The Forgotten Ninth and Tenth Amendments
by Roger Pilon

It is unremarkable that a section of the American Bar Association, even the Section of Individual Rights and Responsibilities, should title the final session of its program commemorating the bicentennial of the Bill of Rights “The Forgotten Ninth and Tenth Amendments.” As Randy Barnett and Suzanna Sherry have reminded us, those amendments were meant to secure the higher law that stands behind the Constitution. Yet within 30 years of the drafting of the Bill of Rights, adjudication based on the concept of a higher law all but disappeared in this country.

It was something of a surprise, then, when Justice Goldberg drew upon the Ninth Amendment in 1965 to find a right to privacy, which helped the Court to strike down a Connecticut statute forbidding the sale of contraceptive devices. Although the Ninth Amendment has since been cited in over 1,000 cases, in all but one of those cases it has played only a supporting role. As for the Tenth Amendment, after a brief revival in 1976, the Court reversed itself only nine years later. Thus, if not entirely forgotten, the Ninth and Tenth Amendments today are hardly alive and well.

Our ambivalence toward the demise of those amendments could not be better illustrated than by comparing the debate that four years ago surrounded the nomination of Judge Robert Bork to the Supreme Court with the debate that today surrounds the nomination of Judge Clarence Thomas. When Bork likened the Ninth Amendment to an inkblot that afforded judges no guidance in interpreting the Constitution, he was supported by conservatives but roundly condemned by liberals. Unlike Bork, Thomas believes that the Ninth Amendment points to the higher law that ought to guide judges in their adjudication, yet he too has been generally supported by conservatives but eyed with suspicion by liberals.

Although a large part of that ambivalence is simple politics, there are deeper issues that help to explain why the Ninth and Tenth Amendments and the higher law they reflect have played so limited a role in our legal history. Before examining those issues, however, we need first to review briefly what the amendments meant to the men who wrote them. We will then be in a position to ask what led to their demise and what must be done to restore them.

The Original Understanding

Addressed to our rights, the Ninth Amendment states, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” By contrast, the Tenth Amendment speaks to powers: “The powers not delegated to the United States by the Con-

(Cont. on p. 10)
The Crime Bill Is a Killer
Chairman's Message

Crime in the United States is a serious problem. The crime bill now being considered in Congress, however, is not a serious solution. A product of mindless Republicans and spineless Democrats, the crime bill is counterproductive, discriminatory, and expensive. Let me count the ways.

Approval of the crime bill would probably increase the number of murders. It has been widely reported that the bill authorizes capital punishment for some 31 crimes. What has not been widely reported is that 10 of those crimes involve something other than murder: treason, espionage, transporting explosives with intent to kill, arson of federal property in interstate commerce, the fourth felony conviction of a major drug supplier, drug-trafficking "drive-by shootings," aircraft hijacking, hostage taking, kidnapping, and bank robbery. Those are clearly serious offenses. The problem with authorizing capital punishment for them is that it would eliminate any marginal deterrent effect on the offender who murders the victims of or witnesses to those offenses. That would surely increase the number of hostages, kidnap victims, witnesses to bank robberies, and so on, who are murdered. The deterrent effect of a criminal penalty is a function of the severity of the penalty and the probability of arrest and conviction. An increase in the penalty for the crimes listed here would reduce the number of offenders convicted, at the cost of the lives of innocent victims and witnesses.

Second, the bill creates different classes of murders, depending on the status of the victim. The murder of foreign officials, a wide range of federal officials from the president to poultry inspectors, the families of federal officials, state officials assisting federal officials, court officers and jurors, and others would be capital crimes. The bill would not provide a similar deterrent for the 99-plus percent of murders that do not fall under those categories. Similarly, the bill authorizes a police officer's 'bill of rights' without addressing the issue of who is being killed and who is being allowed to kill in the arbitrary exercise of police power. One might hope that those sections would be ruled unconstitutional as inconsistent with equality under the law.

And third, the bill is expensive, authorizing an additional $3 billion of federal funds for enforcement, incarceration, and the training of police officials. That figure underestimates the total cost, because other provisions would increase the current overcrowding of state prisons and jails. Crime is a serious problem, and additional funding might be appropriate if there were any evidence that it would reduce crime. Sen. Warren Rudman (R-N.H.) expressed what may be a common belief when he said, "Crime in America is inversely proportional to the number of police men we have on the streets." Unfortunately, there is no evidence that a general increase in funding for police and corrections would reduce crime.

The provisions of the crime bill discussed above are broadly supported by the Bush administration and members of Congress of both parties. Most of the controversy has been focused on the provisions affecting gun control and the exclusionary rule. Crime in America is a serious problem, but whatever the merits of those provisions, the crime bill of 1991 is not serious legislation.

In 1723 the English Parliament passed the Black Act, which authorized capital punishment for offenses as stalking deer in disguise at night, cutting down young trees, and writing threatening letters. The crime bill now before the House is addressed to more serious offenses, but the political incentives to talk tough and legislation stupidly are the same as those that led to the notorious Black Act.

—William A. Niskanen

Cato Policy Report

Revealing Calls for Spending Cuts
Global Interventionism Is Dangerous and Expensive

A policy of global intervention, or adopting every country's threats as our own, "is the strategic premise of the Bush administration's post-Persian Gulf defense program," contends former Pentagon official Earl C. Ravenal in a new book from the Cato Institution. Ravenal, a senior fellow at the institute and distinguished research professor of international affairs at Georgetown University, argues in Designing Defense for a New World Order: The Military Budget in 1992 and Beyond that despite some proposed modest reductions in general purpose forces, the administration's defense program is "a prescription that is still expensive and potentially escalatory." He warns that given the administration's policy assumptions, "the United States is acquiring every nation's enemies."

Ravenal's alternative defense budget, based on a strategy of nonintervention, would save American taxpayers more than $320 billion over the next five years. He contemplates a military force of 1.1 million active duty personnel at the end of that period instead of the administration's projected 1.7 million. His alternative strategy would also phaze out such increasingly irrelevant Cold War era commitments as those to NATO and the U.S. troop presence in South Korea.

Ravenal contends that an effort to promote collective security, the essence of President Bush's "new world order," probably prove futile in the long term. International developments point to the emergence of a system of "general unalignment," which will be characterized by "the extensive fragmentiation and 'regionalization of power' among more than two dozen nations.

Instead of reflexively intervening in regional conflicts, as Washington did in the Persian Gulf, U.S. policy should be to "quarantine" regional violence and "compartmentalize" global instability. Compartamentalization, Ravenal insists, can be accomplished better through nonintervention than by "universalizing" every quarrel, which was the instinctive response of the United States in the Gulf War. Bush's "new world order"--"backless" U.S. intervention can antagonize or neutralize critical participants in regional balances of power, and "encourages regional countries to hang back... and watch the Americans do the geopolitical work they should be doing for themselves."

U.S. leaders are in danger of drawing dangerously erroneous lessons from the military victory in the Persian Gulf. Ravenal contends. Although the outcome demonstrates that the United States will not be defeated on the battlefield by a Third World opponent, the price of success--especially the cost of maintaining the forces needed to wage similar conflicts in the future—is very high. In the long run, even the price of "success" in such Third World interventionist ventures will be rejected by the American political-economic-social system.

Designing Defense for a New World Order is available from the Cato Institute for $4.95.

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Cato Institute

Earl C. Ravenal calls for withdrawal from U.S. military commitments in his new book, Designing Defense for a New World Order, doing for themselves."

INSITUTE

—Earl C. Ravenal
Cato Policy Report

IRAs, 1981 Tax Cut Debated

Cato Hosts Party for P. J. O’Rourke’s New Book

Cato Events

June 6: More than 400 people filled the ballroom at the Capital Hilton Hotel for the Cato Institute celebration of the publication of P. J. O’Rourke’s latest book, *Parliament of Whores: A Lonesome Gun in a Tame United States Government.* O’Rourke, who also wrote *Holidays in Hell and Republican Party Reptile,* told the crowd that “giving money and power to government is like giving whiskey and car keys to teenage boys.”


June 19: “Competition and the Utility Industry: AT&T Revisited” was the topic of a discussion at a Cato Policy Forum. Former AT&T executive Doug Houston, associate professor of business economics at the University of Kansas, discussed his proposal for an AT&T-style breakup of the utility industry. In response, David Raboy, chief economic consultant for Patroon, Bogs & Bow, gave the utility industry’s perspective on various reform proposals.

June 20: Cato executive vice president David Boaz spoke on “400 Years of Sidak, who identified four types of veto authority and their constitutionality. Nelson Lund, assistant counsel to President Bush, commented.

June 26: “The Brady Bill: Saving Lives or Sacrificing Liberty?” was the subject of a Cato Policy Forum. The Brady bill would mandate a seven-day waiting period for the purchase of handguns. David Kopel, former assistant district attorney in Manhattan, argued that the waiting period could actually aggravate violent crime and may provide an administrative procedure for denying rights to bear arms. Sanford Horwitt, political consultant for the Coalition to Stop Handgun Violence, argued that although the waiting period might not do much to stop handgun violence, it would be an important first step.

June 27: Cato senior editor Sheldon L. Richman spoke on “The Persian Gulf War: New Order or Old Disorder?” at the second summer intern lecture. He pointed out that President Bush’s Gulf policy is not likely to make a change for the better in the Middle East.


July 18: The ethnic violence in the Balkans was the subject of a policy forum. Paul Menzelt of the University of Washington discussed the relevance of free market policies to the overall debate over “Defusing the European Time Bomb.”

July 19: During a lunch-time Policy Forum, debaters examined the question of whether IRAQ is a Sound Tax Policy? Jacob Dreyer of the Investment Company Institute and Joseph Cordes of George Washington University tangled over whether IRAQ can meet its obligations. The debate was held each day at the Senate hearing room full of spectators and reporters. Taking the “economic miracle” side were Larry Kudlow, chief economist for Bear Stearns and Company; Arthur Laffer, chairman, Laffer, Canto, and Associates; and Richard Rahn, chief economist, U.S. Chamber of Commerce. Changing “voodoo economics” were Robert S. McIntyre, director, Citizens for Tax Justice; Rudolph Penner, senior fellow, Urban Institute; and Robert Shapiro, director, The Value of Money Policy Institute. Moderating the debate was Fred Barnes, senior editor of the New York Post. Argument centered on whether the 1980s were a decade of extraordinary economic growth and to what extent, if any, the 1981 tax-rate cuts were responsible.

July 30: Roger Pilon, William Niskanen, David Boaz, and Melanie Tamm discussed various policy issues at a seminar of the National Policy Foundation East European Fellows.

James Buchanan Looks at Europe’s Constitution in Cato Journal

Nobel laureate James Buchanan believes that America’s constitutional history is relevant to Europe on the eve of 1992. He presents his interpretation in “An American Perspective on Europe’s Constitutional Opportunity” in the Winter 1991 issue of the Cato Journal. The issue also includes

Regulation Looks at Banking System, Insurance, International Trade

The Spring 1991 issue of Regulation magazine, Cato’s review of business and government, focuses on modernizing the nation’s financial system. Senior editor Catherine England leads off the issue by asking “Are Banks Special?” She notes that treating banks as they were different is wrong. It leads to regulation that reduces their freedom and efficiency and “largely removes[] U.S. banks from the realm of market discipline.”

Other writers include Scott E. Harrington on “Should the Federal Reserve and the Insurance Company Solvency?” and Paul G. McMahon on “Bankruptcy as a Public Policy: The World Bank and International Financial Institutions.”


Two articles on Soviet monetary matters—Edgar L. Feige’s “Perestroika and Ruble Convertibility” and Steve H. Hanke and Kurt Schulter’s “Ruble Reform: A Lesson from Keynes”—Domestic concerns are the subject of other articles, including “The Economics of Drug Control” by Paul R. Hubin, “The War on Drugs as Antitrust Regulation” by Gary M. Anderson and Robert D. Tollison, and “The First Minimum Wage Laws” by Clifford Thies.

Kevin Dowd contributes an article on options clauses and bank suspension, and Fred S. McChesney discusses “Antitrust and Regulation: Chicago’s Consigning Visions.”

The Spring/Summer 1991 issue will contain papers from Cato’s conference held in Moscow in September 1990.
The Reagan Tax Cuts after 10 Years:
Economic Miracle or Voodoo Economics?

Policy Forum

The Cato Institute regularly sponsors Policy Forum in Washington, where distinguished analysts present their views to an audience that includes policymakers, the media, and the public policy community. A recent forum was held on July 29, 1989, the 50th anniversary of the passage of the 1938 income tax cuts. The speakers were: Arthur Laffer, chief economist with Bear Stearns Company, Arthur Laffer, chairman of Laffer, Canto, and Associates Robert S. McIntyre, director of Citizens for Tax Justice; Ralph Peters, senior fellow at Urban Institute; Richard Rahn, vice president and chief economist at the U.S. Chamber of Commerce; and Robert Shapiro, vice president of the Progressive Policy Institute. Fred Barnes, senior editor of the New Republic, moderated. Selections from the forum are printed here.

Arthur Laffer: The happiest day of my life has been the day Reagan took office, and the second happiest was the day he was left office, without the economy's having collapsed. As we look back to the 1980s, we notice that old arguments are not as potent. The fact that they don't even fade away--especially when they're based on hope. Therefore, to judge the economic impact of the Reagan tax cuts, it is important to remember that, although the first bill was passed in 1981, the tax cuts did not take effect the day the bill was passed. They were phased in. Therefore, to judge the economic impact of the tax cuts, you have to begin the analysis when the tax cuts took effect, not when the tax bill was passed. It's amazing how tax cuts don't work until they take effect.

We had a 5 percent cut in October 1981, a 10 percent cut in July 1982, and a 15 percent cut in July 1983. As all of you know, there's no such thing as a mid-year tax cut. You report your income for the whole year, and you pay taxes based on your whole year's income. Therefore, a 5 percent cut in October 1981 was really a 2.5 percent cut for the whole year. Likewise, for 1982 we had a 10 percent cumulative cut of the first two years. Starting in 1981, we had a 20 percent across-the-board cut. That's when the tax cut really started. It's really not due to the economic impact of the Reagan tax cuts, you need to start with January 1, 1981. If you do that, if you get a very different answer than you would if you were to compare economic performance during the Eisenhower administration and during another.

Second, you need to judge the arguments by the ex ante critiques of the time, not by the ex post Monday morning quarterbacking that you hear today. For example, the biggest criticism of the Reagan tax cuts in 1981 was that they would cause annual inflation to be 20, 30, maybe even 40 percent. No one argued that inflation would actually reach that level. Most people agreed that inflation would actually be very low. What really happened when the Reagan tax cuts went into effect was that we took capital that was earning 10 percent interest, an inflation premium, and a very inefficient way of storing capital in tax shelters, inflation hedges, windmills--and redirected it toward productivity. The real mistake was government making inefficient capital efficient. That caused huge appreciation in the value of capital assets. Thus, while savings rates may have been on the low side, total savings as measured by wealth increased enormously.

Fourth, you must remember what things were like back in 1981 when you judge Reagan's policies. At the end of 1980 the prime interest rate was 21.5 percent. The highest marginal rate on unearned income was 80 percent. The Soviets were still a major threat to the world. The conceptual framework, left over from the 1970s, held that you could tax workers and producers and pay them to do almost anything, and not to produce and still expect more people to become workers. That just doesn't make sense. The '70s framework doesn't have any impact on the economy. But, frankly, a trade surplus is a capital account deficit. A trade deficit is a capital surplus. Which would you rather have, investors lined up at your bank? They'd be lining up to invest your country's or try to get out? If they're trying to get in, you're going to have a capital surplus and a trade deficit, plus lots of new jobs and businesses. That's what occurred during the 1980s.

In my view, the distribution of income indicates that the tax cuts did not do much for the poor. But remember, one part of our program that was never put into effect was enterprise zones--tax-free zones in the corn set up to lift the other very high marginal tax rate group back into the mainstream of the economy. Enterprise zones were to have consumer goods, with the across-the-board tax cuts.

My last point is that cutting taxes is not what I think was done by the Congress. I often forget that John F. Kennedy gave us a supply-side tax cut back in the 1960s, which was the model for Reagan tax cuts. Kennedy's tax cut worked then, as Reagan's cuts did in the 1980s. And first of all, we don't have a Republican governor like California, Peter Wilson, who just raised the income tax and the sales tax. Wilson is no more a supply-side governor than George Bush is a supply-side president, even though they both are Republicans.

Rudolph Penner: My attitude toward the 1981 tax cuts today is exactly the opposite of the one I had in 1981. At the time I said the good news was that we'd successfully reduced marginal tax rates and disincentives for savings and work. The bad news was that we couldn't afford all the good news.

The fact that the public debt has risen by $1.6 trillion, or more than triple, since that time provides more than enough evidence to support that conclusion. The deficit represents a tragic erosion of the nation's wealth and is now large enough to have a noticeable effect on our prospects for improved living standards. Estimates of the potential growth of the economy are constantly being revised downward. Ironically, the mistake was recognized almost immediately, and the nation gravitating toward increased taxes again; some sort of tax increase occurred in every subsequent year of the 1980s. Perhaps those tax increases were responsible for the healthy recovery that followed the 1982 recession, the deepest since the Great Depression. I don't really believe that, but I think it's as logical as the recovery was due to the 1981 tax cuts. Particularly large tax increases occurred under the Tax Equity and Fiscal Responsibility Act of 1982, gasoline and payroll taxes were raised in 1983; the Deficit Reduction Act of 1984 increased business taxes; and less important tax increases occurred in subsequent years.

The tax policy of the 1980s left us with an overall federal tax burden of 19.3 percent of GDP in fiscal 1989, compared to 27.6 percent in 1980, before the tax burden went up in 1981. So the end looked almost as the beginning, at least as the average tax rate was concerned.

With the help of the 1986 tax reform, the tax system evolved in a way consistent with improving efficiency: marginal tax rates were lowered while the tax base was broadened. But the effects of that laudatory reform on things like personal savings were highly disputable, even to people like me, who never had much faith in the extraordinary claims of the supply siders but thought that some good might come of the reform. Art Laffer mentioned the efficient use of capital. Actually the combination of the poorly designed depreciation increase in the early 1980s and S&L fiasco left us with a national full of empty office buildings, hardly an efficient use of capital.

Before each tax increase, President Reagan would typically say that he would sign a tax increase over his dead body. He then signed it. He then claimed victory. Recent books suggest that Reagan slept through much of his presidency, but he certainly confused a lot of wake Democrats.

Sen. Daniel Patrick Moynihan and others have charged that the administration never really believed in supply-side economics; it merely seized on tax cuts as a means of starving government and controlling spending in the long run. Reagan himself had some success in deep core tax cuts, but during the 1984 Congress, almost all of the tax cuts of the 1980s were the fault of the high-spending Congress. But in fact, the Congress in 1986 passed almost exactly the amounts that he requested. The arguments were over priorities, not total spending levels.

For example, between 1983 and 1987 Congress cut Reagan's request for defense spending each year by amounts ranging from $33 billion to $33 billion and then proceeded to spend that money on civil programs. When Reagan had a chance to reduce the national debt, spending significantly in 1985, he really blew it. Sens. Robert Dole and Pete Domenici had courageously convinced the Senate to pass significant spending cuts, including cuts in cost-of-living adjustments and social security benefits for Social Security recipients. Reagan, at first, backed them; then he became scared of the elderly and double-crossed the Republican leadership. We would have a very different budget today if the Dole-Domenici cuts had been passed and the President did not suspect that the Republicans would still control the Senate. The elderly were convinced in 1986 that the Republicans were against them, but if the COLA cuts had actually passed, they probably would have saved them.

Having said all of those negative things, I still suspect that history will regard Reagan as a highly successful, effective president. He deserves much praise for giving Paul Volcker the independence to fight inflation. But, despite the deep recession that monetary policy caused in 1982, I believe that Reagan's deficit-cutting policies--there is no role in convincing the Soviets to throw in the towel, and I still have hopes that the President can bring basic economic reasoning and data to bear on the supply-side claims. On that basis we can confidently justify the program to have been at best trivial and at worst a botch.

Supply siders, and here I rely on the writings of Lawrence Lindsey, make their case for tax cuts roughly as follows: the government should be traced to constraints on economic vitality imposed by income tax increases, which were the most powerful

Lawrence Kudlow, Richard Rahn, and Fred Barnes listen as Arthur Laffer makes a point about the 1981 tax cuts at a Cato forum.

(Cont. on p. 8)
force behind the growing size of government. But if the disease is the tax burden, then the cure should begin not with tax cuts but with spending, in a system that holds officials accountable to voters, representatives don't raise taxes and then ask what to do with the money. They agree to spend more money, usually to assist those who helped elect them, and then ask how to get it. Supply-side theory seems to be inoffensive of how democratic politics works. Moreover, the data show that income taxes are not the driving force behind either federal spending or the top 1 percent tax burden. The share of federal spending paid for by income taxes has fallen steadily for 30 years, from 42 percent in the 1960s to 40 percent in the 1970s to 38 percent in the 1980s. And the top marginal income tax rate has been declining for a generation. In contrast, the share of federal spending paid for by working people in Social Security taxes rose from 18 percent in the 1960s to 28 percent in the 1970s and continued to rise, to nearly 30 percent, during the course of the supply-side experiment of the 1980s.

But the heart of the supply-side case is the assertion that cuts in marginal income tax rates restore individual incentives to work, save, and invest, and that the economic growth generated by work, savings, and investment can make the cuts self-financing. As evidence for that, and for the fairness of their approach, supply-siders offer numbers showing that high-income folks pay more income taxes after the tax cuts than before. Of course they did. In the 1980s, the real incomes of the top 1 percent of taxpayers grew five times faster than the incomes of average people. Yet, thanks to supply-side cuts, the average tax burden on the wealthy, the share of their total incomes claimed in federal taxes, fell, though it rose significantly for everyone else except the very poor.

And while the share of national income at the top increased, as a whole the economy created new wealth at about the same rate after the supply-side tax cuts as it had before. The rate of real growth in the 1980s was nearly identical to that of the 1970s, and both were much less than the rates during the 1950s and the 1960s—years of very high marginal rates. On a business-cycle basis—including the 1981–82 recession—from January 1983 to the beginning of the current recession, real output grew at an annual rate of 4.35 percent a year. But that's actually less than the 4.35 percent yearly growth during the four-year expansion in the second half of the 1980s. And as an economic outcome, neither case is much to brag about, because in both instances most of the growth came from an increase in the number of people working, not from increased worker productivity.

Did the tax cuts then help create the jobs that promoted growth in the 1980s? Fewer than a million jobs were created in July 1982, when the first large cut went into effect. But that rate of job creation reflects the way our economy normally works, regardless of marginal tax rates. By the data, the overall rate of job creation was slightly lower in the 1980s than in the 1970s, when marginal rates were higher. Some 13 million jobs, for example, were created in just the last four years of the 1970s.

Did the tax program stimulate investment? The data show that corporate capital spending did rise faster for two years—1984 and 1985—and then during other two-year periods since World War II. But from January 1983 to January 1990, investment as a share of GDP grew at only half the average rate of the previous three decades. Did the tax cuts stimulate savings? Certainly not. By government, not by individuals.

Supply side even failed when it came to nurturing entrepreneurship. At the end of the 1981–82 recession, the number of new businesses incorporated has increased by 3.9 percent a year, compared with 6 percent annual growth in the three preceding high marginal tax rates.

Where does that leave us? However badly the supply-siders want us to forget that, as David Stockman wrote, “it was all about the new era in free lunches,” validated by anecdote, as a macroeconomic event supply-side tax cuts lay somewhere between a wastage and a failure. And as E. J. Dionne observes: “After nearly a decade, supply-side analysis has not achieved a foothold in established economic thought, writing or instruction.”

Economics, Philosophy Highlighted at Catos 13th Annual Summer Seminar

Nadine Strowen, president of the American Civil Liberties Union, discusses the Bill of Rights on July 4 at the Catos Institute’s annual Summer Seminar in Political Economy.

“NewAlan W. Vickers of Cincinnati and James Joseph of the University of Chicago Law School talk during a break between lectures.

The 75 participants in the Summer Seminar included people from Mexico, Guatemala, Sweden, Canada, England, as well as immigrants from Peru, India, and China.

Boston, Burlington, Philadelphia, and a wide range of other American cities.

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stated. It led eventually to what Robert Summers has called America’s leading theory of law, “pragmatic instrumentalist” theory of law—pragmatic instrumentalist theory of law is a practical instrument for accomplishing social goals.

Bentham stood in a long line of moral skeptics, stretching from antiquity to today. The question whether there is any possibility of legitimacy yet had his own second-best solution to the problem of legitimacy. In time, not surprisingly, those skeptics took their toll on the American Constitution, which is not in our human tendency toward self-doubt, they undermined judicial belief in natural rights and propided judges toward other rationales. With their faith shaken, judges turned naturally to the “clearer, more agreeable, and more cordial” path of constitutional law, from rights-based to policy-driven law, from judge-made to statute law, from the law of reason to the law of will. Indeed, it remained only for the judiciary to catch up to mod-

ence Clause, to a wide range of activities the Founders would never have imagined—the result amounted almost to government by referees. It is one of the most bruising and most difficult of the Founders’ assumptions: enumerated rights, unenumerated powers. Modern practice, in short, runs up against the deliberate omission in the Constitution of the Founders’ powers to guard against those dangers, making it clear that the enumeration of certain rights were not meant to deny or disparage others and that powers were meant to be limited to those that were enumerated. In the drafting of the Bill of Rights, for example, the Framers initially included it with any constitutional provision.

Legitimacy and the Loss of Confidence

How did we get to this point—where conservatives read the Constitution almost as a constitution without Bill of Rights, where they are inclined to ignore the Bill of Rights and propided judges toward other rationales. With their faith shaken, judges turned naturally to the “clearer, more agreeable, and more cordial” path of constitutional law, from rights-based to policy-driven law, from judge-made to statute law, from the law of reason to the law of will. Indeed, it remained only for the judiciary to catch up to mod-

During the Progressive Era we stopped thinking of government as a necessary evil, and started thinking of it as an instrument for doing good.

—A judge whose misguided restraint precludes him from carrying out his full responsibilities is in fact an activist, finding powers that have nowhere been given.

The American people have adopted the Bill of Rights, how can we imagine that those rights were meant to be any less secure with a bill of rights.

Those conclusions are at direct variance with modern constitutional thought, of course, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases, save for in a fairly limited number of cases,
Prohibition Didn't Work; Neither Does Intervention in Middle East

A alcohol prohibition didn't reduce the consumption of liquor. There's a new conspiracy to raise the price of alcohol in America against the Third World and the United States. "It's a negligible amount that will be sold in the states," O'Quinn said. "But it will have an impact on the international market." O'Quinn suggests a number of amendments to the ADA that would "significantly limit its costs while actually enhancing the act's ability to integrate disabled people into American society." For example, costs that are not offset by tax credits or grants and that exceed certain minimum amounts should be presumed a "undue hardship" on employers or an "undue burden" on the owners of public accommodations.

U.S.-Middle East Relations since World War II

American intervention has not brought stability—much less peace or freedom—to the Middle East, writes Cato Institute senior editor Sheldon L. Richman in "Ancient History, U.S. Conducts a Middle East War II and the Folly of Intervention" (Policy Analysis no. 139). In 65 years of U.S. intervention in the Middle East, Richman writes that it is time for the United States to learn from its past mistakes and return to a foreign policy designed to "nurture the peace and security of the American people, not to export American power hither and yon for grandiose schemes." He concludes that President Bush's new world order "bodes ill for long-suffering American citizens, who will watch their hard-earned dollars and the purchasing power of the American economy increasingly dis- tribute military spending, and their blood sweat and tears in Iraq and Afghanistan.

Higher Milk Prices

Farm-state congressmen are launching another crusade to drive up dairy prices via sweeping new controls over dairy farmers and milk sales, writes James Boudin in "Our Next Criminal Class: Milk Bootleggers!" (Bibliographical Pudel-Kollath Policy is already costing consumers over $5 billion a year, according to Boudin, yet the new proposals could boost milk prices even higher.

(Cont. on p. 15)
Cato Scholars Write for a Wide Range of Magazines

Cato staff members and senior fellows frequently write frequently on a wide variety of policy issues for major newspapers, magazines, and journals, as well as on television and radio. In addition, we contribute chapters to books. Many of their newspaper articles are reprinted in Cato Commentaries, which Cato Sponsors and friends of the Institute receive periodically.

To acquaint our readers with some of the other work of Cato authors, we have listed a sample of their recent publications below.

**Doug Bandow**
"A Call to Civic Service," The Freeman, May 1990.
"Does Uncle Sam Really Need the Bases?" Defense and Diplomacy Review, November-December 1990.

**David Boaz**

**Ted Galen Carpenter**
"Uncle Sam as the World’s Policeman: Time for a Change?" USA Today (Monday/Sunday), April 1991.
"The New World Disorder," Foreign Policy 84, Fall 1991.

**Edward H. Crane**
"Private Property and Entrepreneurial Vitae of the Deadly, November 1990.

**James A. Dorn**

**Peter J. Ferrara**

Christopher Layne

**Stephen Moore**
"Higher Taxes Aren’t the Answer," Reader’s Digest, December 1990.

**Roger Pilon**

**Earl C. Ravenal**

New Perspectives for the Nineties
Ritz-Carlton • Atlanta • October 3, 1991
Speakers will include Scott Rasmussen, Edward H. Crane, and Richard Rahn.

New Perspectives for the Nineties
Ritz-Carlton • Boston • October 16, 1991
Speakers will include Gov. William Weld, Walter Williams, and Edward H. Crane.

New Perspectives for the Nineties
Ritz-Carlton • Atlanta • October 9, 1991
Speakers will include W. Lee Hoskins and Edward H. Crane.

National Energy Policy: Central Planning Reconsidered
Willard Hotel • Washington • January 30, 1992
Speakers will include Gregg Easterbrook, Douglas Bohl, Robert Candall, Robert Bradley, Fred L. Smith, Jr., Ben Zycher, and Jerry Taylor.

Fourth Annual Benefactor Summit
Ritz-Carlton • Nashville, Florida • February 6-9, 1992
Speakers will include Vaclav Klaus and P. J. O’Rourke.

Money in the Transition from Plan to Market
Tenth Annual Monetary Conference
Willard Hotel • Washington, D.C. • March 5-6, 1992
Speakers will include Vaclav Klaus, Allan Melzer, Antonio Martino, Alan Reynolds, Edgar Feige, Anna J. Schwartz, and Steve H. Hanke.

Cato associate defense policy analyst. But, she adds, "no international agency or coalition will be effective in halting the spread of missile technology." Thus, "the virtual inevitability of proliferation also demands that the United Nations develop and deploy a new national missile defense program."
“To be governed…”

Where is Keynes now that we need him?
States and Cities Fight Recession With New Taxes

—headline in the

It costs a lot of money to reduce government

“Give us time,” says Anna Kondratas, the assistant secretary of HUD. “The federal government is just starting to do what it should have been doing all along. There’s more money in the pipeline than there was before. We are shooting for ending homelessness in the ’90s. I would urge people to keep this issue in the public eye. Government will only do what the American people demand it does.”


The more-than-imperial presidency

Q. When Queen Elizabeth and Prince Philip visited the U.S. last month, they reportedly were accompanied by 41 servants. When Presidents Bush, Reagan, and Carter and their wives travel abroad, how many staff members go with them?
A. When traveling abroad together, President and Mrs. Bush reportedly are accompanied by “a minimum of 125 staff members.”

—Parade Magazine, June 16, 1991

Having already gotten his piece of the pie

As a new homeowner on Cape Cod, former senator Paul Tsongas] was so appalled by two-hour traffic jams each weekend that he spearheaded a movement that eventually won development controls across the cape.

—Washington Post, Apr. 11, 1991

Democracy isn’t pretty

[Lyndon B.] Johnson did use his power to aggrandize himself… stuffing ballot boxes to defeat [Coke] Stevenson in 1948. But this kind of corruption was endemic in Texas politics—Johnson had lost an earlier U.S. Senate race in 1941 because his opponent fixed the final tally. Had he hewed to the path of virtue, Johnson would never have been elected to the Senate, and those elected in his place would have been his moral and political inferiors.

—John B. Judis in the

A politician’s prerogative

[Texas governor Ann] Richards is pondering a dreaded state income tax, having pledged not to introduce one in her campaign.

—The Economist, June 22, 1991

The next step is to allow them to tap directly into taxpayers’ accounts

Maryland soon will become the first state to distribute welfare and food stamp benefits electronically through cash cards and automated teller machines.

“The goal of all these welfare programs is to help people achieve self-sufficiency,” said Betty Joe Nelson, who oversees the food stamp program for the U.S. Department of Agriculture. “We think that electronic benefits are an important ingredient that brings clients that much closer to the mainstream and begins to get people familiar with the commercial banking process.”


It’s a vision thing

It wasn’t until the late 1970s, [President] Bush said, that he “seriously started thinking about” running for president.

Why? a student asked.

“I wanted to try to help,” said Mr. Bush. “You have to have some motivation, ideological motivation, and I think our administration is doing good things for the country. . . . And I think at my age, and maybe younger too, you want to think that you can contribute to world peace. It’s a big, big-picture thing.”


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