legal Foundation, the non-profit public interest group that represented them in court, it’s not clear how the Sacketts would even have had their day in court.

The Sacketts’ experience is becoming all too common. Regulatory enforcers know few of the regulated have the courage to fight back, particularly when they know that resistance can be costly. One EPA official was caught on tape suggesting the agency should model its enforcement efforts on the Roman Empire and “crucify” a few regulated firms. After all, as the Romans found, making an example of a select few can make one’s subjects “really easy to manage.”

As more and more power has been concentrated in the nation’s capital, the administrative state has become untethered from any meaningful political accountability. Broad delegations of regulatory authority are compounded by judicial deference to administrative findings and legal interpretations. Influencing the administrative process is beyond the hope of all but the most organized, and well-financed, interest groups and those who can afford to pay for access to policymakers. Larger corporations, for their part, have largely made their peace with this state of affairs, and content themselves with manipulating rules, where possible, for competitive advantage. The result is a gargantuan “government of special interests, by special interests, and for special interests” (254).

This state of affairs was not created overnight, and there is no conventional cure. Those who believe in limited government—those Murray refers to as “Madisonians”—are deluding themselves if they believe that electing Republicans or confirming the right justice to the Supreme Court will save the day. As much as conservatives like to complain about the current Administration’s excesses, the pathologies about which Murray complains did not begin in 2009. Government grew even when Republicans controlled the Capitol and 1600 Pennsylvania, as did the scope of federal power. Supreme Court decisions have drawn the occasional line in the sand, but they have (as yet) done nothing to alter the existing trajectory.

Does this mean things are hopeless? Not to Murray. He believes it is possible to turn the tide through strategic civil disobedience. If enough of those subject to unreasonable regulatory demands resist, he reasons, the government will be unable to take action against them all, and the inanities

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and excesses of the modern regulatory state will be exposed. “[P]our sugar into the government’s gas tank” (153), he urges, and it will become possible for more Americans “to safely ignore large portions of the laws and regulations with which we are burdened” (129).

Resisting the regulatory state comes at great risk, however. The Sacketts benefitted from pro bono legal support from the Pacific Legal Foundation, but they still faced the prospect of substantial fines. Imagine, however, if there were an entity that would not only offer them legal support, but might indemnify them as well, allowing them to go about their work without fear of violating some ticky-tacky government rule.

Enter the Madison Fund, Murray’s idea for a new type of legal defense fund to support those who would resist the excesses of the regulatory state. More than a public interest legal group, the Fund would defend those guilty of violating pointless or excessive rules, publicize their cause, and even to indemnify them for the costs of their resistance.

Eventually, Murray hopes, trade associations might assume a similar role, collecting funds to protect their members from regulatory excess. The American Dental Association (ADA), for example, might offer a form of regulatory insurance to its members, reimbursing fines and covering legal expenses for those members who, despite following applicable ADA guidelines, find themselves subject to regulatory enforcement for failure to comply with every jot and tittle of the hundreds of pages of regulations to which dentists are subject. Such efforts could “make enforcement of certain regulations more trouble than it’s worth” (147).

This is a novel and provocative idea, as Murray himself admits. Such an institution would be overtly subversive, and that’s the point. It’s not enough to make regulatory enforcement more expensive; Murray wants to delegitimize it—at least when regulations are not truly necessary.

Murray’s target is not all regulations. He carefully enumerates those sorts of regulations which should be presumed legitimate, and exempt from systematic civil disobedience (such as the tax code or laws prohibiting violent acts), while also highlighting categories of rules that should be most suspect (such as occupational licensing rules and limitations on non-harmful private land uses). Murray’s goal is to push the government towards a “no harm, no foul” approach to regulatory enforcement.

The categories he draws are imperfect and at times contradictory. For instance, while Murray calls for a presumption against regulations that limit the use of private land, he accepts regulations that aim to control pollution. Yet such regulations may be one and the same. Limitations on wetland development, such as those to which the Sacketts were subject, may prevent a private landowner from building a home, but they may also help control runoff and nonpoint source pollution.

Many absurd-seeming regulations are adopted for bad reasons, such as suppressing competition or chasing phantom risks, but just as many if not more were responses to perceived needs, even if only a media-driven panic over a miniscule risk or freak accident. Many restrictions on seemingly harmless behavior were adopted to address the outliers. It may be absurd to regulate dental offices like factory floors, but what happens

when a patient is poisoned or contracts a contagious disease from unclean instruments? In today’s culture, that’s sufficient to revive the regulatory demands. Highlighting the absurdities that result from such rules can help, but there must ultimately be a more principled and foundational attack on the premises of the regulatory state.

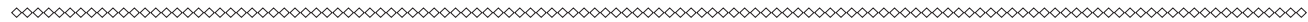
Murray is certainly correct that ridicule and exposure are powerful weapons against an overweening state. It can be just as important to try a case in the court of public opinion as in the court of law. As innovative liberty-oriented public interest groups such as the Institute for Justice have shown, litigation creates a platform upon which a public case can be made. A court case can transform an ordinary regulatory dispute into a newsworthy event. Forcing the government to defend its policies can lay the absurdities bare, particularly if there is a sympathetic client. As property rights activists showed in the 1990s, exposing the absurdity of much federal regulation can catalyze political support for reform.

Murray hopes his strategy would pressure the courts to adjust their posture toward the administrative state and curb deference to agency determinations. This is a worthy aim, but also a larger endeavor than Murray seems to appreciate. I share Murray’s belief that “The premises of the regulatory state are wrong” (176), but many of these premises are embedded into federal statutes, not to mention decades of jurisprudence. Murray may have identified a useful tactic, but it will take more than a Madison Fund—or even a dozen such funds—to dislodge the foundations of the contemporary regulatory state.

Murray is, as noted, something of an optimist, and he believes the time is right for an audacious effort of the sort he describes. As he sees it “the stars are in fact aligning for a much broader rebuilding of liberty than we could have imagined a decade ago” (189). Technological innovations have eroded the state’s ability to constrict key industries. Government efforts may be well intentioned, but the sclerotic operation of most agencies, particularly those at the federal level, compares unfavorably with the relative efficiency and responsiveness of a technologically enabled private sector. At the same time, subcultures have proliferated that want little more than to be left alone to pursue their own zen, and portions of the business community may be waking up to the true consequences of the modern regulatory state. All this, Murray suggests, has created a propitious moment to act. It’s a hopeful claim, but obviously one that can only be evaluated in hindsight.

Murray’s book is self-consciously aimed at a Madisonian audience. He makes no effort to convert liberals or progressives to his cause. But the sort of transformation he urges will necessarily require expanding the constituency for reform beyond the Madisonian cadre. It’s not enough to point out silly things that result when government overreaches. Alternative ways to satisfy the contemporary demands for safety and security must also be explicated. Building a coalition for reform requires compromise too, and to that end, Murray suggests those on the right should make their peace with the welfare state and embrace a more federalist approach to divisive cultural issues. There are only so many battles to fight at any one time.

By the People provides an excellent, compact indictment of the modern regulatory state, even if Murray has not, in



fact, alighted on a silver bullet. Murray's plan of action may be audacious, but it may still be worth a try. Madisonians of the nation resist; you have nothing to lose but your chains.

