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Book Review. Einhorn, Robin L., American Taxation, American Slavery

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to *M'Culloch*'s opponents. Second, the analysis of the congressional debates in 1811 (on the failure of the First Bank’s charter) and 1816 (on the creation of the Second Bank) adds important context to the much better known clash between Hamilton and Jefferson over the First Bank’s charter. Third, the book offers a much-needed review of the oral arguments in the case, which lasted for nine days and included such luminaries as Daniel Webster and Luther Martin. Since Marshall issued his opinion just three days after these arguments ended, Killenbeck probably gives them more attention than the Chief Justice did.

The book’s chief weakness is that the author does not explain why *M'Culloch* became a great case. This is particularly important because, as Killenbeck acknowledges towards the end, Jackson destroyed the Second Bank and his political allies rejected Marshall’s reasoning. In a few hurried pages, the last chapter argues that the *Legal Tender Cases*, decided after the Civil War, “made it quite clear that *M'Culloch* was the guiding spirit for what followed” and that “Jackson’s efforts to repudiate or minimize *M'Culloch* had failed” (179, 181). This is true to a certain extent, but that begs the question of why *M'Culloch* is lionized while the *Legal Tender Cases* are now neglected if they did the real work. Moreover, even after the paper money cases were decided the Court did not adopt the broad reading of *M'Culloch* that is now accepted as gospel. The missing link is the New Deal, which needed to find precedents for its transformation of the federal role and found one in a selective reading of Marshall's opinion. Rather than writing a ten-page epilogue on James *M'Culloch*, the named party in the case who was a colorful character but largely irrelevant, the author would have done better by exploring the decision’s canonical status in greater depth.

In sum, this is a fine work that brings every thread of *M'Culloch v. Maryland* into a single volume. As an example of legal argument that combines politics, structural analysis, precedent, and pragmatic considerations, the debate over the Bank of the United States should be part of every constitutional law curriculum.

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“The anti-government rhetoric that continues to saturate our political life is rooted in slavery rather than liberty,” argues Robin Einhorn. “The American mistrust of government is not part of our democratic heritage. It comes from slaveholding elites who had no experience with democratic government where they lived and knew only one thing about democracy: that it threatened slavery” (6–7). Einhorn comes to this conclusion through a brilliant account of the historical links between slavery, democracy, and taxation. Just as she used fiscal history in her fascinating first book (*Property Rules*) to excavate the surprising political economy of mid-nineteenth-century Chicago, Einhorn has once again turned to taxation “to focus
in on when, where, and with what kinds of results democratic governments existed in the early United States"(8).

What she has uncovered is sure to spur new scholarly discussions about the pervasiveness and implications of American slavery. Legal historians have long recognized the influence of slavery. Yet, in employing a “neo-institutionalist” perspective, Einhorn goes deeper and further in illustrating just how slavery was imbricated within the initial design, early development, and everyday operations of American governance. Stretching from the colonial era to the Civil War, American Taxation, American Slavery chronicles how the self-interest of Southern slaveholders determined colonial fiscal systems, the framing of the U.S. Constitution, and the development of state constitutional limits on the taxing powers. With prodigious research into primary and secondary sources, Einhorn’s masterful narrative challenges the conventional Jeffersonian story about the Southern yeoman origins of American liberty and anti-statism.

Einhorn’s tale has three parts. She begins with a comparative analysis of colonial tax regimes in the North and South, using Massachusetts and Virginia as her primary case studies. Whereas Massachusetts relied on its long tradition of self-government and robust local democracy to levy a complex mix of sophisticatedly administered poll and property taxes, Virginia and its oligarchic county courts turned instead to an easily administered “tithable poll tax” that did little to challenge the slaveholding elites’ “culture of sovereign mastership.”(82). The fiscal needs of the Revolutionary War exposed this stark sectional distinction, providing further credence to Einhorn’s claim that “tax structures were more sophisticated in the colonies (and states) where local governments were more democratic and where slavery was rare” (82).

Part II turns to national tax politics from the Revolutionary era to the early 1800s. Unlike previous accounts that have focused on the Founders’ personalities or the battles of contending ideologies, Einhorn explores the debates over taxation and representation to show how a country that was “half free and half slave” struggled to finance wars, build a centralized nation-state, and imbue meaning into ambiguous constitutional provisions. National political leaders found that nearly any debate about taxation “hinged explicitly on the implications of the sectional geography of American slavery” (115). Seeking to dodge the contentious issue of how slavery ought to be treated for tax purposes, lawmakers drifted toward the use of customs duties to finance the new nation. The national tax structure that emerged in the early republic was thus a result of “decisions about how to avoid talking about slavery” (111). Silence, Einhorn shows, can speak volumes.

The final section returns to the subnational story to explain sectional differences and to analyze the novel development and anti-democratic consequences of state constitutional “uniformity” clauses. Einhorn persuasively demonstrates how these constitutional provisions originated in the early 1800s as part of a Southern political compromise between nonslaveholding yeoman clamoring for greater political representation and slaveholding planters who sought “security” for their peculiar institution. Uniformity clauses ensured that newly “democratized legislatures taxed slaves at the same rate as other forms of property—such as the land and livestock
of the yeoman" (203–4). Gradually, these constitutional restrictions were adopted by Midwest states as a means to distribute tax burdens more equitably.

But what began as a tool for tax fairness, Einhorn argues, was subsequently transformed by “activist judges” into a shield for northern elites (245). By stringently interpreting uniformity clauses, courts prevented the aggressive assessment of corporate property and consequently invalided attempts at more direct and progressive taxes. The framers of Midwest constitutions, Einhorn contends, failed to realize the anti-majoritarian potential of these legal restraints. Thus a constitutional restriction intended to protect slavery morphed into a protection of elites’ property rights, at least until the early twentieth century when a new set of state constitutional revisions “freed the legislatures from the stranglehold of the state supreme courts” (248).

Some might disagree with Einhorn’s characterization that Midwestern constitution writers “misunderstood” the implications of uniform taxation. As practical policymakers, searching for ways to correct the fiscal failures of the moment, these lawmakers were attempting to ensure that all citizens bore their fair share of the tax burden. Their inability to achieve that goal over time may have as much to do with unintended consequences as with their own misunderstandings about the origins of the uniformity clauses.

American Taxation, American Slavery is a book that needs to be read by those who continue to subscribe to the resilient Jeffersonian myth that liberty and democracy require weak government.

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On the night of March 10, 1854, Joshua Glover, residing peacefully near Racine, Wisconsin, was arrested by U.S. marshals pursuant to the Fugitive Slave Act of 1850, under a certificate granted to Benammi Garland of Missouri, his putative owner. Glover was taken under cover of darkness to Milwaukee and detained in the county jail. What set this case apart from all others was not that Glover was quickly emancipated from federal custody by popular fiat and the breaking of a door, nor that the leaders of the rescue were prosecuted and convicted. All this had happened before. What set it apart was that the Wisconsin Supreme Court intervened in the criminal proceedings against antislavery journalist Sherman M. Booth and freed him by declaring the Fugitive Slave Act unconstitutional.

American antislavery had never lacked for distinguished legal theorists and tacticians, but H. Robert Baker persuasively suggests that to the better known names of William Jay, Robert Rantoul, Jr., Lysander Spooner, and Salmon P. Chase should be added the name of Byron Paine, attorney for Booth. Paine argued that the Fugitive Slave Law, in denying the writ of habeas corpus and the right of trial by jury, abridged