

How the Government Breaks the Law

by Andrew P. Napolitano

It should be against the law to break the law. Unfortunately, it is not. In early 21st-century America, a dirty little secret still exists among public officials, politicians, judges, prosecutors, and the police. The government—federal, state, and local—is not bound to obey its own laws. I know this sounds crazy, but too many cases prove it true. It should be a matter of grave concern for every American who prizes personal liberty.

When I became a judge in New Jersey, I had impeccable conservative Republican law-and-order credentials. When I left eight years later, I was a born-again individualist, after witnessing first-hand how the criminal justice system works to subvert and shred the Constitution. You think you've got rights that are guaranteed? Well, think again.

Eternal vigilance is the price of liberty, particularly when it comes to the American criminal justice system. Nowhere else does the state have greater raw power over an individual's life, liberty, and property. And nowhere else are our constitutionally guaranteed rights and freedoms under such a relentless, subtle, and ultimately devastating attack.

The deck is grossly stacked in the government's favor. No wonder, as a recent *New York* magazine cover story put it, referring to the government's long winning streaks in criminal trials, "The Defense Rests—Permanently." No wonder that in 2003 fewer than 3 percent of federal indictments were tried; virtually all the rest of those charged pled guilty.

Being an American means having certain rights and liberties guaranteed by

Andrew P. Napolitano, senior judicial analyst for Fox News Channel, is the youngest life-tenured judge in the history of New Jersey. He is the author of Constitutional Chaos: What Happens When the Government Breaks Its Own Laws, on which this article is based.



Judge Andrew P. Napolitano, Fox News judicial analyst, discusses the Supreme Court's record on civil liberties at the annual Constitution Day conference of Cato's Center for Constitutional Studies on September 17. Federal Election Commission chairman Brad Smith and Judge Royce Lamberth listen.

the Constitution and the Bill of Rights. That's what it has always meant, and that's what it will continue to mean in the troubled times before us.

Most of us take these guaranteed rights and liberties for granted. Most of us live comfortable lives that never bring us in conflict with the criminal justice system. But in many ways, that's a bad thing, for if you had seen the system as I did, you would never take your guaranteed rights for granted again.

Breaking the Law to Enforce the Law

As a judge, I once heard an infuriating case involving the owner of a small Italian restaurant, an immigrant from Italy who was visited by two well-dressed gentlemen who introduced themselves and asked for weekly payments of a hundred dollars. In return, they promised the restaurant owner that his garbage would be collected on time, he would not have any trouble with labor unions, he would not be the victim of any crime, and no competing restaurant

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Toward the Ownership Society



Few organizations that support dynamic market capitalism and individual liberty were more critical of the policies and practices of George W. Bush's first term than was the Cato Institute. Our commitment has always been to the ideals of a free society, not to any political party. So when the administration imposed punishing tariffs on steel imports, our Center for Trade Policy Studies spoke out vociferously in opposition, as they did with the administration's support for so-called anti-dumping laws.

During this four-year administration, spending skyrocketed nearly 30 percent—more than half a trillion dollars. Again, our fiscal policy studies department documented and criticized this fiscal profligacy. As the *Washington Times* wrote, “If you want to know the full extent of waste in Washington, get a copy of an eye-opening new report from the Cato Institute, titled ‘Downsizing the Federal Government.’”

And when the Justice Department supported the administration's claim that the president of the United States has the authority to strip an American of his citizenship rights (to an attorney, to due process of law, and more) Cato filed an amicus brief with the Supreme Court on behalf of Jose Padilla. Not because we have any affection for Padilla (believe me, we don't), but because we do care about the rights of all Americans. The Supreme Court, by the way, agreed with us.

On military affairs, Cato was one of the first organizations in the wake of 9/11 to call for U.S. intervention in Afghanistan to eliminate the Taliban and Al Qaeda threat to our national security. But when the administration talked about war in Iraq, we questioned the wisdom of diverting resources from the pursuit of Al Qaeda. As the *New Republic* wrote, “Cato was one of the first think tanks to warn that the lack of postwar planning” would make the reconstruction effort exceedingly difficult, as it has proven to be. In that regard, the replacement of Secretary of State Colin Powell with Condoleezza Rice is not very encouraging.

So, why am I so enthusiastic about the prospects of a second Bush administration? Primarily because of its domestic agenda. To begin with, the influence of Big Government neoconservatives in the administration has been greatly diminished, not only because of their wildly off-the-mark predictions about Iraq, but also because their support for big domestic spending programs has led to unacceptably high deficits. Plus, Attorney General John Ashcroft, whose personal views seemed more influential in the Justice Department than was the Constitution, will be replaced by Alberto Gonzales, who was often at odds with Ashcroft's apparent disdain for civil liberties.

Now it appears President Bush is going to concentrate on a domestic agenda that his campaign dubbed the “Ownership Society.” Unlike New Deal, Fair Deal, or Great Society, Ownership Society means something—something very important. It means control over our own lives, which is the essence of a free society. This domestic agenda includes Social Security privatization, fundamental tax reform, and judicial reform. We have, as readers of *Cato Policy Report* well know, long advocated all three initiatives. The administration has even talked about, for the first time, getting control of domestic spending, something Cato scholars will be more than happy to help them with.

We also are in a unique position, by virtue of being so steadfastly nonpartisan, to work with Democrats as well as the administration to see that these and other opportunities to roll back federal intrusion into civil society become a reality. This is going to be especially important with Social Security reform, something that must be promoted in a bipartisan manner if it is to succeed. Two of the rising stars in the Democratic Party are Rep. Harold Ford and Sen.-elect Barack Obama, both of whom have expressed an openness to the idea of personal

accounts. They could be a Nixon-to-China phenomenon with Social Security that could change American history.

Noting that the Bush administration was going to propose Social Security privatization, *Time* magazine wrote after the election that Social Security privatization was a dormant idea until “Ronald Reagan ignited a Republican revolution and the recently formed libertarian think tank the Cato Institute latched onto personal accounts as a free-market fix.” That was in reference to Cato's 25-year history of promoting the idea. *Time* noted José Piñera's meeting with President Bush to discuss the idea, and called Cato Project on Social Security Choice director Mike Tanner “one

of the architects of the private account movement.”

There is also growing support across the political spectrum for serious simplification of the 40,000-page IRS code. If liberals think there are too many lobbyists in Washington (and there certainly are), they should help pass a flat tax, sit back, and watch thousands of lobbyists pack their bags and leave Gucci Gulch. Very often a single sentence in the tax code means a very comfortable life for a lobbyist. Likewise, conservatives have got to get over their fascination with the social engineering that comes from tax credits (I know, Cato scholars support tuition tax credits, but not at the federal level).

Whether or not you consider President Bush to have a “mandate” (and it is a bit of a stretch to call 51 percent such a thing), this is an opportunity for some positive reform of American domestic policy. The Cato Institute will be doing everything in its power to help make that happen.

—Edward H. Crane

“Ownership Society’ means something. It means control over our own lives, which is the essence of a free society.”

Cato publishes third annual Supreme Court Review

The Supreme Court's "Impressionist" Year

Liberty and judicial clarity took a beating in the Supreme Court last term, as the high court handed down a series of decisions that George Washington University law professor Jonathan Turley characterizes as "judicial impressionism." Like the impressionistic paintings you might find in a freshman art class, he writes in this year's edition of the *Cato Supreme Court Review*, this year's major decisions eschew bright lines and clear precedents in favor of vague,

multifaceted opinions that look different to each interpreter. Although that allows the Court to sidestep tough calls and gives them ample flexibility in deciding subsequent cases, it exacts a toll on the rule of law, which demands clear and predictable precedents so that all parties know how the law will be applied. As Vice President for Legal Affairs Roger Pilon wrote of the Court's pair of affirmative action cases, "If a cardinal purpose of law is to give notice about what is permitted and prohibited, we are without law on this matter."

For the third year in a row, the *Review* was published on Constitution Day, September 17. Its publication was kicked off by a daylong conference, at which leading constitutional scholars examined the just-completed term and previewed the most important cases in the upcoming term. Probably the most anticipated decision last term was *McConnell v. FEC*, in which the Court upheld the controversial McCain-Feingold campaign finance reform law. FEC chairman Bradley Smith blasted the decision, which he said gives Congress wide latitude to restrict political speech, traditionally a core First Amendment value. He predicted that the current legal confusion



Richard Epstein of the University of Chicago Law School delivers the annual B. Kenneth Simon Lecture.

will only get worse, as more independent groups find ever more inventive ways to skirt the law, and political candidates use the law as a club to prevent independent groups from criticizing them.

Judge Andrew Napolitano, a judicial analyst for Fox News, criticized the Court

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Judge Douglas H. Ginsburg, Neal Katyal of Georgetown University Law Center, and Jonathan Turley of the George Washington University Law School discuss the Supreme Court's record on executive war powers at Cato's annual Constitution Day conference.

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Tom McClintock and Penn Jillette team up in Los Angeles

Forums on Terrorism, Health Care, Trade

◆**August 19:** The contours of the bitter debate over affirmative action have changed little since the term entered the American political vocabulary in the 1960s. At a Cato Policy Forum, “Affirmative Action after Michigan,” policy analyst Marie Gryphon highlighted a new study that could change the terms of the debate. The study found that when truly comparable students are compared, attendance at Ivy League institutions does not appear to raise wages relative to attendance at less prestigious schools. On the other hand, Gryphon argued, students admitted under affirmative action programs drop out of elite schools at alarming rates. Tanya Clay of People for the American Way argued that elite schools should judge applicants on the basis

of a full range of characteristics and that an admissions policy based solely on grades and test scores lacks nuance. Harry Holzer of Georgetown University argued that elite universities produce the next generation of leaders, and that both universities and the businesses that hire their graduates benefit from a diverse Ivy League student body. Douglas Besharov of the University of Maryland argued that the affirmative action debate distracts attention from more important issues. Reforming student aid to focus on disadvantaged students would have a much bigger impact on improving the lot of minority students, he said.

◆**August 26:** The Supreme Court’s *Blakely v. Washington* decision has cast a legal cloud over the regime of sentencing guidelines that has governed federal criminal sentences since 1984. At a Cato Policy Forum, “Blakely’s Wake: Should the Federal Sentencing Guidelines Be Saved or Scrapped?” law professor Erik Luna of the University of Utah expressed hope that the decision would spur an overhaul of the guidelines, which he argued are a threat to civil liberties and violate the Constitution. Jack Kress, an architect of the current system, disagreed. He stressed that the guidelines were put in place to check the unbridled discretion of judges in determining sentences. While some reforms are welcome, he acknowledged, it would be wrong to abandon a system that, on the whole, effectively checks the unbridled discretion of judges in determining sentences. Daniel J. Bryant,

assistant attorney general for legal policy, agreed with Kress and stressed the importance of remaining true to the principles of the 1984 sentencing reform. William Young, chief judge of the U.S. District Court of Massachusetts, emphasized the importance of the jury system, and hailed *Blakely* for reiterating the primacy of jury decisions in the American judicial system.

◆**September 8:** A panel of experts reviewed the progress the United States has made in dismantling global terrorist networks at a Cato Policy Forum, “The War on Terrorism: A Progress Report.” Roger Cressey, former director for transnational threats at the National Security Council, criticized the president’s decision to launch a war in Iraq before the crucial work of stabilizing Afghanistan had been completed. The war, he claimed, has actually made America less safe from terrorists by transforming Iraq into a major source of terrorist recruits. Peter Bergen, author of *Holy War, Inc.: Inside the Secret World of Osama bin Laden*, argued that bin Laden remains the focal point of Al Qaeda and lamented that his trail appears to have grown cold. Bin Laden’s decades of battling the Soviets and hiding in the desert will make him exceptionally difficult to catch, Cressey warned. Walid Phares, author of *The Iranian Khumanist Islamic Revolution*, stressed the cultural gulf between the United States and the Islamic world. Islamist radicals, he said, believe that their resistance in Afghanistan triggered the collapse of the Soviet Union, and many of them believe they can do the same thing to American troops in Iraq. Cato’s Chuck Peña warned that it will never be possible to build a perfect defense against terrorism and urged American officials to remain focused on the most pressing terrorist threats.

◆**September 14:** At a Cato City Seminar in Los Angeles, California, Senator Tom McClintock discussed the ongoing California fiscal crisis and laid out a detailed plan to get the state back on the road to fiscal stability. On a panel titled “The New Censorship Wave: How Real Is the Threat to Freedom of Speech and Expression?” Cato adjunct scholar Robert Corn-Revere warned that the latest congressional and regulatory attempts



Piotr Kaznacheev, an economic adviser in Russian president Vladimir Putin’s office, tells Cato University attendees that bananas were so rare under communism that they became a symbol of freedom after the end of the Soviet Union.

Estuardo Zapeta of Francisco Marroquin University in Guatemala discusses the role of markets in traditional crafts at Cato University, held near San Diego.

to limit freedom of speech on the airwaves threaten artistic freedom and creativity. Penn Jillette of the magic/comedy team of Penn & Teller agreed, in colorful language.

◆ **September 17:** Participants at Cato's third annual Constitution Day symposium, "The Supreme Court: Past and Prologue," blasted the Supreme Court for issuing a series of vague, unprincipled decisions in the October 2003 term. Perhaps most depressing was the *McConnell v. FEC* decision, which—ignoring the plain language of the First Amendment—upheld the McCain-Feingold campaign finance law. Bradley Smith, chairman of the Federal Elections Commission, warned that the distortions already evident in the campaign finance system as a result of the law will only get worse: as each party attempts to use the law as a club against its opponents, freedom of speech will continue to lose ground. Panelists were no less critical of the Court's trilogy of executive detention cases. Jonathan Turley, a law professor at George Washington University, compared those decisions to the impressionist paintings one might see in a freshman art class. The Court, he said, has eschewed clear principles in favor of vague and ambiguous rulings that allow it to institute its own policy preferences with little regard for either constitutional text or precedent. The day concluded with the University of Chicago's Richard Epstein, who delivered this year's B. Kenneth Simon Lecture—a critique of the constitutional vision of the progressive movement in the first half of the 20th century.

◆ **September 20:** Cato scholars have long argued in favor of free trade, and trade in pharmaceuticals is no exception. At a Cato Hill Briefing, "Drug Reimportation: The Free-Market Solution," Roger Pilon argued that allowing Americans to freely purchase prescription drugs from other industrialized countries would help bring sky-high American drug prices in line with those in the rest of the world. That, in turn, would encourage foreign countries to bear a greater share of the research and development costs for new drugs—costs that are paid almost exclusively by American consumers today. On the other hand, he blasted bills currently before Congress that would go too far in the oth-

Judge William Young, Assistant Attorney General Daniel Bryant, and former ABC News correspondent Tim O'Brien discuss federal sentencing guidelines in the wake of the Supreme Court's *Blakely* decision.



Pacific Research Institute president Sally Pipes and National Center for Policy Analysis president John Goodman discuss their new books on national health insurance at a Cato Policy Forum on September 29.

Washington Post columnist Steve Pearlstein makes a point to Olaf Gersemann, author of *Cowboy Capitalism: European Myths, American Reality*, at a September 29 Book Forum.



er direction by prohibiting drug companies from engaging in price discrimination. Those prohibitions might make it impossible for drug companies to recoup their research and development costs, he warned, depriving the world of lifesaving new medicines.

◆ **September 22:** Opponents of globalization raise criticisms that range from exaggerated

to completely bogus, charged Martin Wolf of the *Financial Times* at a Cato Book Forum for his new book, *Why Globalization Works*. Nations that have opened their markets and liberalized their economies have seen dramatic reductions in poverty, he argued. He conceded that critics are right to be concerned about poor states' loss of sovereignty, but he noted

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that trade agreements typically require unanimous agreement. On environmental and labor conditions, he argued, globalization opponents have it precisely backward—economic growth allows societies to invest more in technologies that improve worker safety and reduce environmental damage. Columbia University's Arvind Panagariya praised the thesis of Wolf's book but noted that the rapid pace of political change might quickly render it obsolete. The growing trade in services between the United States and India, for example, has changed the terms of the debate by casting a spotlight on the increased competition for white-collar jobs.

◆ **September 22:** At a Cato City Seminar in Philadelphia, Dan Griswold, director of the Center for Trade Policy Studies, argued that Lou Dobbs is wrong when he charges that the outsourcing of services hurts American workers. To the contrary, Griswold said, such outsourcing improves the efficiency of the American economy, and in the process generates new, better-paying jobs for American workers. Michael Tanner, director of health and welfare studies, made the case for Social Security reform based on personal accounts. Finally, Fox News commentator Andrew Napolitano delivered a spirited attack on the Patriot Act, charging that it endangers civil liberties and does little to combat terrorism.

◆ **September 28:** The case for school choice is rapidly becoming too compelling to ignore. Today, the debate is less about *whether* school choice is worth trying and more about

how best to introduce market mechanisms to the educational system. Unfortunately, lamented participants at a Cato Conference, “**Creating a True Marketplace in Education,**” our tools for evaluating competing choice proposals are still quite primitive. Tax credits, vouchers, and charter schools all expand kids' range of educational opportunities, but they offer different opportunities and pose different threats of regulatory interference. John Wenders of the University of Idaho emphasized a public choice perspective on the problem, warning that the primary obstacle to substantive reform is the existence of entrenched constituencies who are threatened by change. Choice programs must be designed so that existing interests are not allowed to stifle reform, as well as to avoid the creation of new entrenched interests, he said. John Merrifield of the University of Texas at San Antonio stressed the importance of specialization. He argued that today's one-size-fits-all schools do a poor job of meeting the individualized needs of their students.

◆ **September 29:** Most Europeans have a cartoon view of the American economy, charged Olaf Gersemann at a Cato Book Forum for his new book, *Cowboy Capitalism: European Myths, American Reality*. They believe American workers are plagued by perpetual insecurity, forced to work multiple jobs to make ends meet, and saddled with massive credit card debt to finance their unsustainable lifestyles. That is nonsense, Gersemann said. American workers are substantially wealthier than their European counterparts. And although American workers

can be fired more easily than European workers, they can usually find new jobs in a few months, whereas European workers tend to languish in unemployment for more than a year. Steven Pearlstein of the *Washington Post* warned that despite the growing transatlantic gap in wealth, Europeans still don't understand the stark difference in economic competitiveness between America and Europe. The European economy, he said, is focused on maintaining the current standard of living, whereas the American economy is focused on opportunities for growth.

◆ **September 29:** Advocates of socialized medicine have blinders on when it comes to the flaws of that system, argued John Goodman, coauthor of *Lives at Risk: Single-Payer National Health Insurance around the World*, at a Cato Book Forum. Single-payer health care systems like those in Canada and Great Britain, he argued, suffer from long waiting lists, queue jumping by the rich and powerful, and soaring costs. Canadians and Britons are frequently denied health care by governments struggling to contain costs. American hospitals, meanwhile, are required to treat everyone who visits their emergency rooms. In practice, he concluded, America's poor are no worse off than their counterparts in nations with socialized medical systems. Robert Kuttner of the *American Prospect* argued that while markets work fairly well in most industries, health care markets suffer from persistent market failures that are best dealt with through a system of single-payer health insurance. Sally Pipes, author of *Miracle Cure: How to Solve America's Health Care Crisis and Why Canada Isn't the Answer*, emphasized that an effective health care reform must put consumers back in control of their medical decisions. Neither government bureaucrats nor insurance company bean counters are likely to make good decisions about an individual's health care needs, she argued. Patients in her native Canada, for example, suffer from a poor quality of care, long waits for service, and few choices. Jeff Lemieux, executive director of centrists.org, stressed the need for a reasonable compromise and argued that each side of the health care debate is driven by fear of what the other side might do if left unchecked. ■



Cato senior editor Gene Healy (with newspaper) and senior fellow Tom Palmer (right) lead a workshop for Cato's interns on how to write for newspapers.

Microsoft, tobacco, and other assaults on justice

Business and Government Abuse the Law

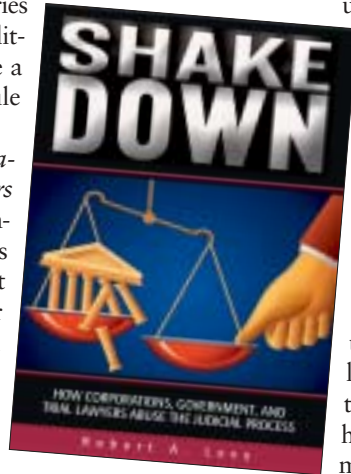
Politics is infecting our courts. The judiciary is supposed to be a neutral referee, even-handedly applying the law. But in several recent high-profile cases, the legal system has been used instead to loot and shackle unpopular industries at the behest of competitors or political activists. Trial lawyers make a killing, but consumers and the rule of law are big losers.

In *Shakedown: How Corporations, Government, and Trial Lawyers Abuse the Judicial Process*, Cato senior fellow Robert A. Levy highlights two of the most blatant ways that the courts are being used to further private agendas. Part One is an exposé of the ongoing campaign to use “public health” as a justification to loot unpopular industries.

That disturbing trend began with the tobacco lawsuits of the 1990s. Levy details how the state plaintiffs in those cases abused the judicial process to ensure that Big Tobacco would have no hope of defending itself. The most egregious was Florida. In 1994, the Florida legislature passed legislation specifically abrogating defenses ordinarily available to defendants in cases involving Medicaid expenses. The Florida Supreme Court upheld the law—which essentially guaranteed that the state’s forthcoming lawsuit would prevail—on a narrow 4-3 vote. With the deck stacked against it in Florida and other states, the industry was forced to accept a quarter-

trillion-dollar settlement.

Predictably, the success of the tobacco litigants (not to mention the size of their lawyers’ contingency fees) has spawned a wave of copy-cat lawsuits against other unpopular industries.



Soon after the tobacco settlement, dozens of major cities, as well as the Clinton administration, had trained their sights on the gun industry, alleging that it was liable for crimes committed with its products. More recently, lawsuits modeled after the tobacco litigation have been filed against makers of lead paint

and fatty foods.

The costs of such lawsuits are ultimately borne by consumers, as targeted industries raise their prices to recoup their costs. But the harms go beyond customers’ pocketbooks. Fundamental principles of our judicial system, like the rule of law and personal responsibility, are being undermined. The rule of law requires that the legal system be fair and predictable. But if cigarette makers can be held responsible for the costs of cigarettes their customers voluntarily chose to purchase and smoke, and gun makers can be punished for crimes committed by their customers, it is hard to see how any indus-

try with a potentially dangerous product can know what it must do to avoid liability.

Part Two of *Shakedown* deals with another case in which the judicial process was abused to punish an unpopular company. Having been soundly beaten in the marketplace, Netscape, Sun Microsystems, and other Microsoft competitors turned to the federal government for help in their crusade against the company. The Clinton Justice Department obliged, accusing Microsoft of antitrust violations for, among other things, tying its Web browser to its Windows operating system, which enjoys a dominant position in the personal computer market.

Levy argues that the case, like most antitrust litigation, rests on dubious economic theories and has therefore done serious damage to Microsoft, the broader technology industry, and the American economy. Radical overhaul of antitrust law—or, better yet, outright repeal—is the best medicine, he concludes.

Court TV host Catherine Crier has praised the book, writing: “Increasingly, our laws and courts are used to further the political agenda of a powerful few. Robert Levy presents a compelling argument that such legal manipulation must be reined in to preserve the rule of law and our democratic system of justice.”

Shakedown is available in paperback for \$22.95. It can be purchased in bookstores, at www.cato.org, or by calling 800-767-1241. ■

News Notes

Susan Chamberlin has been named vice president for government affairs at the Cato Institute. She has served as director of government affairs since 1999. In her new position, she will be a member of the senior management team at the Institute and will also devote some of her time to fundraising.

Doug Bandow’s *Salon* column on President Bush’s troubling record on war and federal spending was cited in the *Doonesbury* comic strip on October 13, sending several hundred thousand *Doonesbury* readers to the column.

Jim Harper has been named director of information policy studies at the Cato Institute. Harper is the editor of the Web-based privacy policy think tank *Privacilla.org* and a former counsel to committees in both the U.S. House and Senate. In his new position, he will analyze privacy, cybersecurity, online consumer protection, commercial communications, and credit reporting, as well as intellectual property, Internet governance, and new technologies. Harper will work closely with Adam Thierer, Cato’s director of telecommunications studies. Harper earned a law degree at Hastings College of the Law in San Francisco, where he was editor in chief of the *Hastings Constitutional Law Quarterly*.



Susan Chamberlin



Doug Bandow



Jim Harper

Affirmative Action: Myth or Necessity?

At an August 19 Policy Forum, entitled “Affirmative Action after Michigan,” scholars discussed the latest research on the impact of racial preferences in higher education. Participants included Cato policy analyst Marie Gryphon, Georgetown University professor Harry Holzer, and Tanya Clay from People for the American Way. Excerpts of their remarks follow.

Marie Gryphon: When I started working on this issue, some of my friends asked whether it was really the best use of my time and energy. “Shouldn’t you just keep ranting about the failures of urban public schools?” they asked. And in a way, they are right. Affirmative action is not a crisis on that level. It does not leave children illiterate and hopeless in America on a daily basis.

Nonetheless, I think affirmative action policy deserves serious attention, because no debate I am aware of is in more desperate need of clear thinking or honest discourse than this one.

I titled my new paper “The Affirmative Action Myth” because I think that the costs and benefits of preferences are misunderstood and that the misunderstanding is promoted by academic and political leaders. The myth holds that preferences benefit minority students in concrete ways, that their social and psychological costs are small, and that without preferences colleges would become resegregated, depriving students of the educational benefits of diversity.

William Bowen and Derek Bok, former presidents of Princeton and Harvard, respectively, became the standard-bearers of the myth with the publication of their book *The Shape of the River*. But recent and better research shows that their claims are untrue. Preferences do not offer real benefits to disadvantaged groups, but they do impose real costs on students of all backgrounds.

For one thing, affirmative action does not actually send more minority students to college. Most people don’t realize this. Advocates mention affirmative action and the importance of college together so often that we are bound to think there is a connection. It is like hearing Saddam Hussein and September 11 together so much that you eventually come to think that Saddam had something to do with September 11. But no matter how often we hear the importance of a college edu-

cation and affirmative action in the same breath, the one still does not affect the other.

And this is because most four-year schools are not academically competitive. They accept everyone with a standard high school education. Preferences directly affect only the 20 to 30 percent of American colleges that enjoy more applicants than spaces. Students applying to these schools have many other college options.

The reason that more minority students do not get degrees has nothing to do with competitive admissions. Rather, too many of them leave high school without the bare minimum credentials necessary to attend any four-year school, selective or not. Freshmen must be college ready. This means that



Marie Gryphon: “Preferences do not help minority students go to college, and they cannot increase minority incomes.”

they have to be literate, they must have a high school diploma, and they must have taken certain minimum coursework.

Jay Greene of the Manhattan Institute found that only 20 percent of black students and 16 percent of Hispanic students leave high school ready to go to college. Minority underrepresentation in the college environment is thus the result of public schools’ failure to prepare minority students. It is a failure that affirmative action cannot remedy. In the *Los Angeles Times*, Greene noted that 1.3 million American kids become college ready each year and that 1.34 million of them go to college. We are sending

every ready kid to college, and a few more.

So affirmative action does not send more kids to college. It does, however, redistribute minority students from less selective schools into more selective ones. Advocates argue that this will raise graduates’ wages and help close racial disparities in wealth and income.

But contrary to what many assume, attending a selective school does not raise student incomes, regardless of race. This is an important new finding. A couple of years ago, economists Stacy Dale and Alan Krueger generated shockwaves by solving a persistent problem of older research on this issue. They compared students who were accepted to Cornell, for example, and went to Cornell, to students who were accepted to Cornell but chose, for reasons of their own, to attend a less selective school, like the University of Washington.

Comparing students with identical acceptances allowed them to control for all of the factors that colleges consider when they accept students. Dale and Krueger found that when genuinely equivalent students are compared, those who attended the fancier schools make no more money at all—not an extra dime—than students who attended the less selective schools. The idea that the Ivy League will make you rich is just another part of the myth. The Dale and Krueger paper, by the way, is in the *Quarterly Journal of Economics*, Fall 2002, in case you need to print it out and give it to that neighbor who is so proud that his son got into Penn early admission this year.

Preferences do not help minority students go to college, and they cannot increase minority incomes. But they do reinforce a harmful notion: the notion that status and not skill matters the most in the game of life. Upper-middle-class families are the worst offenders. The *New York Times* recently reported on a woman who was visiting elite colleges with her daughter who had not even started her sophomore year of high school yet. Because we associate college increasingly with prestige rather than learning, debates about affirmative action tend to turn on philosophical notions of fairness or merit, as if admissions were a trophy or certificate for good behavior.

Affirmative action worsens this tendency because it implies that some colleges are objec-

“When genuinely equivalent students are compared, those who attended the fancier colleges make no more money—not an extra dime—than students who attended the less selective schools.”

tively better than others and need to be redistributed. But this notion backfires. Having sold us on the idea that prestige matters, elite universities now generate racial resentment by apportioning this prestige according to race. A group led by Doug Massey at the University of Pennsylvania found that white and Asian students at selective schools feel cooler toward “affirmative action beneficiaries”—so labeled—than nonbeneficiaries of all races.

But affirmative action has more concrete harms. All researchers agree that sending students to selective schools results in lower grades. Bowen and Bok found that minority students finish 15 points lower in terms of class rank than they would have achieved if preferences did not exist. Minority students are more likely to drop out. And those who graduate finish, on average, in the bottom 25 percent of their class.

Now, this is in part due to lower levels of academic preparation. But it is also caused by what Claude Steele of Stanford calls “stereotype threat.” It’s a term of art that he uses to refer to a debilitating fear of confirming a negative stereotype that afflicts high-achieving minority students.

Doug Massey likewise found that stereotype threat leads to lower grades. His group noted that minority students who exhibit symptoms of stereotype threat earn GPAs that are .122 lower than those earned by similar minority students who feel less threatened. If that seems small to you, understand that it is over half of the .22 gap that remains between white, Asian, and minority students after differences in academic preparation are controlled or held equal.

Now, supporters of affirmative action often say: “Well, at least we are doing something about this terrible problem of inequality. What do you want to do?”

It is a fair question. I think the first thing we should do is to acknowledge our history of slavery and segregation and the role it has played in generating our current predicament. If, as John McWhorter argues, minority students harbor a distrust of the academic life, if some subcultures attach less importance to educational attainment than others, it should come as no shock that those feelings can be traced to centuries of oppression during which African Americans in particular were often denied the legal ability to pursue an education.

Acknowledging our history is an important prerequisite to moving forward together to tackle the only task that will truly promote racial equality in America: closing the skills gap. Studies show that minorities make about as much money today as whites with similar standardized test scores. Tests are often dismissed as irrelevant or biased. But they are measuring *something* that is valuable in the labor market. We can close the black-white earnings gap by closing the test score gap.

Tests measure skills that *can* be taught. Economists Derek Neal and William Johnson found that scores are powerfully affected by family size, parenting style, and the quality of local schools. Asian students not only score the highest on tests but also get



Harry Holzer: “Students admitted under affirmative action policies do benefit from them, but they are not the only ones who benefit.”

better grades than other groups even when the test scores are the same. This is because their parents and peers have very high expectations for their performance.

Finally, I think elite colleges may want to reconsider their current highly selective admissions policies. Most of the problems generated by affirmative action—resentment, stereotype threat, underperformance—are not caused by a general spread of abilities in a given college environment. Rather, they are caused by the creation of isolated subcultures of minority students who are obviously and painfully less prepared than their peers.

I agree that diversity is an important part of college life. And even if preferences

were abolished now, the top dozen schools in the country would retain a third of their black and Latino students, and the very selective schools that rank just beneath them would retain two-thirds of those students.

If that is not enough, schools should consider admitting a wider variety of students of all races, a move that would increase cultural diversity far more than the current practice of mixing a cadre of preferred students with an overachieving group of nonpreferred students.

The take-home lesson here is that affirmative action cannot solve the disparities in our country. Preferences were designed to harness what supporters hoped would be the formidable power of prestige. But those who hope to ride credentials into the sunset of equal opportunity have saddled the wrong horse. Only no-fuss integration and real skills will lead us to success.

Harry Holzer: Who really benefits from affirmative action? I am going to draw a very different picture from the one Marie drew. I would argue that when minorities are admitted to good schools because of affirmative action, they really do benefit. There is a wide range of good literature that controls for things like test scores and grades and still finds that getting into these better schools does lead to higher earnings.

Marie quoted a paper by Stacy Dale and Alan Krueger. It is a quirky paper. It uses a very unusual statistical methodology to get at the issue of comparing apples to apples.

If you read that paper carefully, two things come out. First of all, the lower down the income ladder you go with a family, the more the prestige of the college raises your earnings later. It is not as though there is no effect. And since minorities at these institutions tend to come from lower-income families (they are not coming from poor families, by and large, but from families with lower incomes than those of their white peers), they are, on average, going to benefit more than the white students.

Also, when Dale and Krueger use the average tuition of the university rather than the average GPA, they also find fairly strong effects on later earnings, which is a quirky finding. So maybe the lesson is, don’t go to

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“Additional services are provided to low-income and minority communities by affirmative action beneficiaries.”

POLICY FORUM *Continued from page 9*

the University of Michigan because it is not that expensive; go to Harvard because that's where the real payoff is.

Moreover, if the elite schools are not any better than their much lower-priced alternatives, it raises the prospect of a major market failure. Why are these students and their parents working so hard to get into those elite schools if they are so worthless? It would imply a massive irrationality on the part of consumers that the folks at the Cato Institute do not usually believe in and that I tend to not believe in either. I think there are reasons those schools are very competitive. There are reasons why parents shell out 40 grand a year to send their kids to those schools. There is a payoff in the labor market, and I think the people who go there do benefit from it.

There is other literature that says: “Well, we are admitting minority students, but then so many of them drop out afterward. So no one benefits.” I certainly agree that the high dropout rate among minority students is a big issue, and we have to pay more attention to it. But it is not caused by affirmative action. Because at elite institutions that are doing a lot more affirmative action, the dropout rates are lower, not higher. The elite schools do a better job at providing financial support, counseling, and other support services to students who are in trouble. They make sure that most of them get diplomas. So the dropout rate is a big problem, but it is not caused by affirmative action.

I think that students admitted under affirmative action policies do benefit from them. But in my reading of this literature, they are not the only ones who benefit. For one thing, there is pretty clear evidence that additional services are provided to low-income and minority communities by affirmative action beneficiaries. That is clearest in the case of doctors, for example. Several papers have indicated that minority doctors coming out of medical schools under affirmative action programs are more likely to serve low-income and minority patients in their communities.

Universities clearly believe they benefit from these policies. You may or may not buy the research on how diversity improves

the quality of the classroom, but the universities themselves feel that their legitimacy is enhanced by reaching out to a much larger population and providing access to a greater range of students.

And the business community seems to benefit. The demographics of the labor market are changing a lot in tight labor markets. Businesses are really strapped for ways to find talent in minority applicant pools, and affirmative action helps them do that.

Tanya Clay: Affirmative action provides equal opportunities to those who have equal abilities. It opens the door. It allows those people who have otherwise been denied this



Tanya Clay: “Affirmative action opens the door to the variety of experiences that an individual brings to the table.”

opportunity to compete on a level playing field. Education is a building block to providing opportunity. And by denying it to some, we are ignoring the realities of society and denying opportunities to communities of color.

It's difficult to provide equal opportunity if we are going to be judged by the standards of meritocracy that are typically used by institutions of higher learning. I think we need to revisit that standard. Our educational excellence is actually weakened by not having the contribution of various cultures. In the brief submitted by People for the American Way in the Michigan cases, we presented a number of reports by social scientists stating that heterogeneous groups—

including those based on race—are better at creative problem solving than homogeneous groups, due to the benefits of interactions between individuals with different vantage points, skills, or values.

I think that the sole reliance upon test scores and grade-point averages ignores the comprehensive evaluation of a student's promise within the context of their opportunities. Not all students can be judged solely by their grade-point averages or solely by test scores. Standardized tests like the SAT and the LSAT have a disproportionate effect on communities of color. We should not base our judgment of academic excellence solely on those two factors. Affirmative action opens the door to the variety of experiences that an individual brings to the table. It creates a better learning environment than a homogenous student body would.

LSAT scores have a huge effect on who can go to law school. And various studies have shown that, at most, LSAT scores can determine somebody's ability to get through the first year of college. It tells you nothing about how somebody is going to succeed after law school—whether or not they are actually going to pass the bar and have a successful career.

But doesn't affirmative action create these stereotypes, that simply by using race as a factor we are automatically assuming that somebody has particular unique experiences that somebody else does not have? It shouldn't. Affirmative action means taking positive steps to end discrimination, to prevent its recurrence, and to create new opportunities that were previously denied qualified minorities and women. The key term is “qualified.” Qualified means that individuals who are accepted through affirmative action programs already deserve to be there but were excluded on the basis of other reasons.

We have a responsibility to educate people about the real impact of affirmative action, what affirmative action really is. It is not quotas or some type of social promotion scheme in which people who are not qualified are admitted anyway based on their race.

And it goes both ways. If we think that people who are the beneficiaries of affirmative action are somehow not qualified to be at that school, what do we say to a white

“Affirmative action provides equal opportunities to those who have equal abilities.”

student who is the beneficiary of affirmative action at a historically black university? Are we then saying that they are not qualified to be at that institution as well? Most of you probably do not think of it in those terms, because we think of affirmative action as applying only to white institutions.

Admissions to selective institutions are based on a variety of criteria, not simply race or socioeconomic status. The University of Michigan decisions supported the theory that we should judge people based on numerous criteria.

However, one criterion is often overlooked. At Texas A&M, in 2002 and 2003, it is estimated that about 350 freshmen were admitted not on the basis of merit but on the legacy of their parents. During that same period, approximately 180 African-American students were admitted through affirmative action.

So why don't legacies have the same stereo-

types? Why don't we look at legacies as not being qualified to attend elite universities?

Colin Powell stated it very succinctly. He is also supportive of affirmative action. And he says that most people criticize him for his stance, but they have no problem with a preference that gives legacy scholarships or legacy admission to a certain university because your parents went there. But it is the particular type of affirmative action—based on race—that they find somehow improper. That seems inconsistent to me.

Marie Gryphon: Harry discussed more details about the Dale and Krueger work, which I think really did crack the nut on wages and school quality. He pointed out that there are some low-income effects to school selectivity. For reasons that aren't clear, if you are right around the poverty level—if you are truly poor—then there is a statistically significant positive benefit associ-

ated with increased selectivity. That's not true for other groups, and overwhelmingly, beneficiaries of affirmative action are middle class or upper middle class—86 percent, in fact, come from middle- or upper-middle income families.

He also mentions the price of tuition being positively related to higher wages in the Dale and Krueger study. What's interesting about this finding is that Dale and Krueger matched applicants for accepted and rejected colleges by school selectivity, and as a result they were able to filter out the unobserved variables that pertain to academic preparedness, or ability to succeed academically. However, they did not match students based on the cost of colleges they applied to. So this, too, like the older wage studies, could be the result of a statistical artifact. That is—the wage gains that appear to be the result of increased price of college are actually tied to unobserved socioeconomic status variables. ■

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“If you had seen the system as I did, you would never take your guaranteed rights for granted again.”

BREAKS THE LAW *Continued from page 1*

would open in his neighborhood.

He threw them out.

They returned unannounced about six times and every time their demands increased, eventually to a thousand dollars a week, each. After he rebuffed that demand, they said they'd be back the following week with guns, and he'd better get one. Terrified of this threat, and afraid as most immigrants are to involve the police, the restaurant owner borrowed a friend's gun.

When the two gentlemen returned and asked if he had a gun, the restaurant owner reached into a drawer, pulled out the gun, and pointed it at them. They immediately slapped handcuffs on him! Unbeknownst to him, they were New Jersey state troopers who were trying to either shake him down for money or coerce him into breaking the law.

His prosecution for carrying a gun was assigned to me, along with a similar case involving a nearby Italian bakery.

Before the cases began, I ordered the troopers to appear in my courtroom, to inquire if their schemes were self-directed or authorized by their supervisors. They refused to be so interrogated, whereupon the prosecutors asked me to dismiss both cases, which I did. The bakery owner was so delighted, he proclaimed in a classic Sicilian accent: “The Judga, he can eata for free for the resta his life!” I never took the owner up on his offer, but I appreciated his sentiments.

Torture and Psychological Abuse

Political ambition can be a powerful motivating factor for government abuse of our rights. Consider one of the cases that helped propel Janet Reno to national stardom. In 1984, Reno faced a serious challenger in her bid for reelection as Dade County's state attorney. In August of that year, Frank Fuster and his wife, Ileana Fuster, were arrested for sexually abusing more than 20 children who attended their home daycare center. Reno began the case by soliciting Laurie and Joe Braga, both billed as “child abuse experts” with no psychology training, to interview the children.

The Bragas used suggestive and misleading interview techniques to elicit false accusations from the children in the case.

The children were brainwashed with fantasies of sexual abuse involving masks, snakes, drills, and other objects, and eventually came out of the interviews thinking they were victims.

Of all the children alleging sexual abuse against Fuster, Reno's office only presented physical “evidence” that one child was abused. The prosecution invoked a laboratory test suggesting that a child had tested positive for gonorrhea of the throat. However, the lab test that was performed is very unreliable and often gives false positives. Reno's agents tested for the family of bacteria to which gonorrhea belongs rather than specifically for gonorrhea; other bacteria that could have caused the false positive are harmless and are frequently found to live in children. Of course, the state ordered the lab to destroy the evidence three days later, thereby preventing the defense from challenging the state's “evidence.”

Recognizing that the case against Fuster was weak, Janet Reno's final straw was to torture Ileana Fuster physically and mentally to the point where she could be coerced into implicating her husband.

Reno had Ileana isolated from the prison population and placed in solitary confinement, naked. Ileana described her treatment in a 1998 interview: “They would give me cold showers. Two people will hold me, run me under cold water, then throw me back in the cell naked with nothing, just a bare floor. And I used to be cold, real cold. I would have my periods and they would just wash me and throw me back into the cell.”

Late one night, the naked Ileana, according to her lawyer, received a visit in her darkened solitary cell from an intimidating 6-foot-2 woman. The woman told Ileana that she knew that Ileana and her husband were guilty. “But how can that be? We are innocent,” Ileana proclaimed. “Who are you?” “I'm Janet Reno,” the woman said. Ileana repeatedly told Reno that she was innocent, and Reno kept repeating, “I'm sorry, but you are not. You're going to have to help us.” Reno made several more solitary, nightly visits to the naked Ileana, each time threatening Ileana that she would remain in prison for the rest of her life if she didn't tell Reno what she wanted to hear.

Finally, Reno hired two psychiatrists from a company called Behavior Changers Inc., who met Ileana 34 times in a one-

month period. These psychiatrists claimed to be able to help individuals “recover memories,” but their technique was simply to hypnotize Ileana so that she could be brainwashed into believing that Frank Fuster was a child molester. The coercion eventually worked: with the psychiatrists present and with Janet Reno squeezing her hand, Ileana implicated her husband.

Ileana's trial testimony against her husband put the final nail in Frank Fuster's coffin. Reno won the conviction, her reelection bid, her name in the newspaper headlines, and a stepping stone to a position as the nation's chief law enforcement officer. However, Ileana Fuster has repeatedly retracted her confession and testimony, swearing that she and Fuster never abused any of the children, and that her confession was the product of brainwashing.

Yet, thanks to Janet Reno, an innocent Fuster remains incarcerated for 165 years without the possibility of parole.

Messing with Texans

It is unfair, unwise, and un-American for police to break the law in order to enforce it. A corrupt police officer in Tulia, Texas, a small rural town of about five thousand people, engaged in what one commentator deemed an “ethnic cleansing of young male blacks.”

Thomas Coleman, an undercover narcotics officer, committed one of the worst police atrocities in recent years by arresting 46 people on July 23, 1999. Of those arrested, 39 were black, which amounts to approximately half of the town's adult black population. Many others were involved in the family or personal relationships with black Americans in an otherwise overwhelmingly white community. Coleman's previous law enforcement employers knew that Coleman himself had once been arrested for theft during an undercover operation, that he used racial epithets, and that he had a widespread reputation in the Texas law enforcement community as being unreliable and untrustworthy.

Nonetheless, on the basis of Coleman's testimony, 38 individuals arrested on that day were found to be guilty of drug dealing. Some were sentenced to up to 90 years in prison! Some were coerced into accepting plea bargains under the threat of lengthy imprisonment.

“Thanks to Janet Reno, an innocent Fuster remains incarcerated for 165 years without the possibility of parole.”

What is most shocking is that the prosecution's only evidence against these defendants was the testimony of Coleman, the dirty cop. The testimony was uncorroborated: no witnesses or other police officers could confirm that Coleman bought drugs from these defendants. And Coleman could not offer any audio or video surveillance verifying his undercover drug purchases. Not even fingerprint evidence was introduced.

Coleman's testimony was based solely on notes he scribbled on his stomach and his leg. He did not keep a permanent notebook. At the time of their arrests, these 46 supposed drug dealers possessed no guns, no drugs, and no money. Coleman claimed to have purchased \$20,000 worth of cocaine from these “dealers.” Furthermore, some of the individuals who were arrested established that they were miles away from Tulia that day. A few of them neither worked nor lived in Tulia. All of the people arrested that day were either convicted by juries or pleaded guilty. In 1999, Texas attorney general John Cornyn—now a U.S. senator—named Coleman the outstanding law enforcement officer of the year.

The Tulia, Texas, debacle attracted national media attention and a coordinated, multi-defendant habeas corpus campaign, coordinated by the NAACP and many law firms. About four years later, the Texas Court of Criminal Appeals exonerated the victims of Coleman's fraud. Coleman had previously acknowledged that the convictions were based on nothing more than his testimony. While he stated that he was “pretty sure” that all the defendants “deserved” to be behind bars, he admitted to several “mess ups” and stated that some of his own sworn testimony was “questionable.” It is a rare anomaly that police abuses such as that perpetrated in Tulia, Texas, are overturned. You can't help but wonder how many wrongfully convicted defendants never had the luxury of seeing justice served. It shouldn't be a luxury.

Coleman currently faces trial for perjury, but the buck does not stop at Thomas Coleman. Coleman's activities were financed by the federal government's war on drugs, as he was part of the Panhandle Regional Narcotics Task Force. The Department of Justice encourages officers like Coleman to rack up as many arrests as possible, since

the money is allocated to the task forces on the basis of number of arrests, not convictions. Because there is no distinction between high-quality and low-level arrests, the federal government creates an incentive for officers like Coleman to engage in sloppy investigations against low-level offenders, and against the innocent.

Rights No More

The war on terrorism has increased the need to protect vigilantly our civil liberties. In July 2003, the U.S. Department of Justice held a celebration at which it handed out honors and praises to federal agents and lawyers involved in the prosecution of the Lackawanna Six.

It should have handed out indictments instead, because those prosecutors—or at least some of them—violated their oaths to uphold the Constitution in order to coerce six soccer-playing young men from Lackawanna, New York, with no criminal records, into accepting long jail terms, well out of proportion to their alleged crimes.

The six—all Arab Americans in their early 20s, five of whom were born here—were charged in federal court in the Western District of New York with providing aid and support to a terrorist group, before September 11, by attending camps in Afghanistan, learning about weapons, and listening to Muslim clerics preach hatred toward the United States.

They were charged with listening to others—including, in the case of one of them, Osama bin Laden himself—talk about causing America harm and with training for some undefined jihad, even though they said that once they arrived and met the people in the camps, they wanted nothing to do with it. The government actually told a federal judge that since the clerics being heard by the six were preaching violence, the six had committed crimes of violence.

The court rejected that argument out of hand. After reviewing the evidence against the six, the judge wrote that these defendants—like all defendants—are guaranteed due process, and that federal courts should do more than just pay lip service to the guarantees of the Declaration of Independence and the Constitution; they should enforce them.

“We must never adopt an ‘end justifies

the means’ philosophy,” the judge wrote, “by claiming that our Constitutional and democratic principles must be temporarily furloughed or put on hold in cases involving alleged terrorism in order to preserve our democracy. To do so would result in victory for the terrorists.”

But within mere yards of where this fair judge sat when he wrote those words, the government lawyers who once swore to uphold the Constitution were plotting to put it on hold.

According to a lawyer for one of the six—himself a former federal prosecutor—the government lawyers implicitly threatened the six during plea negotiations that if they did not plead guilty, if they did not speak up as the government wished, if they did not cooperate in their own prosecutions, if they insisted on their due process rights, the government would declare them to be enemy combatants.

In that case, the so-called defenders of the Constitution threatened, the six would have no due process rights, no trial, no lawyers, no charges filed against them, and they would receive solitary confinement for life.

There is no reported case in American history in which a court allowed a defendant to be told that his insistence on due process would result, not in prosecution and conviction, but in punishment without trial. It has always been the case that when entering a guilty plea—and when negotiating for that plea—the defendant's fears of punishment were limited to that which the law provides. Today, for the government to threaten that the punishment can be increased by fiat by the president after the crime has been committed is not only unconstitutional, it is tyrannical.

Liberty: Void Where Prohibited

It is only a warped view of American history, culture, and law that could seriously suggest that constitutional rights are discretionary—that any president can strip a person of his due process rights. Let's be clear: There is no Supreme Court case supporting or authorizing presidential enhancement of punishment, and the Justice Department knows that.

So if it is constitutionally impossible for the government to strip a person of his

Continued on page 15

New studies on reimportation, New York's reckless overspending

The Coming Pension Crisis

The Pension Benefit Guaranty Corporation, the federal agency that insures private-sector defined-benefit plans, had a surplus of \$9.7 billion at the end of 2000 but a deficit of \$11.2 billion at the end of 2003. That highlighted the precarious fiscal position of the corporation, which insures pension plans that are underfunded by a total of \$350 billion. In “How to Reduce the Cost of Federal Pension Insurance” (Policy Analysis no. 523), Richard A. Ippolito, the former chief economist of the agency, recommends that it be converted into a self-insurance pool in which members of the pool would be jointly liable for any deficit that develops. That would give member companies a powerful incentive to ensure that the pool remains solvent. He further proposes that premiums be based on the degree to which each plan is underfunded. That, he argues, would encourage plans to become fully funded. Ippolito suggests that Congress cover the \$18.7 billion projected shortfall before creating the self-insurance pool. Although that is a lot of money, he concedes, Congress could be forced to bail the corporation out at much higher cost if the system is not reformed.

◆“Privacy” Laws: The Fox Guarding the Henhouse?

There is a wide variation in individuals’ preferences when it comes to privacy, argues Jim Harper in “Understanding Privacy—and the Real Threats to It” (Policy Analysis no. 520). Government, he argues, should focus on providing mechanisms to enforce individual preferences rather than impose the same privacy regime on everyone. Moreover, he contends, the biggest threats to privacy come from government itself, not from private industry. Most obviously, only governments directly violate their citizens’ privacy by engaging in widespread surveillance. Governments can also compel a wide variety of information disclosure through force of law. And the administration of many government programs generates databases of sensitive information that can become vulnerable to privacy breaches. To protect privacy, Harper concludes, policymakers should focus on ways to reduce the privacy threat posed by governments.

◆Making Drug Free-Riders Pay Their Share

In “Drug Reimportation: The Free Market Solution” (Policy Analysis no. 521), Vice President for Legal Affairs Roger Pilon argues that allowing reimportation of prescription drugs is required by free trade principles. Moreover, he writes, the United States is being unfairly forced to bear the vast majority of the R&D costs of developing new drugs. Under a regime of legal reimportation, drug companies would make greater efforts to limit exports to price-controlled markets to avoid undercutting high prices in the domestic market. On the subject of drug safety, Pilon notes that other wealthy countries have regulatory barriers similar to ours, and there is little evidence that foreign drugs are less safe than those manufactured domestically. Pilon surveys the leading bills currently making their way through Congress and concludes that there is much room for improvement in each of them. A well-designed bill, he argues, would repeal the statutory restrictions on reimportation currently on the books but leave drug companies the freedom to discourage drug reimportation through contract and supply restrictions.



Roger Pilon

◆Balancing the Big Apple’s Books

Reckless overspending, not a lack of revenue, is responsible for New York City’s perennial budget crises, charges Raymond J. Keating, chief economist for the Small Business Survival Committee and a New York native, in “Budget Reforms to Solve New York City’s High-Tax Crisis” (Policy Analysis no. 522). Some claim that the city has cut its budget to the bone, but Keating notes that spending has risen 53 percent over 10 years—about twice the rate of inflation. Keating examines the city’s budget in detail and identifies numerous areas where fat could be cut, including privatizing recreational services, increasing hours for employees, privatizing housing, and introducing choice to the school system. Keating also stresses the importance of tightening controls on the issuance of new debt to prevent a repeat of the city’s 1970s budget crisis.

Keating looked at New York state’s budget problems in Policy Analysis no. 506 in January.

◆Turnout Myths

The conventional wisdom holds that large campaign spending and the negative ads it often finances have turned off voters and caused a decline in voter turnout. In “Three Myths about Voter Turnout in the United States” (Policy Analysis no. 524), John Samples examines those claims and finds them wanting. Indeed, he argues, when properly computed, the turnout of eligible voters declined sharply in the early 1970s and has held steady since then. The evidence that campaign spending depresses turnout is paltry, he argues. And some studies have found that negative ads actually have a slightly positive impact on voter turnout, as they impress upon voters the high stakes of an election and motivate them to vote. The decline of participatory democracy is greatly exaggerated, he concludes, and, in any event, campaign spending and negative ads are not to blame.



John Samples

◆Good Neighbor Trade Policy

The Central American Free Trade Agreement, which promises to liberalize trade between the United States, the five Central American countries, and the Dominican Republic, is a big step in the right direction, argue Dan Griswold and Dan Ikenson in “The Case for CAFTA: Consolidating Central America’s Freedom Revolution” (Trade Briefing Paper no. 21). The agreement isn’t perfect, the authors acknowledge—sugar and textiles in particular remain heavily restricted—but it would serve important policy goals. In addition to benefiting American consumers, the agreement would bolster economic reforms and political stability in Central American nations. Critics of the agreement, the authors argue, have it precisely backwards when they fret about a “race to the bottom” for environmental and labor standards. In fact, by spurring economic growth, the agreement would

enable Central American nations to raise labor and environmental standards more quickly than would otherwise be possible.

◆ **Fooling All the People All the Time**

The average voter is shockingly ignorant of basic facts about the American political system. Before the 2000 election, only about half of voters knew which party controlled Congress, and a dismal 15 percent could identify one of the candidates for the House of Representatives from their own district. Polls show a similar level of ignorance about high-profile government programs like Social Security and Medicare—only 31 percent of voters, for example, were familiar with the recently passed Medicare prescription drug benefit. In “When Ignorance Isn’t Bliss: How Political Ignorance Threatens Democracy” (Policy Analysis no. 525), George Mason University law professor Ilya Somin argues that such ignorance presents serious challenges for democratic governance. Voters, he argues, must have at least minimal political knowledge to make prudent decisions in the voting

booth. While advocates of majoritarian democracy posit a variety of “shortcuts” that might allow clueless voters to make informed decisions (such as following opinion leaders or focusing on a handful of issues most relevant to their own lives), Somin shows that such techniques are inadequate to the task of disciplining today’s gargantuan federal government. Two solutions that are effective, he says, are federalism and limited government. Federalism allows voters to “vote with their feet,” seeking out jurisdictions with more effective policies. Such “feet voting,” he notes, doesn’t require voters to have an in-depth understanding of why some policies work better than others. Limited government reduces the number of issues that voters need to be concerned with, reducing the costs to voters of becoming well informed about the issues of the day.

◆ **Lender Beware**

It’s hard to justify asking an oppressed people to pay debts incurred by a tyrant in the process of oppressing them. That’s why, in

“Iraq’s Odious Debts” (Policy Analysis no. 526), Patricia Adams argues that the Iraqi people should examine the outstanding claims against the Iraqi government and repudiate those debts that financed Saddam Hussein’s “weapons, palaces, and instruments of repression.” Those debts that were used for legitimate purposes, on the other hand, should be honored. As she explains in some detail, the Doctrine of Odious



Patricia Adams

Debts has been an accepted principle of international law for more than a century. It was used in the American Civil War to repudiate the debts of the Confederacy, and in the Spanish-American War to repudiate the debts the Spanish had imposed on the people of Cuba. It has been used less frequently in recent years, but Adams notes that revitalizing the doctrine will give creditors a powerful incentive to ensure that the money they lend is not used for illegitimate purposes. ■

BREAKS THE LAW *Continued from page 13*

due process rights, why did the lawyers for the Lackawanna Six let their clients plead guilty and accept six-to-nine-year jail terms? Because they knew that the government had suspended rights before and gotten away with it. They knew that the president had actually declared three people to be enemy combatants and kept them locked up without charges and away from their own lawyers. And before the Supreme Court stepped in, he appeared to be getting away with it.

Protecting Freedom

Ultimately, the fate of American liberty is in the hands of American voters. Though we are less free with every tick of the clock, most of us still believe that the government is supposed to serve the people—fairly, not selectively.

There are some surprisingly direct ways to address the excesses I’ve described.

First, Congress and the state legislatures should enact legislation that simply requires the police, all other law enforcement per-

sonnel, and everyone who works for or is an agent of the government to be governed by, subject to, and required to comply with all the laws.

That would eliminate virtually all entrapment, and it would enhance respect for the law. If the police are required to obey the same laws as the rest of us, our respect for them and for the laws they enforce would dramatically increase, and their jobs would become easier. In short, it would be against the law to break the law.

Second, Congress and the state legislatures should make it easier to sue the federal and state governments for monetary damages when they violate our constitutional liberties.

The federal government and many states have rendered themselves immune (called “sovereign immunity”) from such lawsuits if the lawsuit attacks the exercise of discretion by government employees. That is nonsense. You can sue your neighbor for negligence if his car runs over your garden or your dog. You can sue your physician if he leaves a scalpel in your belly. You

should be able to sue the local police, state police, and the FBI under the same legal theories if they torment you, prevent you from speaking freely, bribe witnesses to testify against you, steal your property, or break the law in order to convict you.

If the Constitution is enforced selectively, according to the contemporary wants and needs of the government, we will continue to see public trials in some cities and secret trials in others; free speech suppressed on inexplicable whims; police targeting the weak and killing the innocent; and government lying to its citizens, stealing their property, tricking them into criminal acts, bribing its witnesses against them, making a mockery of legal reasoning, and breaking the laws in order to enforce them.

This is not the type of government we, the people, have authorized to exist, and it is not the type of government that we should tolerate. We can do better. If government crimes are not checked, our Constitution will be meaningless, and our attempts to understand it, enforce it, and rely on it will be chaotic. ■

Beyond vouchers to educational freedom

Creating a Real Education Market

The school choice movement got off to a slow start. As late as the 1980s, two decades after Milton Friedman first proposed the voucher concept in his 1962 book *Capitalism and Freedom*, school choice was still a fringe proposal—familiar to libertarian and conservative intellectuals but almost unknown to policymakers and the general public.

All that has changed. The landmark *Zelman v. Simmons-Harris* decision, which upheld the constitutionality of vouchers, and the runaway popularity of charter schools have made alternatives to the government's education monopoly a subject of mainstream debate. Indeed, today's debate is not so much about *whether* parents should have choices for their kids but *how* those choices should be provided. Even some teachers' unions have grudgingly embraced



Andrew Coulson, author of *Market Education: The Unknown History*, explores how to measure educational freedom at Cato's conference, "Creating a True Marketplace in Education."



tepid reforms like public school choice in the hope it will slow the momentum of more sweeping reforms.

At a September 28 Cato conference, "Creating a True Marketplace in Education," leading education scholars and school choice advocates debated how best to bring the benefits of choice to America's children. Claudia Hepburn of the Fraser Institute described the experience of education reform in her native Canada, whose provinces have a rich tapestry of different educational systems. Of particular interest is Alberta, which provides roughly equal funding to both public and private schools but heavily regulates both. Alberta's system, she argued, works better than those of provinces that fund only state schools, but it is still far from ideal.

Robert Enlow of the Milton and Rose D. Friedman Foundation presented a survey of choice programs around the United States. New choice programs are being started almost every year, he said, but most of the current programs impose heavy reg-

ulatory burdens. Lisa Snell of the Reason Public Policy Institute offered a mixed assessment of recent reforms. The No Child Left Behind Act, she said, has been a windfall for for-profit education companies that benefit from public handouts but has done little to give parents genuine control over their kids' educations. On the other hand, the explosion of charter schools has created new capacity in the education system, which increases parental choice and allows more educational innovation. That is to the good, she concluded.

Some panelists criticized the direction of the school choice movement. Myron Lieberman of the Education Policy Institute charged that the movement's leaders have compromised too easily, accepting weak "choice" proposals like charter schools that keep children trapped in the public school system. Economist John Wenders examined the issue from the perspective of regulatory economics, which studies how entrenched interests use bureaucratic processes to serve their own interests. Any school reform plan, he said, must overcome the resistance of existing special interests and avoid creating new ones that will impede further reforms.

Andrew Coulson of the Mackinac Center for Public Policy presented details of a new index to measure the degree of choice and competition in an educational system, in the same way that Cato's *Economic Freedom of the World* index measures the economic freedom of world economies.

Papers from the conference will be published in an upcoming issue of the *Cato Journal*. Audio and video archives of this and other Cato events are available at www.cato.org/events. ■

Economist John Merrifield examines what a real education market would look like.

Claudia Hepburn of the Fraser Institute describes the diverse educational policies of Canada's provinces.

CONSTITUTION DAY *Continued from page 3*

for a series of decisions that weakened civil liberties. In the *Hiibel v. Nevada* decision, the Court stripped citizens of their right to remain silent when asked by a police officer to identify themselves. In *Illinois v. Lidster*, the Court ruled that “informational roadblocks” seeking witnesses to a crime do not violate the First Amendment’s limitations on unreasonable searches and seizures. In those cases and others, Napolitano argued, the Court missed the opportunity to uphold civil liberties.

Attorney Erik Jaffe expressed exasperation with the *Elk Grove Unified School District v. Newdow* decision, which sidestepped the controversy over the Pledge of Allegiance on the grounds that plaintiff Michael Newdow lacked standing to sue on her daughter’s behalf. The Court was clearly seeking to avoid the political firestorm that would ensue if they struck down the pledge, he said, but on the merits, Newdow should have prevailed, he said. The claim that the phrase “under God” has only ceremonial signifi-

cance, he argued, is belied by the vociferous opposition to removing it.

The University of Chicago’s Richard Epstein delivered the third annual B. Kenneth Simon Lecture to conclude the day’s festivities. He examined the legacy of the Progressive movement’s judicial philosophy, which rose to prominence in the first half of the 20th century. The progressives rejected the dominant judicial philosophy of their day, which held that the state must remain neutral between different economic interests—protecting competition and acting in the public interest, but not serving the interests of one segment of society at the expense of the rest. The Progressives, in contrast, held that conflicts between economic classes were inevitable, and that the state must therefore throw its weight behind favored groups, especially the labor movement. They favored coercive cartels, provided that those cartels were controlled by the state and designed to act in the interests of the majority. Only in recent decades, with the development of public choice economics, has the influence of such ideas begun to wane.

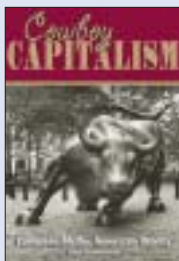


Cato senior fellow Robert A. Levy discusses state power and sovereign immunity at Cato’s annual Constitution Day conference.

Other contributors to the *Review* examined decisions on the separation of church and state, federalism, state sovereign immunity, and the constitutional right to confront one’s accusers. The *Cato Supreme Court Review* is available in paperback for \$15.00. It can be purchased in bookstores, at www.cato-store.org, or by calling 800-767-1241. ■

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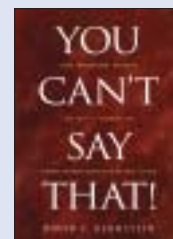
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Book warns of overcriminalization, overfederalization

Is Everything a Crime These Days?

Don't make a federal case of it!" It was not that long ago that that phrase meant something. Traditionally, criminal law has been the domain of the states, with only a handful of serious crimes—like treason and counterfeiting—prosecuted by the federal government. Prosecution in federal court was once a rare and notable occurrence.

No longer. Today, Congress routinely passes federal statutes criminalizing minor violations of obscure federal regulations, such as minor environmental infractions, corporate accounting irregularities, or clerical errors in the submission of medical claims.

Not only are there a lot more federal crimes, but punishments have become harsher. Posturing politicians, in an effort to appear “tough on crime,” have repeatedly increased criminal penalties for relatively minor offenses. As a result, low-level drug offenders today can receive stiffer penalties than rapists and murderers.

Go Directly to Jail: The Criminalization of Almost Everything, edited by Gene Healy, surveys this worrying trend from several different perspectives. In one chapter, Erik Luna of the University of Utah tallies up the economic and moral costs of widespread criminalization. As ordinary business activities become subject to murky regulations backed up by severe criminal sanctions, he argues, respect for the law is undermined. Moreover, criminal sanctions

exact a heavy economic cost by frightening businesses away from the productive activities governed by such regulations.

The problem is particularly acute with environmental regulations, argues a chapter by Cato scholar Tim Lynch. Environmental laws are notoriously vague, and that vagueness gives regulators considerable discretion in how they are applied. Shockingly, many of those regulations are backed up by criminal penalties, leading to the very real possibility that people could wind up with jail time for violating Byzantine rules out of confusion or ignorance about the law. Even worse, Lynch warns, while courts have tended to strike down vague criminal laws in other contexts, a “regulatory exception” to that rule has crept into the judicial system. In regulatory cases, the usual rule giving defendants the benefit of the doubt in cases of vague laws has often been turned on its head, with the prosecutor receiving the benefit of the doubt.

Medicine is another field that has become increasingly criminalized, thanks in large part to the Health Insurance Portability

and Accountability Act. As Grace-Marie Turner of the Galen Institute details, the act, designed to curb Medicare fraud, makes defrauding a health care benefit program a crime punishable by up to 10 years in prison. Worse, the legislation sets up a bounty program in which judgments against those convicted of health care fraud are used to fund further fraud investigation. Ironically, then, a system designed to curb abuse in the Medicare program is itself rife with incentives for abuse, as investigators' budgets are determined by their conviction rate. HIPAA also undermines the doctor-patient relationship by making doctors excessively fearful of prosecution for prescribing what courts may later deem “unnecessary” medical procedures.

In addition to inventing new crimes, there has been a disturbing trend toward the federalization of crimes that are traditionally state concerns. Gene Healy, an attorney and senior editor at Cato, gives a scathing critique of Project Safe Neighborhoods, a gimmicky Bush administration program to prosecute gun crimes at the federal level. The proposal, Healy argues, undermines federalism and will clog already overworked federal courts with routine gun cases.

Go Directly to Jail is available in hardcover for \$17.95. It can be purchased in bookstores, at www.catostore.org, or by calling 800-767-1241. ■



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The High Cost of Health Regulation

by Christopher J. Conover

The soaring cost of health care has become one of this nation's most pressing public issues. Politicians and pundits regularly talk of new programs and changes in law that could address this problem, and some have even discussed the implementation of a socialized health care system. Unfortunately, there is little discussion of one policy response that would significantly lower health care costs: doing away with outmoded and questionable health care regulations that raise prices but produce little if any benefit.

As one health economics textbook puts it, "The U.S. health care system, while among the most 'market oriented' in the industrialized world, remains the most intensively regulated sector of the U.S. economy." Regulation is taxation by another name. Instead of taxing private resources

to fund government spending, regulation directs how private individuals use those resources. The costs of regulation are the benefits we would derive from alternative uses of those resources.

To determine the costs of health care regulation and ascertain whether those costs are offset by benefits, my colleagues at Duke University and I have spent several years evaluating the economic literature to estimate the net burden that health care regulations place on the U.S. economy. Our preliminary results are published by the Cato Institute.

We examined five areas of government regulation that apply solely to the health care sector: regulation of health facilities (hospitals, nursing homes, etc.), health professionals (doctors, nurses, and many other providers), health insurance (pricing restrictions, benefit mandates, portability requirements, etc.), pharmaceuticals and medical devices, and the medical liability system.

Our review of the literature on 47 different types of health care regulation suggests their total cost was roughly \$339.1 billion in 2002. After subtracting the \$170.1 billion in benefits that we calculate those regulations provide, we find that health care regulation places a net burden on society of \$169.1 billion annually.

Broken down by component, the medical liability system appears to impose the greatest net cost, at \$80.6 billion per year. We arrive at that estimate after accounting for the medical liability system's benefits: averted mortality and disability, plus the compensation paid to injured patients.

We estimate that Food and Drug Administration regulation of pharmaceuticals and medical devices imposes a net annual cost of \$41.8 billion. The lion's share of that cost represents the value society places on the net number of lives that are lost while waiting for better pharmaceuticals to be approved, after subtracting the number of lives saved by FDA regulation.

In 2002, regulation of hospitals and other health facilities cost an estimated \$25.1 billion. The two greatest costs in this category are hospital accreditation and licensure requirements (net cost \$8.6 billion),

and laws that tax hospitals and redistribute the revenues to those providing above-average amounts of uncompensated care (net cost \$5.2 billion). Health insurance regulations cost Americans \$14.4 billion annually, whereas regulation of doctors and other health professionals costs \$7.1 billion annually.

This leads to some troubling realizations. Over the next 10 years, the net cost of health care regulations will be some three times more than the \$534 billion cost of the new Medicare prescription drug benefit. By increasing the cost of medical care, regulation increases the cost of health insurance. We estimate health care regulation makes coverage unaffordable for approximately 7.5 million Americans.

Though one might suppose this added burden ensures better medical care, it is likely that it costs lives instead.

Several studies have established a trade-off between income and mortality: As income rises, mortality falls because people are able to purchase more health and safety. We estimate that by making Americans \$169.1 billion poorer each year, health care regulations induce approximately 22,205 deaths annually. That is more than 4,000 more deaths than the Institute of Medicine attributes to uninsurance.

If we are to get the most out of our health care sector, policymakers must address the high cost of health care regulation. In terms of priorities, it would appear that medical liability reform offers the most promising target for regulatory cost savings, followed by deregulation of the FDA, health insurance (e.g., mandated health benefits), and health facilities (e.g., accreditation and licensure).

What should be clear from even this rough picture of the health care regulatory landscape is that the potential savings from deregulation are far too large to be ignored. ■

Christopher J. Conover is an assistant research professor at Duke University and author of the Cato Policy Analysis "Health Care Regulation: A \$169 Billion Hidden Tax." This article was published in Investor's Business Daily on October 7, 2004.

Cato Calendar

Liberty, Technology, and Prosperity

Palo Alto, California • Crowne Plaza Cabaña
December 2, 2004

Speakers include Maren Christensen, Fred von Lohmann, and Rick White.

Cato City Seminar

New York • Waldorf-Astoria
December 10, 2004

Speakers include Christopher Hitchens, Andrew Napolitano, Ray Keating, and Ed Crane.

17th Annual Benefactor Summit

Grand Cayman • Westin Casuarina Resort
February 16–20, 2005

Speakers include Frederick W. Smith, Timur Kuran, and Anne Applebaum.

Get more details at
www.cato.org/events.

◆ **Pay equity now! Pay those women less**
Sheet metal worker, crane operator and telephone repairman are jobs usually still associated with big burly guys. But in Michigan, women are paid more on average than men in these professions, according to an analysis of 2000 Census data released by Pioneer Press last week.

—*Washington Post*, June 13, 2004

◆ **All-out war on baby fat**

To fight the epidemic of childhood obesity, the nation must launch a far-reaching campaign enlisting virtually every aspect of society to reduce the amount of junk food that children eat and get them exercising more, the National Academy of Sciences said yesterday.

—*Washington Post*, October 1, 2004

◆ **Regulatory triumph: Microsoft spends millions to produce a less useful product**

Microsoft Corp. officials said yesterday that the company has spent millions of dollars preparing a version of its Windows operating system without a program for playing digital music and videos, in the event it loses its bid to postpone antitrust sanctions ordered by European authorities.

—*Washington Post*, September 28, 2004

◆ **Maybe they should contract it out**

For the past year, the 20 or so correspondents toiling in the basement of

the press room in the West Wing have been fighting to keep their toilet. “We’ve been using that toilet since Jimmy Carter was president,” said Associated Press Radio correspondent Mark Smith. But after some trouble with the commode last year, the General Services Administration announced it was flushing the troublesome fixture

The GSA said it would cost \$500,000 to fix the toilet.

—*Washington Post*, September 14, 2004

◆ **Sweeney: keep workers in the dark**

John J. Sweeney, president of the AFL-CIO . . . and aides cited several examples of what they called the Bush administration’s hostility toward workers. Among them was a presidential directive Bush signed during his first month in office requiring federal contractors to post signs alerting workers they have a right to refuse paying union dues that are used for political purposes.

—*Washington Post*, August 25, 2004

◆ **Self-government in action**

The proposal to boost the “sin tax” on cigarettes from 5 cents to 30 cents a pack in Fairfax County has commanded proud bipartisan support. . . .

“To my knowledge, no one is against a cigarette tax,” (Supervisor Dana T.) Kauffman said. “Frankly, no one on the (county) board smokes.”

—*Washington Post*, July 25, 2004

◆ **Where in Article I, Section 8, do we find Congress’s authority over the accuracy of television ratings?**

Most people with a cable connection can watch hundreds of television channels, but Nielsen Media Research still counts who watches local TV pretty much the same way it did when Bonanza was on the air. . . .

Congress held a hearing in July into whether the TV industry’s ratings czar, which faces little competition, needs government oversight. “It’s impossible to achieve a high quality of broadcasting if shoddy audience measurement practices are permitted to proliferate,” charges Sen. Conrad Burns, a Montana Republican who chairs the Senate subcommittee investigating complaints from News Corp. and others.

—*Wall Street Journal*, September 16, 2004

◆ **Free speech only for the left**

The Montgomery County Board of Education voted Thursday night to ban religious clubs, the Boy Scouts and other community organizations from distributing fliers in student backpacks, a move those groups say will cripple their recruitment efforts. . . .

School board members said . . . the new policy . . . will allow PTAs, government agencies, student groups, day-care centers, nonprofit sports leagues and the school system to continue disseminating fliers.

—*Washington Post*, July 31, 2004

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