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Polycentric Law in a New Century

by Tom W. Bell

Humans cannot live together without some sort of law. As F. A. Hayek noted, society can exist "only if by a process of selection rules have evolved which lead individuals to behave in a manner which makes social life possible." Law's practical effect thus predates not only states but even the idea of law itself. For millennium upon millennium, customary and private legal systems have ordered human affairs, either alone or in conjunction with state law.

States claimed a monopoly in law only relatively recently, and only after a long struggle to eliminate competing legal systems. Polycentric law—that is, law arising from a variety of customs and private processes rather than law coercively imposed by a single state authority—survived that onslaught, however, and has now taken root in the interstices of state power. As we enter a new millennium, we can anticipate the growth and flourishing of polycentric law.

Three areas in particular stand out as likely fields for the development of polycentric law: alternative dispute resolution, private communities, and the Internet. Each has seen the failure of political legal systems, an exodus by dissatisfied consumers to private alternatives, and rapid growth in the magnitude, diversity, and sophistication of nonstatist legal services.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) is one of the most tangible—and rapidly developing—ways in which modern, dynamic market processes open new choices in legal relations. Taken broadly, ADR includes a variety of private means of settling disputes, including mediation, negotiation, and arbitration. Its record of thriving where state law cannot reach indicates that ADR has a very bright future, indeed.

ADR has thrived under conditions that render soldiers and bureaucrats powerless. Consider the Mediterranean in the 11th century: Muslim and Christian worlds stood on opposite shores, divided not only by sea but by religion, kinship, kingdom, and culture. Merchants struggled with far-flung agents and suppliers, an inability to specify comprehensive agreements, and sharply limited means of enforcing contracts. Yet free, private, and competitive trade thrived thanks to the Maghribi traders, a coalition of merchants who developed a private legal system.

The law merchant (*lex mercatoria*) rep-

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Tom W. Bell, former director of telecommunications and technology studies at the Cato Institute, is an assistant professor at the Chapman School of Law and coeditor of **Regulators' Revenge**. *An earlier version of this article won first place in the Mont Pèlerin Society's 1998 Friedrich A. Hayek Fellowship competition.*

At a Cato Forum on September 15, Sen. Rod Grams (R-Minn.) announced that he would introduce legislation based on the Social Security privatization model described in *A New Deal for Social Security,* by Peter Ferrara and Michael Tanner.

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Will the Constitution Rise with Newt's Fall?

He lied." So said a close adviser to then-Speaker Newt Gingrich when I asked him how in the world Gingrich justified telling the media on the day of the infamous budget agreement that having the federal government fund 100,000 new public school teachers was "good for America." The response wasn't meant to be a criticism of Gingrich (after all, he was still in power) but rather a putdown of me for being so naive as to not appreciate the political realities of the moment.

The cock-sure attitude of that adviser is reflective of the culture that surrounded the Speaker: We know what we're doing and where we're going; we have a strategy for getting there; and, if you don't believe us, just look at all the energy and activity around us. Better still, listen to Newt speak. The man is inspiring. Indeed, many intelligent conservatives were captivated by Gingrich's oratory. And so were the liberal media and his political opponents. The leader of the "revolution" that brought a Republican majority in the House for the first time in half a century was held up by friend and foe alike as a political genius and uncompromising ideologue.

Alas, he was neither. Whatever the propriety of the funding for his college lecture series may have been, the lectures themselves revealed a third-rate scholar at best, who relied on rapid, breathless riffs that usually ended with declarative statements uttered in the tone of a question, to convince his audience that something profound had just been said. Something like, "So at the end of the day what we as Americans have to come to grips with is the notion that the liberal welfare state undermined not only the Roman Empire and, frankly, the former Soviet Union, but that Churchill, Roosevelt, and Reagan had remarkable character at a time when others were perfectly willing to accept Yalta?" His voice would come up a little at the end, as if to ask, Do you see now the insight I've provided? No matter if they made any sense, he could sure string those sentences together!

Which is why intelligent conservatives should have paid a little more attention to the substance, and no attention at all to the style, of Speaker Gingrich. Rarely did he speak about programs that needed to be cut back, much less eliminated. You never heard Gingrich invoke the Constitution in defense of limiting the role of the federal government. In fact, he didn't invoke the Constitution at all, because he agreed with his New Age gurus Alvin and Heidi Toffler that the Constitution was fine for the Industrial Age, but clearly not up to the Third Wave's Information Age. Besides, why should someone as brilliant as Newt Gingrich be constrained by some 200-year-old document?

As for Gingrich the ideologue, well, that myth served the media well because they could blame his bumbling tactics and pervasive unpopularity on his alleged ideological fervor for less government: Just goes to show that the American people want to avoid that kind of extremism. But even the Contract with America was not an ideological document, having been more concerned with processes than substance. The Republican leadership in the 104th and 105th Congresses had an opportunity to present the case for a strictly limited national government under the Constitution and for a return to a true federalist system of competing state governments. With the ugly specter of racially motivated calls for "states' rights" behind us, the wisdom of empowering the states with the responsibility of governance in America is as strong today as it was at our nation's founding—stronger even, given that there are now 50 states to choose from rather than 13.

Without a constitutionally based philosophy of limited government, the GOP is drifting back into the me-too Rockefeller Republican days when it was a permanent minority. Why vote for 80 percent of a philosophy when the other party can give you 100 percent? Thus, the Democrats went into the recent election calling for more federal spending on education, a patient's bill of rights in dealing with HMOs, and a commitment to "save Social Security first." To which the Gingrich-led Republicans replied, "Yeah? Well, Bill Clinton had an affair with Monica Lewinsky!"

The only reason they even held their majority is because of the enormous advantage incumbents have today. A 98.6 percent reelection rate for incumbents in the 105th Congress is a travesty. We need term limits (which, by the way, U.S. Term Limits is starting to give us, seat by seat, through its term limit pledge), and we need to eliminate contribution limits if we're going to have competitive elections and get rid of rule by the political class and career legislators.

We know why government grows, why Thomas Jefferson said, "The natural progress of things is for government to gain ground and for liberty to yield." Concentrated benefits and diffused costs. The tyranny of the status quo. The public choice dynamic of the bureaucratic imperative to expand. We know why it happens. We also know—or should know—that constitutional constraints, rules of the game, are the only hope we have for limiting the federal government's power over our lives. A power that now enmeshes the national government in virtually every aspect of our lives, from education to health care to our retirement.

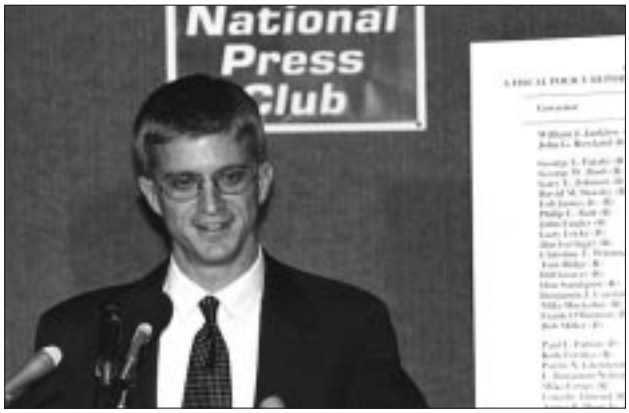
The departure of Newt Gingrich from Congress exposes a media-created ideological Potemkin village in the GOP, and that's all for the good. There is no philosophical commitment to small government in either party, and, without it, Washington, D.C., is an unconstrained engine for government growth. Those clear-eyed advocates of the limited government the Founders tried to give must now step forward to fill this dangerous ideological void. They start with an impressive asset: the Constitution of the United State of America.

—Edward H. Crane

Janklow, Rowland get an A; Fs for Kitzhaber, Chiles, and Carnahan

Cato Hands Out Biennial Grades for Governors

September was not only back-to-school time for most of the nation's youngsters. It was also time for the Cato Institute to hand out grades to the nation's governors. "A Fiscal Report Card on America's Governors: 1998" (Policy Analysis no. 315) by Cato's director of fiscal policy studies Stephen Moore and fiscal policy analyst Dean Stansel measured the performance of the nation's governors according to an objective fiscal restraint index that reflects growth in spending and taxes.



Fiscal policy analyst Dean Stansel discusses the "Fiscal Report Card on America's Governors" at the National Press Club.

Among the report's key findings: One, states that enacted tax cuts and spending restraints in response to the recession of the early 1990s have recovered a lot faster than states that raised taxes to balance their budgets. Two, governors elected in recent years "have tended to be more aggressive in cutting taxes than those first elected before 1993." Three, northeastern states in particular have moved in a most fiscally conservative direction in the last four years—reversing the tax-and-spend policies of previous governors.

Their grades indicate that most of the nation's governors need to sign up for "Fiscal Restraint 101." Only 2 of the 46 governors graded, Republicans William Janklow of South Dakota and John Rowland of Connecticut, received an A on Cato's fourth biennial fiscal report card. The 3 governors given an F were Democrats John Kitzhaber of Oregon, Lawton Chiles of Florida, and Mel Carnahan of Missouri. The average grade for Republicans was B- and for Democrats C-. The top-scoring Democrat was Gary Locke of Washington, who finished 10th. For the first time since Cato began publishing this report card, "party affiliation did seem to make a major difference in the governors' records of fiscal restraint," Moore and Stansel observed.

Governors who received high grades heaped praise on the report. Gov. Gary Johnson of New Mexico, who received the 5th highest grade, said, "I am pleased to be ranked 5th in the nation and am really thrilled by the fact that a prestigious think tank like the Cato Institute has recognized the hard work we have done."

Gov. Ben Cayetano of Hawaii, a Democrat who finished 16th, was similarly pleased: "Compared with the D grade received two years ago, this B grade shows that the groundwork we laid over the past three-and-one-half years is beginning to pay off."

In the 1996 report, Moore and Stansel found that the states generally moved in a fiscally conservative direction starting in 1994, with most states cutting taxes and holding general fund expenditures at or below inflation in 1995 and 1996. In 1998 Moore and Stansel find that bloated budgets are being promoted even by Republican governors who won office in 1994 and 1995 advocating a tax-cutting agenda.

Not all governors were happy with their scores, as political opponents and critics used Cato's report card to bash governors with low or falling grades. Most notably, Republican Tommy Thompson of Wisconsin was unhappy with his grade, which fell from a B in 1996 to a C this year. When he proposed a tax cut a week after the report was released, Thompson was accused by a political opponent of making an "election eve conversion" in order to improve his score.

In a National Press Club news conference to announce the report's findings, Moore said, "I've discovered from this that all of the nation's governors seem to suffer from what has been called the Lake Wobegon effect, that is, they all feel as if they are above average." ■

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Norquist: How the feds destroyed the cities

Social Security and Health Care Focus of Forums

✦**August 3:** John Norquist, the Democratic mayor of Milwaukee, discussed his book *The Wealth of Cities: Revitalizing the Centers of American Life* at a Book Forum. Norquist contends that the natural advantages of cities as centers of commerce, innovation, and culture have been undermined by a half century of ill-conceived education, welfare, housing, transportation, crime, and environmental policies. Norquist proposed market alternatives: school choice; competition for public works; and "real work," not "workfare."

✦**August 5:** A panel of top health care experts examined whether managed care needs government regulation and, if so, what kind at a Policy Forum, **Mismanaged Care? Should the Government Regulate HMOs?** Alan Mertz of the Healthcare Leadership Council advocated a system of external review that would help patients get treated faster and avoid unnecessary lawsuits. M. Stanton Evans contended that managed care is similar to Europe's "global budgets" that have led to a rationing of care for the elderly, waiting lists, and cutbacks in research. Andrew Webber of the Consumer Coalition for Quality Health Care proposed a "mixed model" of government regulation and private enterprise mechanisms. Sue Blevins of the Institute for Health Freedom recommended that families be given tax credits for health insurance.

✦**August 18:** James B. Jacobs, New York University professor of law, discussed his book *Hate Crimes: Criminal Law and Identity Politics* at a Book Forum. He argued that hate crime laws are the result of status-symbol politics and may unintentionally exacerbate racial tensions. Jacobs noted that every hate crime is already a crime punishable by existing laws. David C. Friedman of the Anti-Defamation League commented.

✦**August 20:** Author Tom Bethell discussed his book *The Noblest Triumph: Property and Prosperity through the Ages* at a Book Forum. Bethell gave an overview of the way property rights have affected economic progress around the world from the Roman Empire to contemporary times. According to Bethell, private property fell into intellectual disrepute more than 100 years ago and has only recently gained renewed scholarly attention for its connection to justice and prosperity. Richard Messick, a consultant to the World Bank, provided comments based on his first-hand experience working for international organizations in Third World nations.

✦**September 2:** At a Policy Forum titled **Should the Anti-Ballistic Missile Treaty Be Scrapped?** Ted Galen Carpenter, vice president for foreign policy and defense studies at Cato, argued that America should withdraw from the 26-year-old ABM treaty as soon as possible. William Lee of the National Coalition for Defense said the ABM treaty was invalid at its inception because the Soviets were in massive violation of article I when they signed it in 1972. Jack Mendelsohn, a member of the SALT II and START I delegations, defended the treaty's continued existence as a form of mutual deterrence.

✦**September 3:** The Cato Institute hosted a reception for the 50th anniversary of the Mont Pèlerin Society.

✦**September 3:** Stephen Moore, director of fiscal policy studies at Cato, and Dean Stansel, policy analyst at Cato, went to the National Press Club to release the fourth biennial **"Fiscal Policy Report Card on America's Governors."** Only two of the nation's governors, William Janklow of South Dakota and John Rowland of Connecticut, received a grade of A. The governors with the most fiscally conservative records—the tax and budget cutters—got the highest grades.

✦**September 4–7:** Talks were given at **Cato University** in Chicago by Tom Palmer, director of the Cato Project on Civil Society; Steven Landsburg, professor of economics at Rochester University; Stephen Davies, professor of history at Manchester University; Robert Levy, senior fellow at Cato; and psychologist Nathaniel Branden.

✦**September 5:** Ed and Kristina Crane hosted the 14th annual **Salmonfest** at their home.

✦**September 9:** Rep. William Thomas (R-Calif.) was the featured speaker at a health care conference, **An Alternative Vision of Health Care Reform,** jointly sponsored by the Cato Institute, the Heritage Foundation, and the Galen Institute. Robert Moffit, the Heritage Foundation's director of domestic policy, cited several examples of states driving up health care costs as a result of over-regulation. Victoria Caldeira of the National Federation of Independent Business, said that overregulation has made health care the number-one problem for small businesses. Melinda Schriver, senior researcher at the Galen Institute, reported results of a study revealing that the most regulated 16 states have experienced high growth in the number of uninsured people and a decline in private insurance coverage. Michael Tanner, director of health and welfare studies at the Cato Institute, recommended implementing a universal tax credit to give individuals an incentive to purchase insurance against high-cost risky events. Eugene Steuerle, senior fellow at the Urban Institute, suggested that a credit-based system of health care would be more efficient than providing subsidies. Fred Barnes, executive editor of the *Weekly Standard*, suggested that total opposition from the health care industry is needed to overcome media support of government regulation.

✦**September 10:** Jacob Sullum, a senior editor at *Reason* magazine, discussed his book *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health* at a Book Forum. Sullum declared that the myths peddled by the anti-smoking movement in support of restrictions on smoking are an attempt to control voluntary behavior. Matthew Myers, executive vice president and general counsel of Campaign for Tobacco-Free Kids, said that the tobacco control movement is designed to reduce the death toll from tobacco use.

✦**September 15:** Eighteen years after his path-breaking Cato book that changed the Social Security debate, Peter Ferrara, an associate policy analyst at the Cato Institute, has returned to offer a "practical and workable" privatization plan. At a Book Forum, *A New Deal for Social Security*, Ferrara argued that privatized Social Security

At an August 5 Policy Forum, Sue Blevins of the Institute for Health Freedom deplores tax laws that distort health care purchasing.

Cato president Edward H. Crane welcomes members of the Mont Pèlerin Society to a reception in honor of the society's 50th anniversary.

Milwaukee mayor John Norquist tells a Cato forum that ill-conceived federal policies have undermined the natural advantages of cities.

Clint Bolick unveils his new book *Transformation* at a September 16 Forum. Clarence Page of the *Chicago Tribune* and Jim Pinkerton of *Newsday* commented.

Fred Barnes of the *Weekly Standard* tells a health care conference that media support for government regulation is a major obstacle to free-market reform.

is inevitable because reforms are impossible within the current pay-as-you-go system. Coauthor Michael Tanner, director of health and welfare studies at Cato, presented a concrete proposal for Social Security based on savings and investment. Sen. Rod Grams (R-Minn.) announced that he plans to submit legislation based on the Ferrara-Tanner model. Sam Beard, founder and president of Economic Security 2000; C. Eugene Steuerle of the Urban Institute; and Wendell Primus, director of income security at the Center on Budget and Policy Priorities, commented on Ferrara and Tanner's book.

✦**September 16:** Patrick J. Michaels, Cato's senior fellow in environmental studies, presented the keynote address at the **Toward an American Renaissance** seminar in Chicago. Michaels shone the spotlight on the scare tactics employed by environmentalists and the government to alarm citizens about global warming. José Piñera, co-chairman of Cato's Project on Social Security Privatization, discussed the Chilean system as an example of successful privatization. Other speakers were Brink Lindsey on trade deficits, Darcy Olsen on the new paternalism and its effects on women, and Cato president Ed Crane on campaign finance reform and the faltering GOP.

✦**September 16:** Clint Bolick, vice president and litigation director of the Institute for Justice, discussed his book *Transformation: The Promise and Politics of Empowerment* at a Cato Book Forum. Bolick said that public policy addressing inner-city poverty should not be top-down as it is now. Instead, it should foster solutions that come directly from the people themselves. Clarence Page of the *Chicago Tribune* and Jim Pinkerton, a lecturer at the George Washington University Graduate School of Political Management, commented on Bolick's book.

✦**September 23:** The political correctness movement that attempted to stifle intellectual debate during the 1980s hasn't disappeared, said authors Alan Charles Kors, professor of history at the University of Pennsylvania, and Harvey A. Silverglate, civil liberties attorney in Boston, at a Book Forum. Discussing their book *The Shadow University: The Betrayal of Liberty on America's Campuses,* Kors and Silverglate described how universities enforce a politically correct agenda through censorship, double standards, and kangaroo courts.

✦**September 24:** Boston University professor Randy Barnett discussed his book *The Structure of Liberty: Justice and the Rule of Law* at a Book Forum. Barnett suggested that there are three basic problems that a legal system must solve: knowledge, interest, and power. He argued that the only system proven to address all three problems is one of property, freedom of contract, the rule of law, and constitutional limitations on power. Mark Tushnet, associate dean for research at the Georgetown University Law Center, and David Forte, a professor of law at the Cleveland-Marshall College of Law in Cleveland, commented.

✦**September 28:** While entertaining an overflow crowd at a reception to celebrate the publication of his book *Eat the Rich,* P. J. O'Rourke, Mencken Research Fellow of the Cato Institute, warned that libertarians need to arm themselves against liberals who will be using every piece of the current bad news to increase the long reach of government into the lives of citizens. ■

Property Rights and Thought Police

Two recent speakers at Cato Institute Book Forums were Alan Charles Kors, coauthor with Harvey Silverglate of The Shadow University: The Betrayal of Liberty on America's Campuses, *and Tom Bethell, author of* The Noblest Triumph: Property and Prosperity through the Ages. *Excerpts from their remarks follow.*

Tom Bethell: I started working on *The Noblest Triumph* with the belief that the institution of private property was one of the most important institutions of Western culture and that it had been neglected. Therefore, it had the potential, it seemed to me, to explain quite a lot of things. One of the things that obviously needed explaining was the very unequal economic development around the world. If you read the treatises of the development economists after World War II, unequal development was absolutely not anticipated; economic theory suggested that the real sources of economic growth were capital and technology, and those are easily transported around the world. Thus there was no reason why growth shouldn't happen everywhere. But it didn't work out that way. What had been omitted? It seems likely that the real problem was that the developing countries did not enjoy the legal and political institutions that we tend to take for granted in the West.

It might seem obvious to say that to get economic development right you have to first get the legal system right. There are four reasons, I think, why that was not really obvious to a lot of people in policy positions. To some extent, it may still be controversial today. But I think it is rapidly moving from being controversial to being conventional wisdom—to the point where people are saying, "Well, we always said that."

First, there was the communist experience. Boris Yeltsin, just after the collapse of the Soviet Union, was asked about communism, and he said that he thought the "communist experiment" should have been tried on a smaller scale in a smaller country, not on such a vast scale in such a large country. I thought it was very interesting that he referred to it as an experiment, because, in a way, that's what it was. But while it was actually unfolding, it was as though there was a taboo on the discussion of the need for property. In the late 1950s, amazingly enough, Allen Dulles and the Central Intelligence Agency were putting out figures purportedly showing that the economic growth rate in the Soviet Union was twice what it was in the United States. Paul Samuelson's textbook, starting with the 1967 edition and going right on up to the mid-1980s, had a chart in it showing economic growth in the Soviet Union starting from a lower level than in the United States but rising more steeply. Eventually, 20 years into the future, the economy of the Soviet Union would be larger than that of the United States. The dates were altered in each new edition. The chart was finally removed from the 1989 edition, but even then Samuelson was still talking about how planned economies had achieved great growth rates. One thing that made it hard to accept that private property was necessary was that obviously they didn't have private property in the Soviet Union, which was supposedly growing rapidly. That was the whole idea of communism: to abolish private property.

Tom Bethell: "What owners do with their property is by definition efficient."

Second, if you go back to the time of Adam Smith and *The Wealth of Nations*, there's actually very little discussion of the legal and political requirements for the economic theories that he is discussing. Smith basically takes private property for granted. At the time there was a taboo on criticizing private property. The "sanctity of private property" was no idle phrase. So Smith did not think it necessary to say much about private property. And when he did, he rarely used the phrase "private property." In his time, people just talked about "property" because there was not thought to be any workable alternative to it, as indeed there is not, really. All through the classical economists there is very little discussion of what the legal foundations were for their theories.

Alfred Marshall, in *The Principles of Economics* published in 1890, says at one point that the need for private property goes no deeper than human nature. An amazing remark. Marshall and others in the 19th century thought that human nature was changing. Marshall thought that it had already changed rapidly in the past 50 years. He was under the influence of the ideas of evolution and progress.

Third, in Marx, you have a kind of reversal, the idea that economic relations are the infrastructure and political and legal relations are the superstructure. In other words, the economy drives law, instead of law being antecedent to the economy. That idea has been extremely influential, more so in a way than Marx's direct attack on private property in the *Communist Manifesto*, which always looked ideological, whereas the whole notion of infrastructure and superstructure seemed to be science. The influence (between economy and law) runs both ways, of course, but the basic thing is that the legal structure has to be correct.

Fourth, many market economists including, I think, F. A. Hayek and Armen Alchian believed that there was something called efficiency, that the abstract force of efficiency would drive the law to more and more resemble British common law, and that property would become more and more secure.

Douglass North, who won the Nobel Memorial Prize in Economic Sciences in 1993, argued convincingly that it just simply wasn't true, and that rulers in different countries are in fact quite content to maintain inefficient situations for hundreds of years, and we definitely do see that. The concept of efficiency itself, I think, is quite dubious. To illustrate the point, I want to give just one real-life example, not a lot of law-and-economics examples. Just south of Disneyland there is a 58-acre field that is owned by a Japanese-American who grows strawberries

"The developing countries dod not enjoy the legal and political institutions that we tend to take for granted."
—Tom Bethell

and sells them at the gate for a dollar a bag. He has to get up in the middle of the night to turn on windmills if there's any danger of frost. It's hard work with very little remuneration. Michael Eisner invited him to lunch in Disneyland and offered him approximately $100 million for his land. He refused to sell, saying that he didn't know what he would do with the money. Now the question is this: Is that field right now being used efficiently or not? I asked this question of Gary Becker, and without hesitation he said yes, it's being used efficiently. If you accept that, and I have found no economist who disagrees with Becker, then you have to accept that the notion of efficiency is essentially subordinate to the notion of property. What owners do with their property is by definition efficient. If they just want to let it go to weeds, that is efficient. So, efficiency is sort of an empty idea, but nevertheless it was influential for quite a long time.

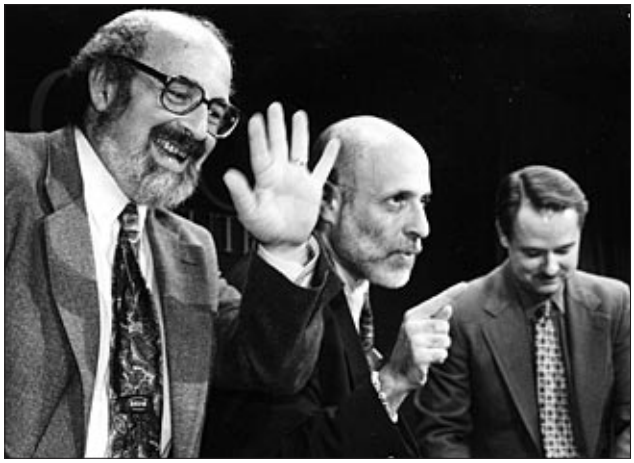
So I would say that the rule of law, secure private property, freedom of contract, and enforceability of contracts are all necessary, but they may not be sufficient for economic growth. Law, then, as Hernando DeSoto has said, has been the missing ingredient in our search for economic development.

Alan Charles Kors: I believe *The Shadow University* is about important things: core values that truly are threatened at our universities. By the late 1960s students had destroyed most of the in loco parentis functions of American universities—that is, universities standing in the place of parents. In the past 15 years, however, the heirs of the 1960s have changed their motto from "Don't trust anyone over 30" to "Don't trust anyone under 30." Those heirs of the 1960s now in power have institutionalized their views in the in loco parentis role of universities, and they have made their specific ideological analysis of American society, gender, and oppression the official secular religion of academic life.

According to that view, undergraduates enter universities inadequately aware of the effects of American racism, sexism, and heterosexism on their psyches, behavior, and society. Further, most Americans who are themselves so-called minorities (I hold to the view that each of us in fact is a minority of one) and most women do not adequately understand the nature and methods of their oppression. They have internalized the very values by which society oppresses them.

Leninists labeled this phenomenon false consciousness. What could workers know about what workers authentically want compared with what intellectuals know? The intellectuals' murderous contempt for those they claimed to love drowned the world in blood.

Today's academics label the phenomenon internalized oppression, and they deduce it from any tendency to reject, resist, or question their view of reality. Although countless courses in the curriculum seek to demystify the nature of American society, that is not enough. Too many students remain independent and critical in their thoughts and values. Most minorities reject truly radical politics. Most whites simply do not feel guilty about their birth. Women and men, far from perceiving each other as class enemies, continue to fall in love and occasionally write poetry. Thus, the full weight of administrative authority must be brought to bear on students' extracurricular and private lives, their speech, humor, and thought. The ideologues' contempt for actual students is as boundless as their benevolence toward undergraduates in the abstract.



Alan Charles Kors and coauthor Harvey Silvergate continue making points as their Forum ends. Moderator David Boaz packs up.

American undergraduates are victims of a generational swindle of truly epic proportions. A few practices and policies stand out on our campuses. First, so-called diversity and multicultural education. In theory, multiculturalism, built into orientations, residential programming, and all aspects of student life, will invite the celebration, deep study, and appreciation of a diversity of cultures. The so-called multiculturalists, however, most decidedly do not mean celebration, deep study, and appreciation of evangelical, fundamentalist, Protestant culture; of traditionalist, Catholic culture; of black-American Pentecostal culture—or of any assimilationist immigrant cultures or white, rural southern cultures. They also do not mean the serious study of West African Benin culture or of Confucian culture, the understanding of which requires linguistic accomplishment and rigorous inquiry. All they mean, absurdly, is the appreciation, celebration, and deep study of those radical intellectuals who think exactly the way they do about the nature and causes of oppression, however nonrepresentative those thinkers are of the groups they allegedly represent. Further, the multiculturalists' view of diversity is humanly and morally impoverished. They consider race, gender, and sexuality, but not religion, class, psychological type, taste, or private passions and commitments. In fact, devout religious believers are probably the most marginalized students on most campuses, often because of their views on sexuality and frequently because of most of their passionate beliefs.

Individuals at universities are welcomed, above all, as members of groups. Which brings me to my second theme, the crime for which this generation truly will have to answer before history, that of officially designated group identities. At the intellectual level, current notions of group identity are crude. Universities speak of white, European, and Eurocentric as a single cultural identity linking those look-alike, think-alike Finns and Sicilians, French atheists and Eastern Orthodox Slavs. At the practical level, the assignment of official group identity by universi-

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"Speech codes have created an arena of double standards, of arbitrary partisan enforcement, and of the raw use of power to impose a political agenda."
—Alan Charles Kors

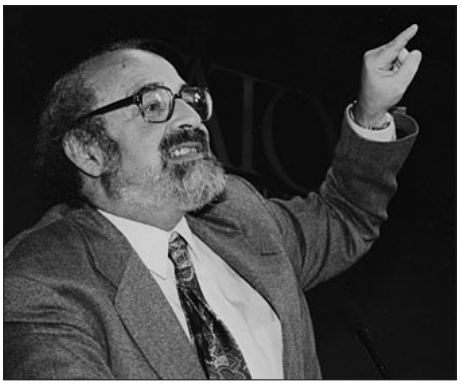
FORUM *Continued from page 7*

ties has been a dysfunctional approach that has worsened, not bettered, human relations on our campuses. That approach fails to take advantage of the open spirit with which most undergraduates enter higher education. Our campuses under the multiculturalists have become ever more segregated and Balkanized.

At the moral level, the mania of official group identity has entailed a denial of the only authentic meaning of liberation: the right to individuate, free of external coercions and impositions. Authentic liberation is the right of individuals to define themselves religiously, politically, by conscience, and in terms of larger voluntary group affiliations. On almost every campus, however, we have so-called women's centers that operationally distinguish between, on the one hand, "real" women with appropriate radical consciousness and, on the other, "fake" women, who have internalized their oppression. That is a condescending and unconscionable assault upon the sanctity and dignity of the individual.

Which brings me to my third theme: a power of such magnitude needs to demonstrate that it controls the symbolic and judicial environment. Hence the scandal of our speech codes, or more precisely, because no one has the courage to call them that, the "verbal behavior" or "verbal conduct" provisions of our harassment codes. In what should be a national disgrace, given the crucial importance of an education in and freedom to America, universities are the scene of a ferocious assault upon free speech. Almost every college or university restricts the First Amendment rights of its students and faculties, prohibiting the creation of a hostile environment. Many colleges and universities offer the most extraordinary and politically selective variations on that theme. Private universities, of course, being voluntary associations, may adopt whatever rules within the law they choose. That liberty, however, does not give universities the right to commit fraud. They promise academic freedom, but they deliver selective academic oppression. In actual practice, speech codes become intolerably wicked by virtue of their intended and systemic double standards. They represent the triumph of the Marcusean notion, increasingly mainstream on our campuses, that tolerance and legal equality are repressive agencies and that universities should be at the forefront of reassigning rights unequally in order to redress historical wrongs.

Speech codes deny the dignity and strength of meeting speech that one abhors with further speech expressing reason, evidence, cold contempt, or moral outrage or moral witness. Repressed, prejudice and ignorance simply go deeper into people's souls, and no one has the chance to know how people think and to respond in appropriate form. "Sunlight," as Justice Brandeis observed, "is the best disinfectant."



Alan Kors: "The heirs of the 1960s have made their ideological analysis of American society, gender, and oppression the official secular religion of academic life."

In fact, speech codes have created an arena of double standards, of arbitrary partisan enforcement, and of the raw use of power to impose a political agenda. In a nation whose essential soul, and indeed whose minority rights, depends absolutely upon equal justice under law for all individuals, the double standard of speech codes at our universities is teaching the worst possible lesson—that one's freedom should depend upon one's local power. Thus Catholic students are asked to bear the insults of Serrano's "Piss Christ," a crucifix immersed in the artist's own urine, of obscene feminist portraits of the clergy, of signs reading "Keep Your Rosaries Off Our Ovaries," in the name of freedom of speech and expression. Has anyone ever been found guilty of harassing a Lutheran or an evangelical? In fact, of course, as anyone who knows universities could tell you, the most common terms of racial abuse on campuses are not the crude, racial epithets of the Klan, but the hurtful and hateful terms "Uncle Tom," "Oreo" (black on the outside, white on the inside), and "Banana" (yellow on the outside, white on the inside), directed against blacks or Asians who have chosen to have white friends among the objects of their love and affection. No one, however, has been persecuted for using those hostile terms. You may call any evangelical a "Jesus freak," any veteran a "baby killer," any black with white friends an "Uncle Tom," any anti-feminist a "Barbie doll." It is an unconscionable hypocrisy.

Fourth and finally, there is the rise of in loco parentis thought reform at our universities. Increasingly, in a process virtually ignored even by critics of political correctness, the people who govern student life—from chief administrators to the organizers of new student orientations to those who select, train, and dictate the behavior of resident advisers in the dormitories—have moved from being service providers to being self-proclaimed progressive social workers whose mission is to bring the benighted children of America into the enlightenment of partisan political awareness. This model violates the freedom, dignity, and autonomy of individual learners and scholars, of free students at free universities. In choosing their residential and student-life thought police and social engineers, universities have hung out "Not Welcome" signs for all those who dissent from their political ideology. No conservatives, libertarians, Republicans, traditional Catholics, or evangelical Christians need apply. They are all excluded from the agenda of "inclusivity."

Further, hidden behind the veil of confidentiality of campus judicial proceedings, a large number of charges of politically incorrect crimes are adjudicated by settlement and academic plea bargaining. In such settlements, the frightened respondent, as an alternative to potentially crushing penalties, agrees to go through intrusive and partisan sensitivity training in matters of race, gender, or sexual preference—sensitivity training that is nothing less than thought reform, more appropriate to the University of Beijing during the cultural revolution than to the universities of a free society. Students choose universities, above all, for the future value of a degree;

for the quality of learning, inquiry, and social life; and, in the broadest sense, for the discovery that will occur there. They do not choose universities to be their therapists, let alone a political police, selectively enforcing restrictive rules governing voluntary relationships and expression outside the classroom.

We must anathematize every university that, without truth in advertising, seeks groupthink, unequal rights, the invasion of private conscience, and the chilling of debate and expression. Let those universities have the courage, if they truly believe what they say privately to themselves, to put it on page one of their catalogs and their appeals to state legislators: "This university believes that your sons and daughters are the racist, sexist progeny or victims of a racist, sexist, Eurocentric, and oppressive society. In return for tuition and massive taxpayer subsidy, we shall assign rights on a compensatory basis and undertake by coercion their moral and political enlightenment." Let the universities have the guts to advertise themselves honestly, and let's see who pays the bills.

History, for better or for worse, has made us all actors in this context. Our multiculturalism has become the multiculturalism of Bosnia. Half a century after the defeat of Nazism, we distinguish our students by blood and we equate blood with culture.

That will not last. America patiently has subsidized critics who have the utmost contempt for its values of individual identity and individual rights. Indeed, it has entrusted its young to such minds. That is folly, but it is also a tolerance unparalleled in human history. It is, however, an utterly absurd supposition that the victims of partisan codes, intrusions upon conscience, lack of due process, and selective biased enforcement of campus regulations will acquiesce indefinitely to the double standards upon which their campus legal inequality depends.

Although human patience can be remarkably enduring, no majority in a democratic society will suffer injurious double standards forever. There will be a day of reckoning, but when it comes, where will one find a broad coalition formed around the love of liberty, of due process, and of legal equality? Universities desperately need men and women for all seasons who reject the new academic tyranny, who bear witness to the universalism of legal equality over the crude official divisions of race, gender, and sexuality; of individual liberty and responsibility over the group politics of victimization and entitlement; of the rights of privacy and conscience. Those are the moral values that define us as human beings with dignity, capable of morals, and free. The struggle for that freedom at universities is one of the defining struggles of the age in which we find ourselves, and there are no sidelines. ■

"Law arises from a variety of customs and private processes rather than exclusively from a single state authority."

LAW *Continued from page 1*

resents a more sophisticated and well-known example of how the demands of commerce can create and sustain a private legal system under circumstances that frustrate statist law. Like the Maghribi traders' coalition, the law merchant's effectiveness relied not on state coercion but on the threat of ostracism. Merchants who deviated from the law merchant's standards found themselves cast out of its community of reciprocal commercial relationships. The law merchant survived the political turmoil of the Middle Ages and influences international law and customary business practices to this day.

Just as impotent states left room for the development of the Maghribi traders' coalition and the law merchant, so today the long delays and high costs of state legal systems encourage the growth of commercial alternatives. The largest private provider of ADR services in the United States, the American Arbitration Association, administered 62,423 cases in 1995, nearly twice as many as the 35,156 it handled in 1975. More than 1,000 ADR brokerages compete with the AAA, led by Judicial Arbitration and Mediation Services/Endispute, a private California company founded in 1979. JAMS/Endispute handled about 15,000 arbitrations and mediations in 1997, generating $45 million in revenue. By March 1998, its monthly average caseload had already risen 13 percent over 1997 figures, to 1,500.

The growth of ADR demonstrates that polycentric law naturally arises in the gaps that open where state power fails. Private communities and the Internet provide other examples of this diffusion of freedom. ADR proves especially interesting, however, because it demonstrates the distinction that F. A. Hayek and Bruno Leoni drew between law and legislation. Law arises as a spontaneous order, an aggregate effect of courts' settling various individual disputes. "The law is something to be *discovered* more than *enacted*," as Leoni put it. In contrast, "legislation is conceived as an assured means of introducing homogeneity where there was none and rules where there were none."

The state's courts have less and less time to *find the law* for civil litigants because their dockets overflow with criminal prosecutions *enforcing legislation*. That the Drug War generates most of those prosecutions merely illustrates the manifold hazards of unjust legislation. By effectively abandoning civil litigants, therefore, state courts have not only encouraged the rise of competing, polycentric legal processes; they have also vividly demonstrated the perils of confusing law with legislation.

Private Communities

Although private communities have existed in various forms for many years (since at least 1831, when Gramercy Park was formed in New York City), their growth has accelerated in the last few decades because of the rapid decline of political communities. The fear of crime and the spread of urban decay have encouraged Americans to seek security and convenience in gated communities, condominiums, and homeowners' associations. Although they vary in detail, at root all such associations rely on the private control and ownership of real property, whether held by individuals singly or in common. The growth of private communities has made polycentric law an everyday reality for millions of people.

By managing their neighborhoods through clear-cut property rights and contractual agreements, residents of private communities win a variety of emotional, psychological, social, and financial advantages, including enhanced property values, security, aesthetics, and "community spirit." On a less esoteric level, those associations provide the basic services—such as garbage collection, water works, and road care—that residents of political communities have found are not consistently provided by state institutions.

Privatization alone is not sufficient to make any community a success. It does, however, create incentives that reward the development of successful communities. Those who own private communities, whether initial investors or later residents, directly benefit by prevailing in the competition for residents. Private communities thus tend to seek out and implement tools for making neighborhoods safe and pleasant. Politicians, who loosely run but do not own conventional communities, simply do not face the same incentives.

Does community privatization work? The numbers speak for themselves. In 1962 the United States had fewer than 500 homeowners' associations. The number has exploded since then. There were 10,000 in 1970, 55,000 in 1980, and 130,000 in 1990. By 1992 there were 150,000 residential associations housing some 28 million people. Experts expect that number to double within a decade. The number of residential associations in the United States has long exceeded the number of cities. Gated communities, which press the extremes of privatization, have become the most rapidly growing type of housing in the United States, with about 4 million residents at present.

Residents of private communities experience polycentric law, not as a theoretical abstraction, but as a working reality. Those people have deliberately removed themselves from the inefficient political machinations of municipal governments, seeking instead to live under regulations of their own choice and making. Faced with the futility of trying to exercise any real influence over the politicians and bureaucrats, who would run their lives, residents of private communities have rediscovered the pleasures—and undoubtedly the pains—of reaching consensus with their neighbors.

Private communities are thus reintroducing a growing number of people to the principles of self-governance. Those people have already rejected political control of their neighborhoods. They are rapidly acquiring a taste for home-cooked governance. Residents of private communities thus may be ready to embrace an expansion of polycentric law in the coming years.

The Internet

Media pundits often describe the Internet as a virtual "Wild West." Thanks to a double dose of dumb luck, the label fits surprisingly well. The pundits mean to imply that the electronic frontier is, as everyone "knows" the western frontier was, a lawless place ruled solely by force and cunning. As Terry Anderson and P. J. Hill have shown, however, the private legal system that existed before the arrival of U.S. marshals made the Old West considerably less wild than, say, the modern District of Columbia. Similarly, a careful study of the Internet reveals that it, too,

"With the advent of commerce on the Internet have come new types of disputes—and new types of polycentric law."

can boast of pervasive and effective polycentric legal processes.

For the most part, informal customary norms suffice to regulate Internet society. Principles of "netiquette," enforced through praise and criticism, set the basic rules for newsgroups, listservs, chatrooms, and other virtual communities. In some cases, "netizens" of those communities establish more formal means of regulation, such as relying on a moderator to screen messages or adopting written rules. In the *Village Voice*, Julian Dibbell offers a fascinating account of how one of those virtual communities responded to anti-social behavior by, in essence, creating a civil government. Professor Robert Ellickson of Yale Law School points out that such examples demonstrate that on the Internet, as in the Old West and elsewhere, "people frequently resolve their disputes in cooperative fashion without paying attention to the [state] laws that apply to those disputes."

Although the Internet began as an academic and recreational network, in recent years it has become an important new marketplace. With the advent of commerce have come new types of disputes—and new types of polycentric law. Consider the well-publicized problem of assigning rights to domain names, the Internet's addresses. Companies holding trademarks, such as "Panavision," have frequently sued parties holding rights to allegedly infringing domain names, such as "panavision.com." While government bureaucrats endlessly deliberated about how to fix the quasi-public domain name registration system, entrepreneurs set up a private, for-profit alternative, the Real Name System. In addition to *technically* bypassing the traditional domain name registration process, the Real Name System *legally* bypasses state courts by relying on adjudication to solve conflicts over trademark rights.

The Internet has just begun to develop generic adjudication and ADR services to which, in contrast to the Real Name System, any mutually consenting parties can turn for help. These on-line experiments promise to open exciting new frontiers in polycentric law. A quick review of three such services, Virtual Magistrate, Internet Neutral, and Online Ombuds Office, illustrates this burgeoning trend.

Virtual Magistrate is an on-line arbitration and fact-finding system designed to settle disputes involving Internet users, parties who complain that on-line conduct has harmed them, or (to the extent that complaints implicate them) system operators. Its organizers, for the most part academics, have given careful thought to why Internet disputes call for special legal procedures. On the Internet, they explain,

> People all over the world interact in real time and take actions that affect the rights, interests, and feelings of others. When conflicts arise over similar activities in the "real" world, regular courts are available to resolve resulting formal complaints. But *the court system is too slow, too expensive, and too inaccessible* to address all problems that arise on the Net. Also, *with people from many countries communicating on the Net, traditional nation-based legal remedies are especially difficult to apply* [emphasis added].

Virtual Magistrate has adopted procedures uniquely suited to Internet law. Filings and other communications normally take place solely via e-mail; neither the parties nor their virtual magistrate need ever meet face to face. Indeed, they need not even leave their computer terminals. Proceedings move at the accelerated pace of "Internet time," with decisions issuing within 72 hours of the receipt of complaints. Far from merely interpreting and applying state law to disputes, virtual magistrates examine the standards of network etiquette and applicable contracts to determine the evolving shape of Internet law.

Another ADR project, Internet Neutral, demonstrates the diversity of the polycentric legal services that have already taken root on the Internet. In contrast to Virtual Magistrate, Internet Neutral offers only mediation and uses on-line chat rather than e-mail to conduct proceedings. It also, again in contrast to Virtual Magistrate, operates on a for-profit basis.

Yet another project, Online Ombuds Office, offers mediation via e-mail, at no charge, as part of a nonprofit experiment in developing Internet ADR programs. Its most interesting work has yet to come. Online Ombuds Office aims to develop a sophisticated interactive multimedia virtual environment, called "LegalSpace," to facilitate on-line ADR. If successful, LegalSpace will make polycentric legal services easy to use and instantly accessible for the millions (and counting) of netizens worldwide.

Internet users sorely need polycentric law. Notwithstanding its somewhat ethereal nature, the Internet sees quite real conflicts. Online Ombuds Office has observed a wide range of situations calling for mediation, including personal disputes between members of newsgroups or listservers, contests over domain names, disagreements between Internet service providers and their customers, and allegations of copyright infringement. Even that partial list shows that life on the Internet, like life off it, gives rise to disputes that demand legal resolution.

As the Internet community grows in population and diversity, it will need polycentric law all the more. At the close of 1995, about 9 million people used the Internet. A year later, the figure had grown to 28 million. Today, more than 100 million people use the Internet. By the year 2005, according one estimate, 1 billion people will do so. American netizens will soon find themselves in the minority. The international Internet community, like the community of itinerant traders that created the law merchant, flows too freely and quickly for state law. Only polycentric law can keep up with that most polycentric of networks, the Internet.

Conclusion

Polycentric law has a very bright future. The case studies of ADR, private communities, and the Internet reveal that all three provide excellent platforms for the growth and development of polycentric legal services. But those examples merely bring us up to date. Ultimately, the fate of polycentric law depends on what individuals choose to make it.

Bruno Leoni wrote, "Individuals make the law insofar as they make successful claims." By that he meant that legal norms arise out of the sorts of claims that have a good probability of being satisfied in a given society. But what Leoni said of the law's *content* holds equally true of the law's *structure*: individuals make the law more polycentric insofar as they reject existing, often inadequate statist legal structures and successfully lay claim to newer, freer ones. ■

Studies on free trade, sanctions, IMF failures

Founders Are the Best Guide on Impeachment

Clearing up many misconceptions and myths surrounding the impeachment process, a new study from the Cato Institute's Center for Constitutional Studies provides guidance to the original constitutional debates, the textual provisions of the Constitution, past impeachments, and modern academic scholarship. In "Impeachment: A Constitutional Primer" (Policy Analysis no. 318), Jason Vicente, a law clerk at the Massachusetts Superior Court, notes that "the Framers of the Constitution considered the impeachment mechanism so crucial that it emerged at the very beginning of the constitutional convention." Its use, however, has been quite limited. The House of Representatives has impeached 15 individuals (one president, 12 judges, a senator, and a cabinet member). The Senate has convicted 7 of those 15. Although scholars debate the range of possible impeachable offenses, Vicente observes that most agree that if an offense is indictable, it is also impeachable. "There is a fundamental inconsistency between a president's oath to faithfully execute the law and his having committed offenses indictable under that law."

Michael Tanner, director of health and welfare studies, welcomes Greg Scandlen (left) to Cato as a fellow in health policy.

✦Protecting the Military's Invisible Sacred Cows

In "The Quadrennial Defense Review: Reiterating the Tired Status Quo" (Policy Analysis no. 317), David Isenberg argues that the United States is spending more than necessary on defense. He cites a major review of Pentagon strategy and force structure that "epitomized status quo thinking." Isenberg, an analyst at a private firm that advises the U.S. government on national security issues, says that the latest Quadrennial Defense Review's "biggest sacred cow was the Pentagon's insistence on the existence of a robust 'threat,' despite all the evidence to the contrary. Today, and for the foreseeable future, the international security environment will remain benign. Spending at Cold War levels in a benign international environment is a waste of taxpayer dollars."

✦Halting Union Extortion

Critics of union violence aren't paranoid. A 1973 Supreme Court decision effectively made union violence and extortion almost impossible to prosecute, leading to an epidemic of union violence, according to David Kendrick, program director at the National Institute for Labor Relations Research. In "Freedom from Union Violence" (Policy Analysis no. 316), Kendrick traces the history of labor law and union violence during the 20th century, beginning with the infamous 1905 murder of a former Idaho governor by union mineworkers who felt betrayed when he called in federal troops during a strike. The Supreme Court's 1973 ruling in *United States v. Emons* upheld a lower court ruling that three electrical union members indicted for sabotaging a substation and other violence had done nothing illegal because they were pursuing "legitimate" union objectives. The result, Kendrick says, is that "since 1975, at least 181 Americans have died as a result of union violence. There have also been more than 5,600 assaults, kidnappings, and threats—almost all committed by striking union militants." Yet "barely 3 percent of the violent incidents recorded in the National Institute for Labor Relations Research's data file have led to convictions," and thus, "thousands of acts of union violence have gone unpunished." Kendrick says that "legislation such as the Freedom from Union Violence Act may be the only way" to deal with the problem.

✦A Gentleman's C for Governors

"A Fiscal Report Card on America's Governors: 1998" (Policy Analysis no. 315) by Cato's director of fiscal policy studies Stephen Moore and policy analyst Dean Stansel shows that "since 1996 state spending has grown roughly 50 percent faster than federal expenditures." The result is that only two governors, William Janklow of South Dakota and John Rowland of Connecticut, received the grade of A on Cato's fourth biennial fiscal report card. Moore and Stansel note that bloated budgets are now being promoted even by Republican governors who came into office in 1994 and 1995 advocating a tax-cutting agenda. Those governors with the most fiscally conservative records—the tax and budget cutters—receive the highest grades. Those who have increased spending and taxes the most receive the lowest grades. Seventeen governors received grades of B, 19 grades of C, 5 grades of D, and 3 (John Kitzhaber of Oregon, Lawton Chiles of Florida, and Mel Carnahan of Missouri) grades of F.

✦U.S. Out of Japan

The presence of 27,000 American military personnel on the Japanese island of Okinawa should be phased out, writes Cato senior fellow Doug Bandow. In "Okinawa: Liberating Washington's East Asian Military Colony" (Policy Analysis no. 314), Bandow says, "The end of the Cold War and the transformation of the strategic environment of East Asia have eliminated the need to deploy the Third Marine Expeditionary Force and other military units stationed on the island—as well as elsewhere in Japan." Bandow dismisses the various justifications and rationalizations for the old and new deployments. "Proposals for new missions—such as providing support for humanitarian interventions—are merely pretexts to preserve bases that have outlived their usefulness."

✦Dangerous Asian Liaisons

President Clinton's changed U.S. policy on Taiwan "combines the worst, most dangerous features of appeasement and firmness," says Ted Galen Carpenter, Cato's

vice president for defense and foreign policy studies. In "Let Taiwan Defend Itself" (Policy Analysis no. 313), Carpenter observes that, during Clinton's visit to China earlier this year, U.S. officials reportedly gave Chinese leaders "private pledges" that America would cut or downgrade arms exports to Taiwan. At the same time, however, Clinton "also implied that the United States would intervene militarily to defend Taiwan from attack." Carpenter says that Clinton's approach leaves Taiwan "highly vulnerable to PRC intimidation or outright military coercion," yet "if Beijing follows up on that advantageous situation and actually seeks to coerce Taiwan," the United States faces "the risk of a disastrous U.S.-Chinese war." Carpenter concludes, "The only solution is for the United States to allow increased arms sales to Taiwan, thus enabling the Taiwanese to build a self-sufficient defense and an effective deterrent to coercion by Beijing."

Ted Galen Carpenter argues that Taiwan should defend itself without U.S. assistance.

✦The Rule of Unlegislated Law

"Congress has built up a habit of delegating large chunks of its constitutionally entrusted lawmaking power to federal agencies," writes Robert A. Anthony, Foundation Professor at George Mason University School of Law. In "Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty" (Policy Analysis no. 312), Anthony notes that, despite the Administrative Procedure Act of 1946, federal agencies are increasingly issuing "nonlegislative rules" that have a practical binding effect even when agencies ignore requirements in the act for public notice and comment and formal publication of their rules and regulations. Putting forth nonlegislative rules in "guidances or memoranda or interpretations or manuals or bulletins or press releases or policy statements or Dear Colleague letters or enforcement guidelines or models or questions-and-answers or action levels or staff instructions or advisory opinions" has become the method of choice for the federal bureaucracy. "A bizarre result is that the binding effect of informal documents purporting to interpret regulations can be even stronger than the effect of formal legislative rules." Anthony concludes, "The courts' indulgence of unlegislated compulsion against private persons is an anachronism . . . [that] should have no place in today's system of limited government under the rule of law."

✦End the IMF and the ESF

The International Monetary Fund and the U.S. Treasury Department's Exchange Stabilization Fund have evolved into institutions whose "current functions have little to do with their original missions," says Anna J. Schwartz, research associate at the National Bureau of Economic Research. In "Time to Terminate the ESF and the IMF" (Foreign Policy Briefing no. 48), Schwartz says that "both institutions should be terminated because both are wasteful and unnecessary for resolving currency crises."

✦Workers of the World Unite—For Social Security Privatization

"The [Social Security] payroll tax is a tax aimed directly at union workers," Michael Tanner says in "Union Workers Should Support Social Security Privatization" (Cato Briefing Paper no. 39). "The payroll tax is the largest tax most union workers pay. If they had the opportunity to save and invest 12.4 percent of their income—the amount now taken by Social Security—low-wage workers would be able to accumulate substantial nest eggs," says Tanner, director of health and welfare studies at the Cato Institute, in the briefing released on Labor Day. By opposing privatization of Social Security, "union leaders are sacrificing the best interests of American workers," Tanner argues. "A privatized Social Security system, in which workers are allowed to divert their payroll taxes to individually owned, privately invested accounts, similar to individual retirement accounts or 401(k) plans, would provide workers with better and more secure retirement benefits, would give them a greater voice in corporate management and a sense of ownership and participation in the American economy, and would avoid painful tax hikes or an increase in the retirement age."

✦Unilateral Free Trade

"The rising tide of 'globalphobia' in the midst of unrivaled prosperity demonstrates that free traders are doing something wrong," says Brink Lindsey, director of Cato's Center for Trade Policy Studies. "Free traders should expand beyond their traditionally exclusive reliance on negotiated liberalization and launch a campaign for the unilateral elimination of specific U.S. trade barriers," writes Lindsey in "A New Track for U.S. Trade Policy" (Trade Policy Analysis no. 4). His prescription is "a campaign to eliminate U.S. trade barriers unilaterally—that is, regardless of whether other countries make similar reforms." Lindsey recommends that free traders target antidumping laws, high tariffs, subsidies (sugar, peanut, dairy), and the 1920 Jones Act that requires all merchandise shipped between U.S. ports to be carried on U.S.-owned vessels. "Free traders today are in that happy circumstance when holding to their ideals is the most intensely practical thing they can do," Lindsey concludes.

✦Unconstitutional Sanctions

According to Boston attorneys David R. Schmahmann and James S. Finch, state and local laws that penalize firms that do business in Burma violate three major constitutional principles. In "State and Local Sanctions Fail Constitutional Test" (Trade Policy Briefing Paper no. 3), Schmahmann and Finch show how the purchasing laws violate federal supremacy in making foreign policy; are inconsistent with the Commerce Clause, which gives Congress the power to regulate commerce with foreign nations; and ignore the Supremacy Clause, which forbids state and local laws that contradict federal law in matters over which the federal government has authority. ■

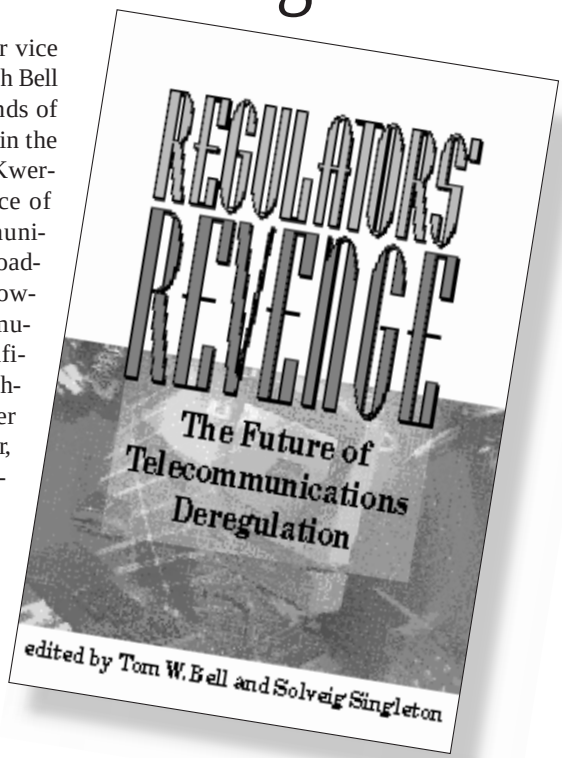
Alfred Kahn, Stanley Hubbard highlight book on 1996 act

Whatever Happened to Telecom Deregulation?

The Telecommunications Act of 1996 promised deregulation and free markets for the telephone, cable television, and broadcast industries. But the act failed to deliver. *Regulators' Revenge*, a new book edited by Tom W. Bell, who teaches law at Chapman University in California and is an adjunct scholar of the Cato Institute, and Solveig Singleton, director of information services at the Cato Institute, offers a free-market response to the act's shortcomings. The book includes essays by leading telecommunications experts who present "innovative ideas for truly freeing markets in the wake of the act."

Regulators' Revenge addresses telecommunications deregulation around the world, the role of antitrust law, competition in local telephone markets, privatization of the wireless spectrum, and universal service subsidies. The essays, first presented at the Cato Institute's conference "Beyond the Telecommunications Act of 1996" in September 1997, have been updated and revised for 1998. Alfred E. Kahn, professor of political economy at Cornell University, explains how lessons from the fantastic success of deregulation of the airline and trucking industries can be applied to telecommunications. Former congressman Tom Tauke, senior vice president for government relations with Bell Atlantic Corporation, looks at the kinds of reforms that can be accomplished within the framework of the 1996 act. Evan R. Kwerel and John R. Williams of the Office of Plans and Policy at the Federal Communications Commission argue that if the broadcasting spectrum is sold as property, allowing a market to develop, the telecommunications industry will become significantly more efficient and productive. Other authors include broadcasting pioneer Stanley W. Hubbard, author Peter Huber, and Cato senior fellow Lawrence Gasman.

Industry observers hail the book as essential reading for policymakers and those involved in the telecommunications industry. Richard E. Wiley, former chairman of the FCC, calls the book "stimulating and provocative"; Robert Corn-Revere, former chief counsel of the FCC, calls it an "important intellectual contribution." The essays in the book will be of significant interest to anyone who wishes to understand how deregulation can offer new benefits both to industry and to consumers.



Copies of *Regulators' Revenge* are available for $18.95 cloth and $9.95 paperback from Cato Institute Books at 1-800-767-1241. ■

Mao endorses Cato's latest book

China Needs Law and Markets

The new Cato book *China in the New Millennium: Market Reforms and Social Development* addresses a wide range of issues that will affect China's economic and social development in the 21st century.

In commenting on the book, Mao Yushi, chairman of the Unirule Institute of Economics in Beijing, writes, "China's economic reforms and opening to the outside world have advanced both material progress and civil society. This book shows why with depth and vision."

Most of the book's 24 essays were originally presented at the Cato Institute's June 1997 conference in Shanghai, "China as a Global Economic Power: Market Reforms in the New Millennium," cosponsored with Fudan University's Center for American Studies. Edited by James A. Dorn, vice president for academic affairs at the Cato Institute, the book addresses the reform or privatization of state-owned enterprises; financial liberalization; China's accession to the World Trade Organization; pension reform; and the constitutional, fiscal, and regulatory changes needed to keep China on the road to a freer and more prosperous future.

One of the key features of the book is its emphasis on the relationship between the free market and personal autonomy. Most people realize that a market economy fosters wealth creation, but they often fail to perceive how the spontaneous market process promotes freedom.

Kate Xiao Zhou, assistant professor of political science at the University of Hawaii at Manoa, points out that women have greatly benefited from market reforms in China. In her chapter, "Market Development and the Rural Women's Revolution in Contemporary China," Zhou writes that "social developments in China came mainly as a result of unintended consequences of the market development." Rural women, who are 80 percent of all Chinese women, "have participated in the development of markets, the rise of rural industry, and migration." Although the "contemporary rural women's revolution" has positively affected the lives of millions of Chinese women, it has largely gone ignored, Zhou says, because it "has no organization, no leader, and no ideology."

Minxin Pei, assistant professor of politics at Princeton University, provides a detailed look at how economic liberalization in China has spawned thousands of semiofficial and private associations that have widened and deepened civil society. They include associations of private entrepreneurs, associations of consumers, and associations of village and township enterprises. Cato president Edward H. Crane explains why China is at a crossroads and must choose between political society and civil society—that is, between coercion and freedom as society's organizing principle.

China's economic growth has been breathtaking since the country first began experimenting with markets and prices in 1978. But if China is to become the world's largest economy in the next 30 years, as some experts predict, further institutional reform is needed—especially a legal system that protects property rights and enhances freedom of contract. Roger Pilon, director of Cato's Center for Constitutional Studies, therefore advocates a "constitution of liberty" for China.

As Dorn writes, "The reality is that, unless China can insulate economic life from the state, future economic and social development will be on shaky ground. Indeed, if China is to escape the crippling effects of crony capitalism, now evident in much of East Asia, the institutional clash between markets and socialism in China needs to be resolved in favor of greater economic freedom."

Although the authors agree that China must continue to reform itself, one point of disagreement is whether China should take the "gradual" or the "big-bang" approach to reform. Fan Gang, director of the National Economic Research Institute and the China Reform Foundation in Beijing, argues that gradualism has worked well for China and is probably the best approach to future reforms. But Barry Naughton, associate professor at the Graduate School of International Relations and Pacific Studies at the University of California at San Diego, argues that although gradualism has worked well for China in the past, China needs "to do more, faster" in the future.

What is needed, argues Zhou Dun Ren, professor and former deputy director of the Center for American Studies at Fudan University, is a "true market economy for China"—and that will require a new way of thinking. As Zhou writes, "We must have more trust in the market, and trust that the true market practice will change people for the better in their economic decisions."

China must look away from its collectivist past. As P. J. O'Rourke, Mencken Research Fellow at Cato, argues about collectivism, "This is a very powerful idea. This is a very common idea. This is a very bad idea."

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