

Cato's Letter

*A Quarterly
Message
on Liberty*

*Spring 2010
Volume 8
Number 2*

Realizing Freedom

TOM PALMER

As I was reviewing a mountain of articles, trying to fish out the best and remember where I'd published each, and pulling out those that were too juvenile, too dated, or not relevant anymore, I noticed that the finalists had a number of themes that had been cooking in my mind over the years. I thought I'd review some of those themes.

The first theme is about the intimate connections between liberty, rights, and the rule of law. Now, anytime someone talks about the rule of law most people feel their eyes turning back in their foreheads; it just seems dull, or uninspiring, or stale. To the contrary, the rule of law should be inspiring to us. It is a vitally important goal, and without it there is no freedom and there are no rights.



*Tom G. Palmer is a senior fellow at the Cato Institute; director of Cato University, the Institute's educational arm; and the author of *Realizing Freedom: Libertarian Theory, History, and Practice*. He is also the vice president for international programs at the Atlas Economic Research Foundation. Palmer spoke about his book at Cato in December.*

**CATO
INSTITUTE**

Its centrality has been made all the more evident to me in the work I do in post-totalitarian and authoritarian societies, in which the central issue is the development of the legal institutions of liberty. Without the rule of law one is at the mercy of the arbitrary will of other people, and that is to exist in a condition of unfreedom. Privatization also won't work without the rule of law, because you can't privatize something into a system that lacks property rights, the right to contract, and the rule of law.

A proper understanding of rights is important to the establishment of the rule of law. It was a great accomplishment of the tradition of classical-rights thinking—among the great figures here are Thomas Aquinas and the Scholastics—to connect “subjective right”

“The challenge is to find within every cultural context the indigenous roots of liberty.”

(the idea that you have a right to do something or to receive something—say, \$10 for something you sold) and “objective right,” which we use when we say “this is the right thing to do,” or “this is the right ordering of the world”—that is, justice. The way in which justice is achieved is by respecting the rights of all the members of a society. Respect for rights is a justice-generating machine, if you will. (Robert

Nozick later articulated fundamentally the same idea in his book *Anarchy, State, and Utopia*.) But that achievement is put in peril when others say, “We'll just rearrange rights so as to produce incompatible, or conflicting, rights, such that we have to override them to achieve justice.” (I have an essay on John Rawls in *Realizing Freedom* in which I present that as a central problem in Rawls's claim to be a liberal, because he overrides rights in the name of justice.)

The second theme that emerged as I was reading through these essays is the historical rootedness of abstractly formulated accounts of rights, and the importance of identifying a narrative of liberty for every cultural context. I've gotten into a little hot water with some conservatives because I do not go around the world defending “Western values.” The reason is that Western history has within it not only the ideas of rule of law, justice, peace, respect for rights, toleration, and so on, but also war, imperialism, genocide, murder, slavery, and systematic oppression. Some of my Chinese friends quickly point out to people who come to promote Western values that, “Yes, we've had a taste of that. Karl Marx, from Germany, imported his Western ideas and we don't like them very much.” Communism, too, is a Western idea.

The challenge is to find within every cultural context the indigenous roots of liberty, because every culture has a narrative of liberty, and also, in parallel, a narrative of power

and oppression. What we, as advocates of liberty, need to do is to excavate: to dig down and identify those roots of liberty in every cultural context. Libertarian formulations of rights are posed in abstract terms. Those abstractly formulated rights are central to the libertarian tradition. But if they are to have staying power they need to be rooted in a historical culture.

The third theme of the book is the role of ideas. We hear quite frequently that ideas matter, that ideas are important—and yet a lot of libertarian political economy ignores ideas. Some of the public-choice theorists seem to imply that the only thing that matters is interests. That’s a bit naive. The more sophisticated ones allow that there are interests and ideas. After all, it wasn’t out of material necessity that European civilization turned so strongly away from liberal values and toward violence, oppression, and brutality at the beginning of the 20th century. One of the problems was that libertarians did not rise to the challenge to criticize the ideas of collectivism strongly and robustly. Too many of them fled the field because they saw collectivism as “the new wave.” In my view, libertarians should never shrink from the battle of ideas—from confronting, in a fair and open debate, the ideas of collectivism, or violence, or statism. As F. A. Hayek put it, “We must make the building of a free society once more an intellectual adventure, a deed of courage.”

“To the contrary, the rule of law should be inspiring to us. It is a vitally important goal, and without it there is no freedom and there are no rights.”

The fourth theme is the significance of implementing the ideas of liberty. When I started promoting libertarian ideas in the Soviet Union and its satellite states—I spent a lot of time smuggling books and photocopying machines and so on—I heard the problem put clearly by my friend Boris Pinsker. He said, “It is very easy to turn an aquarium into fish soup. But to turn fish soup into an aquarium is really a more challenging task.” And that was the problem they faced: to turn fish soup into an aquarium. Whoever can give us such a recipe, a guide to how to introduce the institution of a free society, will get a Nobel Prize and a hearty handshake, because that is the biggest problem we face.

And the final theme is the importance of action. It is not enough to just sit in a room and say, “I’m a libertarian. I’m a radical,” and then criticize others who may not be radical enough according to your standards, but who are taking action to increase liberty or to oppose violence and coercion. Such armchair carping may feel good, but it does not advance the agenda of liberty. The hard thing is to take risks and

actually try to improve the condition of the human race by increasing liberty and respect for justice.

So I'll conclude by addressing, as part of the challenge, the critics of libertarian ideas straightforwardly and in a fair way. Listen to them carefully; don't just dismiss them because they're bad people or they don't come to the right conclusions.

Rather, learn from them. Concede the points that they make that are valid, and where they are on to something. But then, also, respond to those arguments they make that are erroneous. I do that in a number of essays in the book.

To take one example, I was sick of all the communitarian misstatements of what classical liberals believe and, at the encouragement of David Boaz, I wrote an essay called "Myths of Individualism" to defend liberal individualism from the caricatures that were coming out of academic writers of a communitarian bent.

I'd also like to mention a few others. The first is a criticism of G. A. Cohen, the recently deceased Marxist professor at Oxford University. He wrote a critique of Robert Nozick. It is very ingenious, but also confused in its own analysis. Even taking all of his premises for granted, the conclusion does not follow. When I brought this to

his attention he was quite angry with me and demanded to know whether I was criticizing the conclusion or the argument. I thought for a moment and I said: the conclusion is the conclusion of an argument, they are not two different things, and your conclusion does not follow from your premises. He was even angrier and wanted to

know if I was attacking the conclusion... or the argument.

Another is the unending series of attacks on libertarianism by Cass Sunstein. In a delightful book—you'll get the flavor from the title of the book he co-authored with Stephen Holmes, *The Cost of Rights: Why Liberty Depends on Taxes*—he argues that all rights are grants from the state. That

is to say, all rights are welfare rights. That is their explicit claim. The argument is ingenious. They assert that if the right isn't enforced, it is no right at all. (I disagree very strongly; it is a meaningful thing to say that victims of violence have their rights violated.) But even if we grant the claim, the argument fails. They argue as follows:

Almost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the



public purse.

Thus, “the right not to be tortured by police officers and prison guards” is not a negative right as we would normally think of it, but a positive right. It is a positive right that the state hires monitors to watch the guards and punish them if they torture you or abuse you.

A state that cannot arrange prompt visits to jails and prisons by taxpayer-salaried doctors, prepared to submit credible evidence at trial, cannot effectively protect the incarcerated against torture and beatings. All rights are costly because all rights presuppose taxpayer-funding of effective supervisory machinery for monitoring and enforcement.

That’s an interesting claim. I thought about it and concluded that, in fact, this is an argument why rights don’t exist. For, if I have a right that the police not torture me, it is because the state has hired monitors to ensure that they don’t do so, because the guards will be punished by the monitors if the guards torture me. But I would only have a right not to be tortured if I had a right that the monitors punish the police in the event that the police torture me. But I would only have that right if there were super-monitors monitoring the monitors who monitor the police, and punishing those monitors for failing to punish the police for torturing me, and so on ad infinitum.

“Whoever can give us a recipe for how to introduce the institution of a free society will get a Nobel Prize and a hearty handshake, because that is the biggest problem we face.”

Similarly, you find a lot of advocates of welfare rights, such as Joseph Raz and Jeremy Waldron, arguing, “Well, of course, rights come into conflict all the time when we have welfare rights.” I have a right to paid vacation; you have a right to medical care; those conflict, so we’ll just let the state decide whose right wins. But the consequence of that, if you think about it, is not to add another layer of rights—a richer and more robust layer of rights to society—but to eliminate rights from the legal and political system altogether. Because if my right and your right come into conflict and the state must decide which trumps, it is, by stipulation, on the basis of something other than rights. But such theorists never specify what that principle is. Is it tribal allegiance, personal friendship, cronyism, bribery, racial preference? We can think of lots of ways in which those conflicts have been historically resolved. But we would not identify such principles with the principles of liberalism and a rights-governed polity.



Cato Scholar Profile: **JAGADEESH GOKHALE**

Cato senior fellow JAGADEESH GOKHALE is an internationally recognized expert on entitlement reform, labor productivity and compensation, and the impact of fiscal policy on future generations. Before joining Cato, he was the senior economic adviser to the Federal Reserve Bank of Cleveland. His recent book, *Social Security: A Fresh Look at Reform Alternatives*, was published by the University of Chicago Press (2010). Gokhale holds a PhD in economics from Boston University and is a member of the Social Security Advisory Board.

How concerned should Americans be about the economic catastrophe playing out in Greece? Is that country's collapse an outlier—or a sign of things to come in the United States if we fail to reform our entitlements?

We should be greatly concerned. But we don't have to look as far as Greece for indications of things to come. Debt problems in California, New York, Rhode Island, and other states are forcing more Greek-style financing gimmicks that could eventually blow up and dissipate investor confidence. At root is policymakers' poor resolve in reducing states' fiscal imbalances arising from generous, but unfunded, pension and health care promises to state employees—a condition not very different from that of Greece and, indeed, that of the U.S. federal government.

In your new book you write that "Social Security's financial condition is significantly worse [than] projections by the program's trustees." Is there any hope for turning the program around and making it financially healthy?

There must be. First, the measurement of Social Security's shortfalls by official agencies needs to be improved. Second, we have no choice but to resolve the shortfalls proactively—and soon—or markets will do it for us in ways that inflict economic pain indiscriminately. A deliberate resolution would protect those most vulnerable economically but also avoid the most economically harmful tax increases. If politicians pursue business as usual, Social Security's fiscal imbalance will only grow larger and the window of opportunity for resolving it will shrink. The political clout of lobbies unwilling to entertain smaller-than-promised So-

cial Security benefits is growing, but increasing international capital and labor mobility means that the potential economic harm from higher taxes is also becoming larger.

Even if we do succeed in genuinely reforming Social Security, wouldn't that be only a minor success compared to the massive threat posed by health care's unfunded liabilities?

Yes. The financial shortfall in Medicare is many times larger than that in Social Security. Add the commitment to pay Medicaid benefits, and little is left over for other government services. Health care costs are escalating much more rapidly than U.S. income growth. Pervasive government subsidies—direct and unlimited coverage for retirees, health insurance subsidies through employers, and Medicaid benefits to low-income groups—cause us all to purchase generous coverage and overuse health care services—by much more than if we bore most costs directly. And the health care sector is subject to restrictions—a ban on drug re-importation; licensing of doctors and nurses, and strict limits on their respective areas of competency; limited training capacity in medical schools, et cetera—that reduce supply and reduce competition. Government subsidies also generate a ready market for costly medical innovations that are automatically covered under government programs. There seems no end in sight as the Democrats' new health care overhaul forces citizens to purchase health insurance and expands health insurance subsidies. The new law appears unlikely to slow health care cost growth and it won't reduce outstanding financing shortfalls in health care entitlement programs.

The Estate Tax Mess



Federal estate tax policy is a complete mess. In 2010, we have no Federal estate tax. Congress may act sometime this year to re-impose the tax, probably retroactively to the beginning of the year. But if Congress should fail to act in 2010, the estate tax is scheduled to return in 2011 with rates ranging up to 55 percent and a \$1 million exemption level.

So how did this mess come to be? As many of you undoubtedly recall, the estate tax is often referred to as the “death tax” because it is imposed on the assets of folks who have died. For more than a decade, there have been strong calls for its full repeal since it taxes assets that were already taxed, via income and capital gains taxes, throughout a person’s lifetime. Indeed, the estate tax is a very anti-savings tax. The Bush administration supported permanent repeal but was never able to garner enough support to overcome supermajority rules in the Senate.

Instead, an awkward compromise was reached: through 2009 estate tax rates were gradually lowered and exemption levels were gradually increased. Then, in 2010, the estate tax was repealed for one year only. But the bad news is that the terms of the legislative compromise dictate that, in 2011, the estate tax comes back with a vengeance—with high rates and a \$1 million exemption per person.

When this Bush-era legislation was passed, most analysts were convinced that Congress would never allow the muddle of a one-year repeal, followed by a re-instatement of the tax at punitive pre-reform levels. Well, the pundits were wrong: Congress let matters slide and we are now in the midst of the 2010 one-year repeal. Granted, it remains highly likely that, sometime during 2010, Congress will

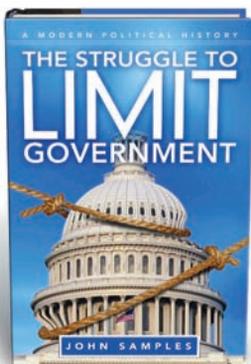
focus on the estate tax. Commentators predict that this re-crafted estate tax will have rates peaking at 45 percent and a \$3.5 million exemption. But nobody knows for sure!

So this leaves folks—citizens, taxpayers—in a real bind. What assumptions should they make when planning their estate? No tax? Low tax? High tax? Reasonable exemptions? Meager exemptions? The confusion is not academic, as many wills are drafted with specific reference to such items as the Federal exemption level—for example, “I leave my children an amount equal to the Federal exemption equivalent in effect at the time of my death.” The drafter of this will may have assumed that the exemption referred to would be upwards of \$1 million. But right now, this clause would utterly fail in its purpose of leaving money to children as there is no estate tax and no exemption.

What to do? Check with your lawyer and financial advisers to make sure that your will and other estate planning documents still work as you intended, even in these uncertain times. It is important to check now during this awkward hiatus in the estate tax and just as important to check after any new legislation. After all, you want to ensure that your assets go the family members and charities of your choice. Take nothing for granted. Congress has not been looking out for you.

If you would like to discuss estate planning or gifting ideas, please feel free to contact **Gayllis Ward**, our director of planned giving, at (202) 218-4631 or at gward@cato.org.

Books from the **CATO** INSTITUTE

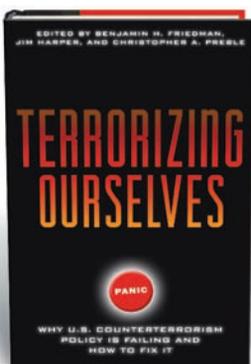


The Struggle to Limit Government: A Modern Political History

By John Samples

This timely new book examines the highs and lows of the nearly 30-year struggle to limit government, from Reagan to Obama, offers compelling perspectives on the 2006 and 2008 elections, and reveals the progressive and New Deal-era foundation of big government and its continuing impact today and on the road ahead.

HARDCOVER: \$24.95 • E-BOOK: \$14.00



Terrorizing Ourselves: Why U.S. Counterterrorism Policy Is Failing and How to Fix It

Edited by Benjamin H. Friedman, Jim Harper, and Christopher A. Preble

Leading experts explore disciplined approaches to terrorism, offer effective strategies for truly protecting Americans, and dismantle the flawed thinking that dominates today's national security policy. The authors also expose the deliberate, politically motivated, and counterproductive manipulation of fear that too often dominates and distorts U.S. plans and actions.

HARDCOVER: \$24.95 • E-BOOK: \$14.00

Available at bookstores nationwide, online at www.cato.org, or by calling toll-free (800) 767-1241.

Cato Institute, 1000 Massachusetts Avenue, N.W., Washington, DC 20001 • www.cato.org

Nonprofit
Organization
U.S. Postage
PAID
Cato Institute

CATO
INSTITUTE

1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
www.cato.org