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Weapon of
the Strong?
Participatory
Inequality and
the Internet

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and Henry E. Brady*



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some instances before the 1900s). His aim is to demonstrate that “[r]ealism about judging was commonplace before realists came on the scene” (p. 67). By collecting various quotations from realists acknowledging the importance of legal factors in judging, Tamanaha also attempts to discredit a “common misapprehension about the realists . . . that they were radical skeptics about judging” (p. 68).

Fully acknowledging the strength of such evidence, even if it is true that judges and law professors were talking about the influence of ideology and/or personal factors prior to the 1930s, should the thinkers we characterize as “legal realists” not get some credit for pulling these ideas together and thinking systematically about the implications of external influences in judging for legal education and the legitimacy of judicial outcomes? Moreover, a difficulty with the presentation of historical evidence of this sort is that many of the quotations the author invokes are out of context (not Tamanaha’s fault—it would be impossible to present the impressive volume of testimonial evidence he does without this being the case). Still, isolated acknowledgments that external considerations and/or the law itself matters in judging *says nothing about the relative importance* that legal thinkers placed on these considerations in decision making. According to Tamanaha, *anyone* who *at any time* acknowledged the importance of law and external factors in judging is a “balanced realist.” By this definition (and by his own admission), Justice Antonin Scalia is a balanced realist, but so is Judge Richard Posner (p. 196). Clearly, these jurists have very different approaches to interpretation that are swallowed up by this all-encompassing category.

Tamanaha alludes to this, noting that “balanced realism will not resolve . . . any of these differences” (p. 197). Still, he argues, “a recognition of balanced realism promises a change for the better. . . . With these extreme positions set aside, the grounds of real normative and empirical disagreement will be more apparent and the discussion more focused and productive” (p. 197). Here, the author seems to be referring to the fact that political science scholars doing empirical work incorrectly view themselves as progeny of the legal realists. According to Tamanaha, most realists were “balanced” in their approach to legal interpretation. Law was the starting point, personal factors mattered at the margins. Empirical political scientists, on the other hand, are “slanted” (pp. 111, 115, 118, 121, 122) in their approach to studying judicial behavior, agenda-driven, and out to show that judges are politically motivated (pp. 120–121). This part of Tamanaha’s argument is sure to catch the interest of many political scientists, and I will leave it to them to evaluate its merits. I would just like to note that it is ironic that an author who starts off with such a nuanced view of the development of ideas in his own discipline characterizes scholars in a distinct discipline so monolithically. I think that the sharpness of his

tone takes away from his general argument. Moreover, his statement that “until the last decade, researchers did not test directly for adherence to precedent or other legal factors” (p. 233 n. 54) ignores some important empirical research, including “case fact” studies of search and seizure and obscenity cases done in the middle to late 1980s. Indeed, I am guessing that if we applied the same criteria to political science scholars as Tamanaha does to judges and legal academics (i.e., simply acknowledging that law and politics matter at some point in their careers), most political scientists—including some of the most ardent attitudinalists—would qualify as “balanced realists.”

More importantly, at base, Tamanaha’s argument suffers from the same difficulty as Powell’s. Even if judges are aware, and have long been aware, of the role of personal factors in their decision making, and even if that influence is implicit in the task (as Powell argues) or incidental rather than strategic (as evidence presented by Brenner and Whitmeyer tends to demonstrate), simply noting this does not address the problem that intersubjectivity poses for judicial legitimacy.

The reason we abide the substantial influence of unelected jurists in our democratic system is because they are experts in law. The task of legal interpretation is supposed to shape, guide, and *constrain* judges’ decisions. To the extent it does not, we as a society will have to come up with a better justification about why *their* personal conception of what is good or right for society should govern where reasonable contestation exists *other than the very fact that they are judges*. Simply stated, the arguments provided by these authors do not adequately address the critique that has been implicit, if not explicit, in empirical studies for years. No amount of virtue or self-awareness on the part of legal decision makers can change this fact. That is not to say that these books do not provide us with a better understanding of what judges do and how they think about their task. They certainly do. But given these realities, it is time for legal theorists and/or political scientists to suggest a different way of selecting judges that legitimates these influences or a better theory of judicial authority to justify them.

After the Tax Revolt: California’s Proposition 13 Turns Thirty. Edited by Jack Citrin and Isaac William Martin. Berkeley, CA: Berkeley Public Policy Press, 2009. 169p. \$24.95.

The Permanent Tax Revolt: How the Property Tax Transformed American Politics. By Isaac William Martin. Stanford: Stanford University Press, 2008. 264p. \$55.00 cloth, \$21.95 paper.
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— Sheldon D. Pollack, *University of Delaware*

In what has become an annual ritual, the California legislature struggles to pass a budget in the face of soaring deficits. The legislature and the governor spar over where to make the obligatory cuts in public spending. And each

year, the deficits, fiscal crisis, and political drama all worsen. The current economic recession has exacerbated the revenue shortfalls, with government at all levels affected. To be sure, this is a national trend, but problems in the Golden State are exacerbated as Californians confront the institutional legacy of a constitutional amendment, ratified more than 30 years ago in a statewide initiative, that fundamentally altered the “rules of the game” for the state’s system of public finance. On June 6, 1978, California voters approved Proposition 13, which transformed the property tax by basing it on the *acquisition* value of property as opposed to its *market* value. The amendment limited annual property tax increases to 2% and imposed stringent requirements for a two-thirds majority in both houses of the legislature for new tax increases. A comparable measure restricted local government.

The most immediate consequence of Proposition 13 was a sharp reduction in revenue from the property tax—almost \$7 billion a year. But it took years for the political repercussions to be fully felt and comprehended. Even now, more than three decades later, there remains considerable disagreement among scholars as to the origins of the tax revolt and its long-term effect on politics and public finance, both in California and nationally. With this in mind, two new books would reevaluate Proposition 13 on its 30-year anniversary. The first is a collection of essays, *After the Tax Revolt*, edited by Jack Citrin and Isaac William Martin. Citrin was the coauthor (with David O. Sears) of the definitive study of the vote and attitudes behind Proposition 13, *Tax Revolt: Something for Nothing in California* (1982), and his introduction to this short volume provides a useful overview of the fiscal consequences of the California tax revolt: a shrinking of the share of state tax revenue derived from property taxation, a long-term shift of the tax burden to the state sales tax and personal income tax (following an initial reduction in the income tax in the face of an “embarrassingly large” surplus of \$11 billion), and perennial deficits as the gap between public revenue and expenditures continues to widen. But one thing did not happen: Big Government did not shrink in California. As Citrin observes in the edited volume, “Proposition 13 may have slowed the dreadnought of government spending but certainly has not reduced the overall size of government” (p. 7).

If Proposition 13 purposefully restructured California’s system of public finance, not every consequence was intended. Most notably, political power shifted from local government to the state as control over property taxation was centralized. This “transfer of power to Sacramento” and the corresponding “reduction in local fiscal autonomy” is ably recounted in Kirk J. Stark’s essay, “Proposition 13 as Fiscal Federalism Reform” (p. 155). The impact of Proposition 13 on the state’s “fiscal constitution” is further delineated in a contribution from David Gamage. Elsewhere, Terri A. Sexton explores the economic

effects of the new property tax regime. Sexton elucidates the “lock-in” effect” for residential housing that resulted from Proposition 13, as property taxation was switched from a market base to an acquisition base. Because of this, homeowners face significant property tax increases if they move—even if buying a replacement home of equal value. This creates a disincentive to mobility, which results in an inefficient allocation of economic resources. Other economic consequences of Proposition 13 are considered in Steven M. Sheffrin’s essay, “Rethinking the Fairness of Proposition 13.”

What triggered the tax revolt in California in 1978? The conventional wisdom is that Proposition 13 expressed a conservative backlash against higher taxes and an expanding social welfare state in the postwar era. In *The Permanent Tax Revolt*, Isaac William Martin challenges this interpretation and offers an intriguing alternative. Like Sears and Citrin, Martin traces the origins of the California tax revolt to the passage of reform legislation by the state legislature in 1967. The legislation, known as A.B. 80, was a response to investigations that revealed widespread abusive practices whereby locally elected tax assessors routinely accepted bribes (often disguised as “campaign contributions”) in exchange for holding down property assessments for favored taxpayers. Under the reform measures implemented by A.B. 80, qualifications for assessors were raised, regular assessments were required, and the tax base was fixed at 25% of the market value of real estate. According to Martin, this modernization and reform of the property tax system is what prompted the backlash of Proposition 13.

Martin’s argument is that under the long-standing system of property taxation as it evolved over decades, homeowners enjoyed an “informal tax privilege” as local assessors sheltered them from rising property values. Under the traditional system, assessors used their discretion to reward “favored constituencies” with below-market assessments. Often this was the quid pro quo for political favors, but it also was done to shelter elderly homeowners on fixed incomes from increased assessments and higher property taxes. This informal system of “fractional assessments,” which doled out tax breaks to the politically connected and, at the same time, implemented a “kind of hidden social policy,” was undone by the reform efforts targeted at the corruption of local property assessors. Opposition from assessors and local government had blocked all prior efforts to modernize the system of property assessment, but pressure from the judiciary and the publicity generated by the investigations into corrupt practices by assessors suddenly bore fruit in the 1970s. California got reform and a “modern” system of property assessment. The result? A tax revolt that undermined the fiscal constitution of California.

Martin links the property tax revolt to the *withdrawal* of the informal tax privilege bestowed upon homeowners

by local assessors for decades. The abolition of this privilege, and not rising taxes or government spending, triggered the California tax revolt. As Martin puts it, “state officials caused the tax revolt by doing away with informal tax privileges, and people fought to restore those privileges because they provided a kind of social protection from the market” (p. 5). In pegging the property tax to market values, legislators eliminated the special treatment that the politically connected and elderly had come to expect, thereby exposing them to higher taxes. This created a constituency for rebellion. Ironically, as the antitax movement gathered steam, activists from *both* the Right and the Left took aim against the property tax. Those on the Right (such as Howard Jarvis, soon to emerge as the leader of the movement) denounced the property tax as punishment against the thrifty who owned their own homes, while activists on the Left denounced the property tax as regressive and supporting a system of public finance that condemned poor communities (those with lower property values and, hence, lower revenue from property taxation) to substandard public services—in particular, inferior public schools. Both factions saw the property tax as disproportionately hurting the elderly. In the end, the antitax social movement was appropriated by the Right, but it is important to remember that the referendum on Proposition 13 had broad popular appeal across the political spectrum, with 65% of voters approving the constitutional amendment. Today, polls show that among Californians, it remains highly popular—if not fully understood.

Whether the tax revolt in California affected fiscal policies outside the state is another matter. After 1978, opponents of property taxation and rising state budgets organized in Michigan, New York, and Massachusetts—all states with high property taxes. Arguably, similar conditions (e.g., rising property values, double-digit inflation, and high property taxation) triggered indigenous revolts in these states. But the California tax revolt influenced events beyond its borders as antitax activists across the nation were emboldened and encouraged by the success of the Proposition 13 movement. Martin examines the tax revolts in these states, as well as tax rebellions in France, the United Kingdom, and Denmark, where events played out differently under different political conditions. Indeed, these are such dissimilar cases that it is difficult to draw meaningful connections between events in California and Europe. The more fruitful comparison is between the California antitax revolt and those elsewhere in the United States.

It can be argued that the vote for Proposition 13 had an impact on national politics as well, although the connection is tenuous. Martin himself concludes that “there is no evidence that the tax revolt changed the fundamental beliefs of the American public” (p. 142). At first glance, this seems to contradict the underlying premise of his book, subtitled *How the Property Tax Transformed American Politics*. I think what Martin means to say is that the course

of American politics was changed by events in California, even if deeply held political beliefs were not. After 1978, the faithful of the Republican Party became even more firmly wedded to an antitax rhetoric, placing tax cuts, as Martin puts it, “permanently on the partisan agenda.” But one must be careful in drawing a line directly from the California tax revolt to the GOP’s unrelenting campaign to cut marginal tax rates. Ronald Reagan (and George W. Bush after him) devoted considerable political capital to cutting marginal rates for the federal income tax, but this was nothing new in the Republican Party. Conservative Republicans have always had a strong aversion to income taxation, opposing the first national income tax enacted in 1862 during the Civil War, as well as populist attempts to resurrect it in 1894. Republican administrations aggressively pursued tax cuts during the 1920s, and following World War II, the Republican-controlled Eightieth Congress enacted tax-reduction legislation over repeated vetoes by Harry Truman. In recent decades, the antitax posture of the Republican Party has reflected the narrow economic interests of its pro-business base, while Proposition 13 was more of a grassroots populist campaign.

That said, these are overlapping political movements to a great extent. On the basis of their demographic analysis of support for Proposition 13, Sears and Citrin characterized the movement as a “revolt of the haves” (p. 140). The virtue of Isaac William Martin’s book lies in locating the origins of the political movement that rocked California more than 30 years ago.

Defiant Dads: Fathers’ Rights Activists in America.

By Jocelyn Elise Crowley. Ithaca: Cornell University Press, 2008.

320p. \$27.95.

doi:10.1017/S1537592710000885

— Mary Fainsod Katzenstein, *Cornell University*

Exactly as its title states, this is a very engaging study about “defiant dads” and “fathers’ rights activists in America.” But, it is also a book that deserves to have a much wider readership than might be drawn to it by its title and focus on activist fathers’ groups. Indeed, one important part of this work’s appeal is in the rich tapestry it weaves, simply as backdrop, describing the radical changes and striking continuities in family and gender structure in America. Consider this: in 2004, more than one out of every three births was to an unmarried woman, up from four percent in 1950; in the same period, women’s labor force participation doubled from 30% to 60%; and, over the same decades, the gender pay gap rose from under 60% to over 75%. These data signify massive cross-class changes in the social structure of American society that have precipitated government involvement in the family, poor and non-poor alike. Indeed, of the nearly 16 million families that constitute the caseload handled under federal child support enforcement, only 2.5 million were families