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Self-Defense: An Endangered Right

by Joyce Lee Malcolm

The withdrawal of a basic right of Englishmen is having dire consequences in Great Britain, and should serve as an object lesson for Americans. Today, in the name of public safety, the British government has practically eliminated the citizens' right to self-defense. That did not happen all at once. The people were weaned from their fundamental right to protect themselves through a series of policies implemented over some 80 years. Those include the strictest gun regulations of any democracy, legislation that makes it illegal for individuals to carry any article that could be used for personal protection, and restrictive limits on the use of force in self-defense. Britons have been taught, in the words of a 1992 *Economist* article, that such policies are "a restraint on personal liberty that seems, in most civilized countries, essential to the happiness of others." The author contrasted those policies with "America' s vigilante values."

The result of that tradeoff of rights for security has been disastrous for both. Many Americans, either unaware of, or unconcerned with, the perverse impact of British policy, insist that our public safety demands a similar sacrifice. But an examination of the experience of the British people offers a cautionary tale. A few examples underscore the situation in Britain today.

A homeowner who discovered two robbers in his home held them with a toy gun while he telephoned the police. When the police arrived they arrested the two men, and also the homeowner, who was charged with putting someone in fear with a toy gun. An elderly woman who scared off a gang of youths by firing a cap pistol was charged with the same offense. The government is now planning to make toy guns illegal.

The BBC offers this advice for anyone in Britain who is attacked on the street: You are permitted to protect yourself with a briefcase, a handbag, or keys. You should shout "Call the Police" rather than "Help." Bystanders are not to help. They have been taught to leave such matters to the professionals. If you manage to knock your attacker down, you must not hit him again or you risk being charged with assault.

In 1999 Tony Martin, a 55-year-old farmer living alone in a dilapidated house, woke to the sound of shattering glass as two burglars broke in. Martin had been robbed six times before, but like 70 percent of rural English villages, his had no police presence. He crept downstairs in the dark and shot at the burglars, killing one and wounding the second. Both had numerous prior convictions. Martin was sentenced to life in prison

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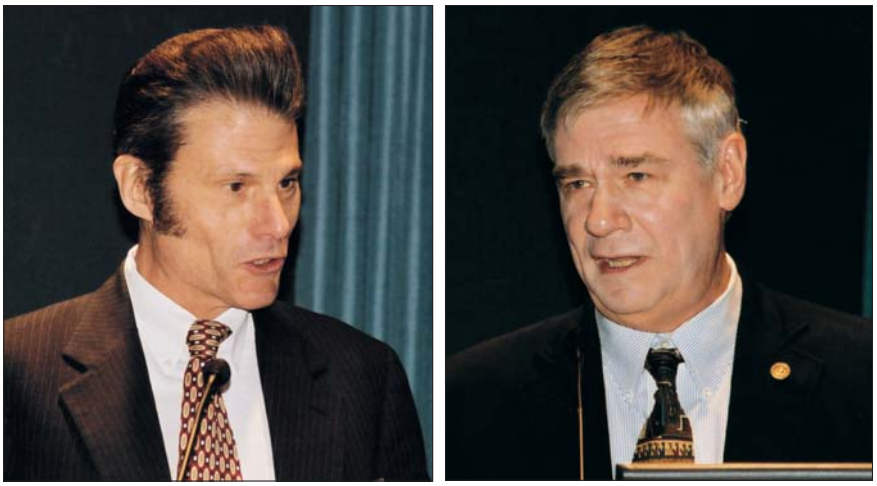
Joyce Lee Malcolm is professor of history at Bentley College and the author of six books, including To Keep and Bear Arms: The Origins of an Anglo-American Right *and* Guns and Violence: The English Experience. *In 2003–04 she is a James Madison Fellow at Princeton University.*



At Cato's December 12 conference, "Global Warming: The State of the Debate," Michael Schlesinger of the Climate Research Group at the University of Illinois and climatologist Pat Michaels of the University of Virginia and the Cato Institute debate the consequences of global warming in the coming century.

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"Starve the Beast" Does Not Work

For nearly three decades, many conservatives and libertarians have argued that reducing federal tax rates, in addition to increasing long-term economic growth, would reduce the growth of federal spending by "starving the beast." This position has been endorsed, among others, by Nobel laureates Milton Friedman and Gary Becker in *Wall Street Journal* columns in 2003. There are two problems with this position.

First, this position is *not* consistent with the evidence, at least beginning in 1981. In a professional paper published in 2002, I presented evidence that the relative level of federal spending over the period 1981 through 2000 was coincident with the relative level of the federal tax burden in the *opposite* direction; in other words, there was a strong *negative* relation between the relative level of federal spending and tax revenues. Controlling for the unemployment rate, federal spending increased by about one-half percent of GDP for each one percentage point decline in the relative level of federal tax revenues. Although not included in the sample for this test, the first three years of the current Bush administration were wholly consistent with this relation.

What is going on? The most direct interpretation of this relation is that it represents a demand curve—that the demand for federal spending by current voters declines with the amount of this spending that is financed by current taxes. Future voters will bear the burden of any resulting deficit but are not effectively represented by those making the current fiscal choices. One implication of this relation is that a tax *increase* may be the most effective policy to reduce the relative level of federal spending. On this issue, I would be pleased to be proven wrong.

Second, acceptance of the "starve the beast" position has led too many conservatives and libertarians to be casual about the sustained political discipline necessary to control federal spending directly and to succumb to the fantasy that tax cuts will solve this problem. President George W. Bush, for example, has proposed and won the approval of most congressional Republicans for large increases in federal spending for agriculture, defense, education, homeland security, and Medicare, and he has yet to veto a single spending bill. As a consequence, real federal spending during the Bush administration is now growing at the fastest rate since the Johnson administration. And Congress has yet to act on the expensive energy and transportation bills or Bush's proposal for a base on the moon and manned exploration of Mars!

The political discipline necessary to control federal spending, especially without a tax increase, must involve a sustained commitment to principle. Members of the administration and Congress must increasingly ask why, rather than only how or how much. Does the Constitution authorize the program or activity? Is there any reason that the federal government is better qualified to perform the activity than state and local governments or the private sector? Is the proposed federal activity the best of alternative ways to accomplish a shared goal? Is the marginal benefit of the federal activity higher than the marginal cost to the economy of the taxes necessary to finance the activity? A negative answer to any of those questions should be sufficient to deny, reduce, or eliminate the activity, whether it is already funded or merely proposed. A focus on domestic discretionary spending other than for homeland security will not be enough. Such spending is now only 18 percent of total outlays and includes most of the spending that benefits specific districts that is especially valued by members of Congress, particularly in an election year.

"Acceptance of the 'starve the beast' position has led too many conservatives and libertarians to be casual about the sustained political discipline necessary to control federal spending."

Above all, keep in mind that the size of government is best measured by the level of spending and regulation. Reducing tax revenues only shifts part of the burden of government spending to future generations.

—William A. Niskanen

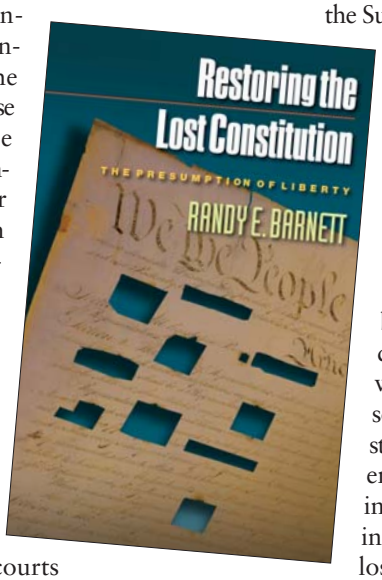
Courts have eviscerated clauses that limit government power

Barnett: Restoring the Constitution

The Constitution found at the National Archives is not the same as the Constitution currently being enforced as the law of the land, argues Cato senior fellow Randy Barnett in *Restoring the Lost Constitution: The Presumption of Liberty.* The original document, crafted by the Founders to create a government of limited powers, has been gradually rewritten by a judiciary intent on preserving the pretext of constitutional government while ignoring its substantive restrictions on state power.

In a wide-ranging work of constitutional scholarship, Barnett rejects "the consent of the governed" as a basis for constitutional legitimacy. Echoing 19th-century scholar Lysander Spooner, he argues that unanimous consent would be impossible in a nation the size of the United States and that anything less cannot create a moral obligation on the minority that withholds its consent. But he offers an alternative theory: a constitution is legitimate and binding in conscience to the extent that it protects the natural rights of those under its jurisdiction.

On this foundation, Barnett builds a comprehensive theory of constitutional interpretation, arguing that the judiciary went off the rails when it began ignoring the clear limits on government power embodied in the Constitution. The scheme of enumerated powers intended to limit the powers of the federal government was killed by expansive interpretations of the Necessary and Proper Clause and of the Commerce Clause. Meanwhile, the limitations on state power found in the Fourteenth Amendment were eviscerated by a series of New Deal–era decisions that gave states virtually unlimited powers to legislate away any rights not explicitly listed in the Bill of Rights. The Founders intended to create islands of government power in a sea of liberty, but the courts have instead given us islands of liberty—embodied in the Bill of Rights and enforced at the whims of the Supreme Court—in a sea of government powers.



The Founders' scheme of limited government took more than a century to unravel, and the lost Constitution is unlikely to be restored overnight. But there have been recent movements in that direction. In 1995 the Supreme Court handed down the *Lopez* decision, the first since the New Deal to declare that Congress had overstepped its authority under the Commerce Clause. In the 2003 *Lawrence v. Texas* decision, the Supreme Court twice cited Cato's amicus brief in holding that the defendants' right to liberty was infringed by the Texas sodomy law. These are small steps to be sure, but it is heartening that for the first time in decades courts are showing a genuine interest in the lost Constitution.

Restoring the Lost Constitution, published by Princeton University Press, is available in hardcover for $32.50. It can be purchased in bookstores, at www.catostore.org, or by calling 800-767-1241. ■

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Seminars on civil liberties, nanotechnology, immigration, and Iraq

Eight Cato Briefings on Capitol Hill

◆**December 3:** The conventional wisdom that Franklin D. Roosevelt rescued America from the Great Depression deserves a thorough rethinking, argued Cato senior fellow Jim Powell, author of ***FDR's Folly: How Franklin D. Roosevelt and His New Deal Prolonged the Great Depression,*** at a Cato Book Forum. In fact, in 1933 and 1935 the New Deal probably strangled nascent recoveries in their cradles. FDR hiked taxes, imposed new regulatory burdens on business, restricted industrial and agricultural output, and broke up the largest and most diversified—and therefore most stable—banks. Columnist Michael Barone, author of *Our Country: The Shaping of America from Roosevelt to Reagan,* agreed that Roosevelt's economic policies were ineffective but asserted that his wartime leadership nevertheless made him a great president. The event was aired several times on C-SPAN's Book TV.

◆**December 9:** The overzealous enforcement of anti-discrimination law poses a threat to civil liberties, said author David Bernstein at a Cato Book Forum for his book, ***You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws.*** In their drive to eradicate every trace of discrimination from American society, federal bureaucrats have convinced the courts to neglect free speech, freedom of association, and other rights ordinarily protected by the Constitution. Courts, Bernstein argued, have erred when ruling that fighting discrimination is a "compelling state interest" sufficient to overrule the protections found in the Bill of Rights. John Leo of *U.S. News & World Report* agreed with Bernstein's thesis and pointed out that too often "the indictment is the conviction." That is, the mere accusation of discrimination is enough to ruin reputations and blackmail firms into paying large settlements.

◆**December 10:** Two authors spoke out against the Bush administration's abuses of civil liberties at a December 10 Cato Book Forum. Philip B. Heymann, former deputy U.S. attorney general and author of ***Terrorism, Freedom, and Security,*** said that the September 11 attacks signaled a sea change in the nature of terrorism as a new breed of terrorists focused their efforts on achieving high body counts rather than merely attracting world attention to their cause. The phrase "war on terrorism," Heymann argued, fails to distinguish among the vastly different types of terrorist threats, ranging from ordinary car bombs, to long-running bombing campaigns, to high-profile spectacles like the September 11 attacks. James Bovard, author of ***Terrorism and Tyranny,*** blasted the Bush administration for dragging its feet on anti-terrorism measures prior to September 11, for passing the privacy-violating USA Patriot Act, and for giving the false impression that Iraq was complicit in the September 11 attacks.

Regulation **magazine editor Peter Van Doren explains the economics of electricity at a Hill Briefing on December 16.**

Author David Bernstein and columnist John Leo discuss Bernstein's book, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws*, at a December 9 Book Forum.

◆**December 11:** At a Cato City Seminar in Silicon Valley, **"Nanotechnology: The Money, Science, and Politics of the 'Next Big Thing,'"** experts debated the future of this emerging field and the government's role in it. Eric Drexler, chairman of the Foresight Institute, argued that funding should be directed at research on molecular assembly, which could form the foundation for an explosion of new nanotechnology products. Kevin Ausman of Rice University made a case for government-funded research on the basic science and environmental impacts of nanotechnology. Neil Jacobstein, chairman of the Institute for Molecular Manufacturing, and Jennifer Fonstad of the venture capital firm Draper Fisher Jurvetson focused on the commercial opportunities for nanotechnology, as well as basic research, and contended that government funding has a role in supplementing the available venture capital. Cato's Wayne Crews pointed out that government spending tends to be directed at large, wasteful pork-barrel projects. In addition, the harmful environmental consequences of nanotechnology are likely to be more severe if government-funded research is shielded from the liability to which private businesses are ordinarily subjected.

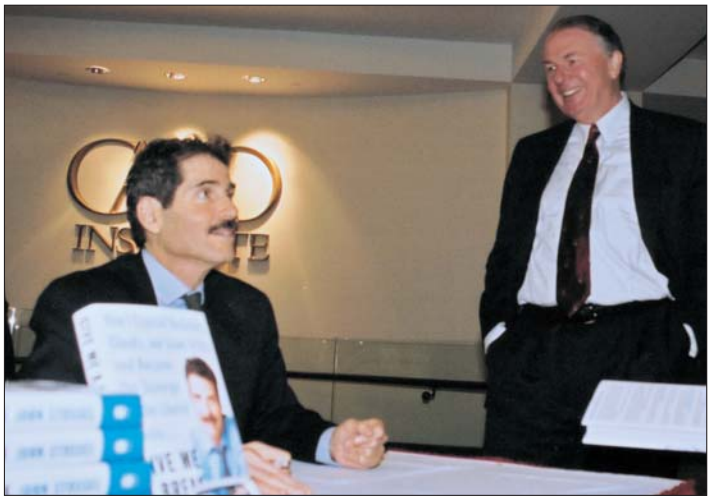
◆**December 12:** Two Cato experts examined the good, the bad, and the ugly in the Sarbanes-Oxley corporate governance reform law at a Cato Hill Briefing, **"The State of**

Corporate Governance: A Retrospective on Sarbanes-Oxley," and concluded that the bad and the ugly predominate. Alan Reynolds pointed out that the law focuses almost exclusively on mandating new processes and new reporting requirements, which will make running a corporation more expensive but will be unlikely to facilitate the detection of determined fraud. William Niskanen offered a survey of the academic literature on corporate governance, which shows little evidence that the reforms mandated in Sarbanes-Oxley improve the accountability of corporate boards or management. A genuine reform would involve reviving the market for corporate governance, which would, he argued, increase the clout of shareholders and make hostile takeovers of poorly managed firms viable.

◆**December 12:** At a Cato Conference, **"Global Warming: The State of the Debate,"** climate experts debated the state of the art of the science and economics of global warming. Panelists emphasized that predictions of catastrophic outcomes fail to account for human ingenuity. Given that human beings will have a century to prepare, they noted, even a large temperature increase is likely to be quite manageable.

◆**December 16:** Peter Van Doren, editor of Cato's *Regulation* magazine, discussed the economics of the electricity market at a Cato Hill Briefing, **"What Is the Role for Markets in Electricity?"** Electricity, he argued, presents a hard case for advocates of free markets, because the United States has never had a free market in electricity. Electricity poses other challenges too: electricity requires real-time matching of supply and demand, and the electricity grid as it exists today is a giant commons. Those characteristics make the consequences of botched regulatory changes dire, as can be seen from the 2000 California energy crisis and the blackouts in the Northeast in 2003. Nevertheless, Van Doren argued, the benefits of market reforms would be substantial. Of most benefit would be the debut of real-time pricing, in which energy consumption at peak times would cost more than at other times of the day.

Diane Ravitch, author of *The Language Police*, discusses political pressures on the textbook adoption process at a January 12 Policy Forum televised by C-SPAN.



John Stossel signs copies of *Give Me a Break* after a Cato Book Forum on January 27. Cato president Ed Crane kibitzes.

Cato's Chris Preble and Chuck Peña welcome Col. Kenneth Allard (USA, ret.) to a December 16 Policy Forum on the future of U.S. involvement in Iraq.

December 16: At a Cato Policy Forum, **"The UN Deadline for a New Iraqi Government: Progress, Problems, and Prospects,"** experts debated how best to deal with the fractious multiethnic environment in Iraq. Donald Devine of the American Conservative Union was cheered by the news that the United States had delayed the introduction of direct democracy. Majority-limiting institutions such as the rule of law, the separation of powers, and federalism are needed before democracy can be successful, he said. The Heritage Foundation's John Hulsman proposed a loose confederation of Iraq's three ethnic groups as the optimal arrangement, given the stark differences and historical animosities among the Shia, Sunni, and Kurdish factions in Iraq. Col. Kenneth Allard (ret.) urged the administration not to bite off more than it could chew and emphasized the need for an enduring commitment to rebuilding the country. Cato's Charles Peña disagreed and argued that, with

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a political commitment from the White House, it is still feasible to have the troops home to their families by next Christmas.

◆**December 17:** At a Cato Hill Briefing, **"The Collapse of Campaign Finance Regulation,"** Cato's John Samples attacked the Supreme Court's *McConnell v. FEC* decision, handed down a week earlier, which upheld key provisions of the McCain-Feingold campaign finance law. The deep divisions over the case, decided by a 5-4 vote, reflect a serious disagreement about the proper role of government in society, Samples said. For the majority, spending limits were a minor infringement of individual liberty compared with the imperative to cleanse the political process of corruption. In contrast, the dissenting opinions reflected a more traditional suspicion of state power over the political process. In effect, Samples concluded, the decision defers to Congress in striking a balance between reducing perceived corruption and protecting speech. That is alarming, he said, because Congress—whose members are frequently the targets of attack ads funded by political donations—is hardly an impartial arbiter.

◆**December 18:** The situation in Iraq is bad and unlikely to improve, and the United States would be wise to withdraw its troops before the quagmire gets worse, argued Charles Peña and Patrick Basham at a Cato Hill Briefing, **"Iraq: Struggling Democracy or Rising Terrorism?"** Peña reviewed the arguments against going to war in the first place and noted that those arguments are now even stronger, given the administration's inability to locate any weapons of mass destruction. The Iraq war, he emphasized, is a dangerous distraction from the real threat to American security—Al Qaeda. Basham gave a grim assessment of the chances for Iraqi democracy, arguing that decades of cultural development will be needed before the Iraqi public will be capable of sustaining a functioning liberal democracy.

Cato senior fellow Jim Powell ponders a question about Franklin Roosevelt at a December 3 Book Forum for his book *FDR's Folly: How Franklin D. Roosevelt and His New Deal Prolonged the Great Depression,* broadcast several times on C-SPAN's Book TV.

◆**December 29:** At a luncheon for his book *Putting Humans First: Why We Are Nature's Favorite,* author Tibor Machan discussed his claim that the concept of rights does not apply to animals. There was a spirited discussion of what moral obligations human beings might have toward animals.

◆**January 9:** At a Cato Hill Briefing, **"How Free Trade Promotes Democracy,"** Dan Griswold argued that the benefits of free trade extend far beyond boosting economic growth. By creating a prosperous middle class and opening closed societies to outside influences, he noted, free trade creates internal pressures for political and social liberalization. Comparing Cato's own *Economic Freedom of the World* with Freedom House's *Freedom in the World,* Griswold found that open economies tend to accompany free political systems, while closed economies tend to accompany repressive political systems. As examples, he noted that in Mexico, Chile, Taiwan, and South Korea, economic reforms led to economic growth, which subsequently spurred a transition to democracy.

◆**January 12:** At a Cato Policy Forum televised by C-SPAN, **"A Textbook Problem: The Politics of Textbook Adoption,"** two scholars blasted the practice of so-called textbook adoption, in which committees in certain states choose acceptable textbooks for every school in the state. The adoption process, contended Diane Ravitch, author of *The Language Police: How Pressure Groups Restrict What Students Learn,* causes textbook makers to self-censor their products in anticipation of adoption committee objections, creating bland, formulaic books. Frank Wang detailed how his former employer, Saxon Publishers, was excluded from the textbook adoption process because it refused to adopt the "checklist mentality" that adoption committees require. Both scholars agreed that the adoption process should be scrapped. Stephen Driesler of the Association of American Publishers defended the process, arguing that textbooks are purchased with public funds, and so public oversight is needed in textbook selection.

◆**January 16:** Participants at the Cato Policy Forum **"President Bush's Immigration Proposal: Too Much, Too Little, or About Right?"** considered the pros and cons of the president's proposal for a temporary worker program. White House policy expert Margaret Spellings laid out the benefits of the president's plan, pointing out that the U.S. economy is dependent on the estimated eight million illegal immigrants in the country and so a realistic plan is needed to bring those workers out of the legal shadows. Frank Sharry of the National Immigration Forum argued that stronger worker protection and an easier route to permanent residence and citizenship would be an improvement over the president's plan. Steven Camarota of the Center for Immigration Studies contended that greater enforcement of existing law was a better solution. Cato's Daniel Griswold praised the president's plan, saying that it will be good for immigrant workers, the economy, and national security.

◆**January 21:** The deepening quagmire in Iraq has prompted calls to reinstate the draft. That would be a grave mistake, argued Cato senior fellow Doug Bandow at a Cato Hill Briefing, **"Dodging the Draft: Will There Be One? Do We Need One?"** Bandow noted that, since the debut of the all-volunteer force, the military has been transformed into a highly skilled, capital-intensive fighting force ill-suited to use raw recruits. Furthermore, he said, a draft would undercut individual liberty, the very ideal our military fights

Cato's Susan Chamberlin talks with former Cato employees Derrick Max, executive director of the Alliance for Worker Retirement Security, and Andrew Biggs, associate commissioner of Social Security for retirement policy, at the Capitol Hill Briefing where Cato released a plan for private retirement accounts.

to protect. Lawrence Korb of the Center for American Progress pointed out that a draft would raise perennial controversies over gays and women in the military. A better option, he said, is to rebalance the composition of active duty and reserve troops to better fit the needs of today's missions.

◆**January 23 and 27:** At a New York City Seminar on the 23rd and a Cato Book Forum on the 27th to promote his new book, ***Give Me a Break: How I Exposed Hucksters, Cheats, and Scam Artists and Became the Scourge of the Liberal Media,*** ABC News anchor John Stossel said that the media establishment is suffocatingly liberal. Early in his career, he said, he won numerous awards for his hard-hitting reports on corporate wrongdoing. Yet when Stossel began to turn the same critical eye to government programs in the 1990s, the awards stopped, and media critics accused him of being biased and mean-spirited. *Give Me a Break* tells the story of Stossel's transformation from a liberal to a libertarian and proposes reforms that ensure that America remains a place "where free minds—and free markets—make good things happen."

◆**January 28:** Dan Griswold took his message of immigration reform to Capitol Hill in a briefing titled **"Willing Workers: How to Fix the Problem of Illegal Immigration."** Rep. Jeff Flake (R-AZ) joined him, arguing that America needs to find a solution for the millions of immigrants who currently live outside the law. In addition to supplying the U.S. economy with desperately needed workers, he said, an effective immigration reform will improve national security by making it easier to keep track of who is in the United States. Griswold said that Flake's bill is "compassionate conservatism at its best" and would help alleviate the nation's shortage of low-skilled labor.

◆**January 28:** People are suspicious of school choice because they don't understand the free market, argued Herbert Walberg and Joseph Bast at a Cato Book Forum for their book, ***Education and Capitalism: How Overcoming Our Fear of Markets and Economics Can Improve America's Schools***. That lack of understanding is unfortunate, they said, because American students rank near the bottom on standardized tests, and inner-city children fare particularly poorly. The problem, he said, is that decades without competition have made the education bureaucracy wasteful, unresponsive, and riddled with conflicts of interest. Bast provided a historical perspective, noting that education in America was much more market oriented and pluralistic prior to the "reforms" of the 1840s. John Fund of the *Wall Street Journal* argued that businesses need to be more active in promoting effective education reforms, to ensure they will be able to find educated workers in the future.

At a Capitol Hill Briefing on January 30, Michael Tanner, director of Cato's Project on Social Security Choice, unveils a plan to give American workers the option to put their entire 6.2 percent share of the Social Security payroll tax into a personal retirement account.

◆**January 29:** At a Cato Policy Forum, **"Antitrust in the High-Tech Marketplace: The Real Irrational Exuberance?"** experts debated the merits of antitrust enforcement in the high-tech arena. Competitive Enterprise Institute president Fred L. Smith Jr. argued that antitrust enforcement has historically been harmful to the economy and needs reform. Ed Black of the Computer and Communications Industry Association argued that advocates of free markets should be sympathetic to antitrust laws, which curb economic power and ensure that industries remain competitive. Jonathan Zuck of the Association for Competitive Technology disagreed. He said that antitrust laws stifle innovation and that lawyers are applying antitrust laws to industries they don't understand.

◆**January 30:** "Honesty" is the buzzword of the **"Cato Plan for Social Security Reform,"** which Michael Tanner unveiled at a Cato Hill Briefing. Other plans, he said, make unrealistic assumptions about the future of the economy or ignore large future costs while focusing on short-term expediency. The Cato plan, in contrast, gives an honest accounting of all transition costs and benefit cuts needed to place the system on a solid financial footing. The plan, Tanner said, is a "big" plan, in which employees would be able to put the entire 6.2 percent employee share of the payroll tax into a personal retirement account, which would allow workers to accumulate much larger nest eggs than other plans that allow only a portion of the tax to be diverted to personal accounts. ■

Free Speech and Campaign Finance

On December 10, 2003, the Supreme Court handed down its decision in the McConnell v. FEC *case. The Court upheld key provisions of the McCain-Feingold campaign finance law, including a ban on soft money and restrictions on "issue ads" that mention a federal candidate in the weeks before an election. FEC vice chairman (now chairman) Bradley Smith and Stuart Taylor of the* National Journal *discussed the pending case at a September 17 Cato conference. John Samples, director of Cato's Center for Representative Government, analyzed the decision at a December 17 Cato Capitol Hill Briefing. Excerpts from their remarks follow:*

Bradley Smith: As a member of the Federal Election Commission, I am a defendant in the *McConnell v. FEC* lawsuit, and some of the plaintiffs, including the National Rifle Association, named me in my individual capacity as well. I should note that I am not today speaking on behalf of the commission. The views I'm expressing are my own. I don't feel too upset about expressing them, since before I was appointed to the commission I wrote a book in which I said that the types of reforms included in the McCain-Feingold bill would be unconstitutional.

I think the problem with this debate is its sense of surrealism. The plaintiffs' attorneys placed themselves at a disadvantage when they accepted the common tendency to look at the Constitution as a hindrance to government, rather than as a considered response to the problems of governance. People venerate the Constitution, and the Bill of Rights in particular, but they often feel they need to find ways of getting around it without admitting that that's what they're doing.

The problem of special interest influence was not unknown to the Founders. If you look through the constitutional debates, you see that both the federalist arguments and the anti-federalist arguments revolved consistently around the question: How do we make these members of Congress act in the public good rather than for selfish personal gain?

In the famous *Federalist* no. 10, James Madison's basic answer was that you have two choices: you can try to extinguish the liberty that gives birth to factionalism, or you can try to control it in other ways. Extinguishing liberty is exactly what we *don't* want to do, so he came up with a number of other suggestions. One was federalism. Despite the project of the Rehnquist Court to try to restore it a more robust federalism, we've pretty much swept federalism away. Another was the separation of powers among the three branches of government. That, too, has been largely eroded in recent years. Everybody now looks to the president to initiate the budgetary process, and agencies such as mine, the Federal Election Commission, blur the judicial, administrative, and

Bradley Smith: "The 'appearance of corruption' rationale is a blank check for Congress to regulate whatever it wants."

legislative functions of government.

The third and perhaps the most important suggestion was to create the government of limited powers spelled out in the Constitution. That too is pretty much ignored nowadays. It's generally conceded—at least by anybody who is in a position to do anything about it—that if the federal government wants to dictate school uniforms, it can do that. If it wants to dictate the size of the hallways in your home, it can do that. It can dictate to whom you rent your apartments, whom you hire for your small family-owned business, and what you do with the corn that you grow on your land.

And that pushes all the burden of protecting our rights onto the Bill of Rights. In particular, we've put this tremendous burden on the First Amendment, which was an effort to restrain the abuse of government power simply by allowing free debate so that people could raise criticisms and expose corruption in government.

We Americans want big government. We want it badly. We want the government to give us prescription drugs, and we want government to do everything else it does.

But that presents us with a dilemma. Either we're going to have to accept a certain amount of influence peddling and factional control of government, or we're going to have to accept the loss of some of our civil liberties as well as our economic liberties. And one of the civil liberties under attack is the right to free speech. The fundamental principle behind campaign finance regulation is "We need to stop this First Amendment stuff."

The Court has justified that approach by suggesting that the federal government has a compelling interest in preventing corruption or the appearance of corruption. I would not deny that campaign contributions might influence how people on the Hill vote or carry out their activities. But I think virtually all the evidence we have shows that it's not terribly important.

Worse, the "appearance of corruption" rationale is a blank check for Congress to regulate whatever it wants. If you look at Gallup polling data from the late 1950s or the early 1960s, when confidence in government was at its absolute peak in this country, you find that well over a third of the population agreed with the statement that most members of Congress were corrupt.

Why did people think that? Maybe they think politicians are corrupt because they think, mistakenly, that elected officials can use their campaign contributions to buy themselves a fancy new car. Maybe they think people are corrupt because in politics you have to make deals, you don't always get to stand on pure, hard principle. Maybe people think politics is corrupt because they think candidates

"The First Amendment was designed to keep the government out of decisions about whose ads are 'sham' ads and whose ads are legitimate."

promise things they know they can't deliver. We don't know what people mean when they say they think things are corrupt. But, in any case, the appearance of corruption is always going to be there.

There are two problems once we give Congress a blank check to regulate speech. First, campaign finance regulation is inherently overbroad. In constitutional law, when we deal with fundamental rights like the First Amendment, we say that laws are subject to "strict scrutiny" in most cases. But in fact, the Court was presented with this challenge in *Shrink Missouri Government PAC v. Nixon,* decided in early 2000. And in that case the plaintiffs said to the state of Missouri: "Prove it! Give us some evidence of corruption." And the state of Missouri basically said: "We really can't prove it. We've got a couple of newspaper editorials where people talk about corruption in the capital, but that's really it." And the Supreme Court, recognizing that it couldn't uphold the law if it applied strict scrutiny, simply lowered the bar and said, "From now on, as long as your solution is narrowly tailored, that will be enough."

But is the solution narrowly tailored? Even if campaign contributions are sometimes given for the specific purpose of gaining access to a member of Congress, we must concede that the vast majority of campaign contributions are not made for that purpose. Most people, including megadonors and even corporations, give money because they believe in what the candidate stands for. That's what all the political science research tells us. So restrictions on campaign giving, even if they can be justified in principle by corruption concerns, are inherently overbroad.

The second problem is that they allow for tremendous manipulation. One point that Seth Waxman, attorney for the congressional sponsors of the McCain-Feingold campaign finance law, made repeatedly in oral arguments to Justice Scalia was essentially: "You're right, this isn't going to solve the problem; we may have to do more. But you can't make us solve the problem all at once. Congress is allowed to deal with parts of it at a time. You can't say that just because we weren't able to pass a comprehensive solution, we can't pass any partial solution."

What this does is to allow Congress to essentially pick on whomever they want. For example, the groups that do what is known as "bundling" best are Emily's List and the trial lawyers. Those are both Democratic constituencies, and they are good at it because their members have lots of money.

Bundling is not an effective strategy for some of the Republican-allied groups, like the Christian Coalition and Right to Life groups, whose members have below-average incomes and are not as politically aware, by and large. But these groups have an offsetting advantage—they have a great network for getting information out to people. So these groups like to distribute very biased voter scorecards to influence voters. That is an effective strategy for them.

Stuart Taylor: "The NRA and other organizations are reasonably efficient proxies for their members in terms of political advocacy and therefore, under the right of association, they should have a right to engage in such advocacy."

So if you ban scorecards, you hit the Republicans. If you ban bundling, you hit the Democrats. And that's why, when early versions of McCain-Feingold included bans on bundling, you lost the support of senators such as Dianne Feinstein (D-CA), a big supporter and supportee of Emily's List.

And in fact, sponsors of the bill spoke proudly about putting together a coalition: "If we ban this, we'll pick up this guy's vote. But if we drop this ban out of the bill, we'll pick up those three votes. If we nail that group, we'll get some votes over here. And we'll get more votes over here than we'll lose by nailing that group." It was very partisan and it was very open.

I would suggest that this is exactly what the First Amendment was designed to prevent. It was designed to keep the government out of decisions about whose ads are "sham" ads and whose ads are legitimate ads, and to keep government out of the position to pick winners and losers.

Stuart Taylor: I would like to explore a somewhat idiosyncratic corner of campaign finance reform that I've been puzzling over: the distinctions among individuals, nonprofit ideological corporations, business corporations, labor unions, and political parties, which are treated differently by the law. And the question that I've been puzzling over is: What justifies the difference?

I agree with the proposition—laid down in the Supreme Court's *Buckley v. Valeo* decision—that an individual does not have a constitutional right to make an unlimited contribution to a candidate because of the corrupting potential, but he does have a right to spend an unlimited amount on independent advocacy for that candidate, including what's called express advocacy. *Buckley* did not give that same right to corporations or unions.

I wrote in a recent column that unions and business corporations should be restricted more than nonprofit ideological corporations in spending money on election-related broadcast advertising. As I understand it, the original version of McCain-Feingold would have barred election-related ads within 30 or 60 days of an election if they mentioned the name of any federal candidate and were funded by a business corporation or by a labor union but would have allowed such ads funded by a nonprofit ideological corporation, such as the National Rifle Association, the Sierra Club, and the ACLU, if they were spending private contributions on it.

Continued on page 10

"The constitutional vision is based on a distrust of political power and the people who possess it."

POLICY FORUM *Continued from page 9*

What justifies the distinction? Well, I have, as many of us do, a 401(k) plan. And I have it invested in the Standard & Poor's 500 Index Fund. So I own a little chunk of all 500 of the biggest corporations in the country. I don't have any idea, or any motivation to find out, how they're spending my money, and the money of all the millions of other people who are similarly situated. There is a disconnect between the amount of money controlled by the corporation and spent on political advocacy and the support by the corporation's own shareholders for that spending. I think that is part of the justification for subjecting business corporations to restrictions that couldn't be imposed on a wealthy individual.

I think another reason is that when a business corporation gives political money—or, I should stress, when it spends on broadcast advertising for politics—it is typically engaging in rent seeking. That has nothing to do with the public interest. It's purely pursuit of a private interest that I think deserves less protection.

Why treat nonprofit ideological corporations differently? If you join the NRA, you pretty well are signing on to its political agenda. That doesn't mean you support every political candidate that it supports, but you know pretty much what's going to be done with your money. The NRA, the ACLU, NARAL, and the National Right to Life Committee are reasonably efficient ways of pooling the assets of a great many individual donors—people who couldn't have a voice without pooling their assets. And I think ideological corporations are better at doing that than the alternative of political action committees.

I struggled with this a little bit. I asked a lawyer for the NRA, "Why don't you just send a note to your members saying, 'We're reducing our dues from $35 to $25, but we have a little box we'd like you to check that takes that $10 we just saved you and puts it in our political action committee'?"

The lawyer said that not many people check that box. Which made me stop and think, "Well, is that because those people really don't want the NRA spending any of their money on this kind of political advocacy, or is it because something about the psychology of checking a box says I'm giving my money to a political action committee?" And I think it's the latter—that is, it's my guess that the reluctance of NRA members to check the "PAC" box does not warrant the conclusion that they would object to the NRA spending their membership dues on election-related advocacy.

I also think the NRA and all those other organizations are reasonably efficient proxies for their members in terms of political advocacy and that therefore, under the right of association, they should have a right to engage in such advocacy, subject to the restriction that they could spend on political advocacy only private contributions.

John Samples: The decision in *McConnell v. FEC* was 5 to 4. There was a deep division between the majority opinion and the dissents. And it seems to me that this division reflects divisions in society at large, and particularly among political elites. There are two visions of government in America, I think. One I call the constitutional vision, which was best expressed by the American Founders in 1787. The other might be called the progressive vision, and that is what finds voice in the majority opinion of *McConnell*.

The constitutional vision is based on a distrust of political power and the people who possess it. It's marked by a concern for the natural rights that Jefferson mentions in the Declaration of Independence. Government is both necessary to protect those rights and a danger to those rights. The American Founders sought to limit and control government as well as to empower it.

So in the Constitution you see all sorts of limits on political power. You see the separation of power between the branches. You see federalism, the division of power between the states and the national government. You see the doctrine of enumerated and limited powers. And you see the Bill of Rights. The constitutional vision is informed by a heavy presumption in favor of liberty and against government.

The progressive vision, on the other hand, says that government is to be trusted, that government should be empowered to do good. Progressives make a presumption for government and its beneficence and against liberty. They don't deny that Americans have a right to free speech, but they are much more willing to say that other values might override that right or that the right might be weaker. And this is the tone, I think, of the majority decision in *McConnell*—that freedom of speech is a privilege granted by Congress rather than a right against political power.

The Supreme Court, as well as Congress, has been willing to restrict liberty, particularly in the economic sphere. In fact, in a famous 1941 footnote, the Supreme Court said, in essence: "Henceforth, anything Congress does about economic liberty or private property will not violate the Constitution as long as it has a rational basis. However, we will oversee the political process to protect the natural rights to freedom of speech and to freedom of political activity."

The question for some time after that was, Do those political rights include the right to give money to candidates and causes in politics? The question was answered in 1976, in the famous case of *Buckley v. Valeo*. The Supreme Court held that the First Amendment covers the right to spend money on politics, on candidates, and on political causes, because money, in American society, is inevitably and ineluctably intertwined with freedom of speech.

Today, the connection between money and speech is widely derided by partisans of restricting campaign finance. But if you deny that money is tied to speech, imagine that the government mandated that the *Washington Post*'s budget for newsprint, for salaries, or for Internet employees were cut by 50 percent in the next year. Would that affect freedom of the press or freedom of speech?

Well, *Buckley* says, of course it would. You would get less speech. For that reason, *Buckley* said, freedom to spend is protected by the Constitution. On the other hand, *Buckley* said, contribution limits don't implicate freedom of speech as strong-

"People who supported the McCain-Feingold bill say forthrightly that the law would stop attacks on themselves."

ly. Therefore Congress might have other values that justify regulations. Namely, to prevent corruption or the appearance of corruption Congress could regulate contributions. *Buckley* struck down spending limits and affirmed contribution limits.

The *McConnell* majority is more trusting of government than the *Buckley* majority was. The new majority says, pursuant to *Buckley*, there is balancing to be done, but it defers to Congress's judgment in striking the balance between the limited free speech claim and the corruption rationale.

This is problematic because in *Federalist* 10 James Madison says, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity." Yet the Court has allowed Congress to be a judge in its own cause; Congress has an interest in the soft money ban in McCain-Feingold. Elections from 1995 to 2002 were marked by groups and individuals raising soft money that supported ads that were critical of members of Congress, in some cases harshly so.

Remember the NAACP ad in Texas that essentially accused candidate Bush of being complicit in the brutal murder of an African-American man? That was a soft money ad. The NAACP received a $9 million soft money gift in 2000 to run those ads. They were also doing it against members of Congress who do not like going through the experience of being attacked. It is no condemnation of Congress that it wanted to stop those ads. If you or I were in Congress, we too would want to stop such ads. That's why we have our Constitution: to stop the human tendency toward tyranny.

Now, of course, Congress could not simply ban the ads. What it did instead was to prohibit soft money fundraising by federal officials. Now, a member of Congress might say: "We didn't ban any ads; all we did was ban soft money fundraising. Groups and individuals are still free to run such ads. They just have to do it with money raised under federal contribution limits."

But if you can raise money, like the NAACP, in one $9 million contribution, or in $100,000 contributions, or if George Soros will give you $5 million, it's easy to raise money. It's certainly a lot easier to raise it than if you try to do it in $2,000 increments. Transaction costs are important to politics. If you make it harder to raise money under the limits, there will be less money raised. If less money is raised, there will be less money spent on ads.

And indeed, the remarkable thing about all of this is that this is exactly what was promised by Senator McCain to his fellow senators, that there would be less money for what were called attack ads.

Senator McCain, on the floor of the Senate, said: "If you cut off the soft money, you're going to see a lot less of that [attack ads]. Prohibit unions and corporations [from making soft money contributions] and you will see a lot less of that. If you demand full disclosure for those that pay for those ads, you're going to see a lot less of that."

John Samples: "There are two visions of government in America—the constitutional vision, best expressed by the American Founders in 1787, and the progressive vision, which finds voice in the majority opinion of *McConnell v. FEC.*"

Sen. Maria Cantwell (D-WA) agreed: "This bill is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." Sen. Barbara Boxer (D-CA) too: "These so-called issue ads are not regulated at all and mention candidates by name. They directly attack candidates without any accountability. It is brutal. We have an opportunity in the McCain-Feingold bill to stop that."

People who supported the bill say forthrightly that the law would stop attacks on themselves. A soft money ban could be expected to lead to less criticism of incumbents, to less information about them in elections, to less competition for their jobs. Yet the Supreme Court is saying that Congress is the right institution to balance free speech against corruption or the appearance of corruption. The Court forgot what Madison said during his resistance to the Sedition Act: "The right of freely examining public characters and measures, and of communication is . . . the only effectual guardian of every other right."

A lot of independent groups like the NAACP ran ads. That money wasn't raised by members of Congress, members of national parties, national officeholders. And unfortunately for McCain-Feingold supporters, under *Buckley* the Court had said that you could regulate only ads that expressly advocated the election or defeat of a candidate. Yet McCain-Feingold required that money for any ad that mentions or clearly refers to a candidate for federal office that runs 30 days before a primary or 60 days before a general election has to be raised under federal election law. Clearly this ran against *Buckley,* which limited federal regulation to ads that expressly advocate the election or defeat of a candidate. So the Supreme Court had to overrule *Buckley* to accept McCain-Feingold. And that's not all that happened. The majority seems to say that Congress can regulate any ad that is intended to influence an election. If that is now Court doctrine, we no longer have constitutional limits on Congress's power to regulate electoral speech.

In 1788 Thomas Jefferson wrote to a friend: "The natural progress of things is for liberty to yield and for government to gain ground." In that sense, the decision in *McConnell v. FEC* is progressive, part of the natural progress of things, which is for liberty to yield and for government to gain ground. ■

New studies on Iraq, trade, neoprohibition, and the "Republican Spending Explosion"

Al Qaeda: The War We Need to Fight

By diverting resources from the fight against Al Qaeda, the war in Iraq endangers national security, charges Charles Peña in "Iraq: The Wrong War" (Policy Analysis no. 502). Peña dissects the administration's arguments for going to war and finds them wanting. Iraq's conventional military is underfunded and poorly trained, he points out, and there was little evidence that Iraq possessed weapons of mass destruction. The administration's claims of terrorist links do not hold up to scrutiny, he argues. The evidence of direct Iraq–Al Qaeda ties is paltry, and Hussein's secularism put him at odds with Al Qaeda's Islamist goals. The only credible terrorist links are to regional terrorist groups that pose no threat to the United States. In short, Peña concludes, the war in Iraq is a dangerous distraction from the real war on terrorism being fought in Afghanistan.

◆Drinking Alone

Despite the spectacular failures of Prohibition seven decades ago, there appears to be growing support for a new, piecemeal effort to limit Americans' access to alcohol, says Radley Balko in "Back Door to Prohibition: The New War on Social Drinking" (Policy Analysis no. 501). The multipronged effort includes raising taxes on alcohol, censoring alcohol advertising, and imposing new requirements and restrictions on bars. Most worrying, the crusade against drunk driving has turned into a crusade against social drinking. By enforcing ever-lower blood-alcohol limits and using constitutionally dubious searches and roadblocks, law enforcement officials have begun harassing moderate drinkers who pose little danger to others on the road. Balko singles out two groups as major supporters of this neoprohibitionist agenda: the Robert Wood Johnson Foundation and Mothers Against Drunk Driving. The former's $8 billion in assets allows it to bankroll anti-alcohol efforts around the country, while the latter's many ties to government officials blur the line between law enforcement and advocacy.

◆Mission Creep at Home

The increasing use of the military for civilian police work is cause for alarm, says Cato senior editor Gene Healy in "Deployed in the U.S.A.: The Creeping Militarization of the Home Front" (Policy Analysis no. 503). The United States has a long history of hostility to domestic law enforcement by the military, arising out of colonial experiences with British abuses. The Posse Comitatus Act was passed in 1878 to codify that hostility, but its strictures have sometimes been evaded and ignored, especially since the September 11, 2001, attacks. An egregious example was the illegal six-month deployment of National Guardsmen to the Mexican and Canadian borders to assist in civilian border control in 2002. Increasing militarization would be disastrous, Healy argues, because military officials are trained to kill, not to enforce the law and protect the rights of Americans. Furthermore, the military enjoys nearly total immunity from civilian scrutiny. Healy urges lawmakers to resist calls for increasing militarization and to instead demilitarize the War on Drugs and scrutinize other domestic uses of the military to ensure that the rights of Americans are not being violated.

Gene Healy

◆BTU Wise, Dollar Foolish

Government regulations mandating higher-efficiency appliances are not as beneficial as official cost/benefit analyses claim, says economist and law professor Ronald Sutherland in "The High Costs of Federal Energy Efficiency Standards for Residential Appliances" (Policy Analysis no. 504). Such analyses make two major errors. First, they assume that there would be little improvement in efficiency in the absence of government mandates. Second, they dramatically underestimate the appropriate discount rate, especially for low-income households. Because of the illiquid nature of the home appliance market and the limited savings of poor households, the 3–7 percent discount rates used in government calculations are completely inappropriate, he says, and suggests that a discount rate of at least 35 percent is more appropriate. When those two factors are taken into account, Sutherland concludes, energy efficiency regulations are a net drag on the economy.

◆Democracy in Iraq: Don't Hold Your Breath

It is fitting that, in the Islamic calendar, we are at the beginning of the 15th century, rather than the 21st, opines Patrick Basham in "Can Iraq Be Democratic?" (Policy Analysis no. 505). Iraq, he says, is centuries behind the West in developing the cultural attitudes and values required for a stable liberal democracy. Without political trust, social tolerance, support for individual liberty, and support for gender equality, he contends, democratic experiments are likely to be illiberal and short-lived. Most Iraqis, Basham notes, value nepotism and tribal loyalties over abstract political principles or the public interest. And given centuries of ethnic hatreds, elections are likely to devolve into bitter and violent power struggles between Shiite, Sunni, and Kurdish factions. The power of clerics with illiberal political agendas is another serious obstacle to reform, he argues. For all those reasons, the White House is in for a nasty surprise if it expects to establish liberal democracy in Iraq any time soon, Basham concludes.

Patrick Basham

◆Trade and Terror

Free trade and free markets do more than raise living standards, argues Daniel T. Griswold in "Trading Tyranny for Freedom: How Open Markets Till the Soil for Democracy" (Trade Policy Analysis no. 26). Griswold contends that open markets spur the creation of an educated, financially independent middle class that begins to demand political reforms. In addition, the growth of a wealthy business class provides a check on the power of the state. Griswold tests his claim empirically by comparing independent rankings of political and economic liberty. He finds a statistically significant correlation, with increasing economic liberty strongly linked to rising political freedom. Griswold predicts that the rapid rate of economic growth in today's China will

Daniel T. Griswold

increase pressures for political reforms. Expanding free trade with the Middle East and Cuba could have similarly salutary effects on those countries, he says.

◆Empire State Extravagance

The state of New York is facing a budget crisis brought on by its addiction to spending, says economist Raymond J. Keating in "Cleaning Up New York's Budget Mess" (Policy Analysis no. 506). Had lawmakers held spending increases to the rate of inflation, he notes, state spending in FY04 would be $77 billion instead of today's $95 billion, and there would have been room to balance the budget and cut taxes. Instead, the legislature has raised taxes and still faces persistent deficits. Keating recommends that New York lawmakers undertake a systematic review of the state budget and cut or eliminate those programs that have outlived their usefulness. In particular, he says, skyrocketing spending increases on Medicare, education, and corporate welfare need to be scaled back. He proposes a series of specific cuts to bring the budget back under control.

◆Digital Discrimination?

Proposals for Federal Communications Commission rules mandating that broadband providers practice "network neutrality" by not restricting users' access to Internet content are not as innocuous as they sound, argues Adam Thierer in "'Net Neutrality': Digital Discrimination or Regulatory Gamesmanship in Cyberspace?" (Policy Analysis no. 507). Such proposals treat infrastructure as a fixed resource to be divided among incumbent service providers, ignoring the possibility of innovation and new capital investments. Neutrality mandates could reduce the incentive to invest and innovate, Thierer points out. In addition, Thierer says, such rules are likely to be the opening wedge for broader regulation of the broadband marketplace, as companies seek to "game" the regulatory system to their advantage by lobbying regulators for more favorable interpretations of nondiscrimination rules. Vertical integration of conduit and content may not be a bad thing. Many users want value-added services and might welcome the simplicity of having those services made more easily available than other Internet content. Finally, Thierer argues, broadband providers have property rights in their infrastructure investments, and restricting how those investments can be used violates those rights.

Adam Thierer

◆Digital Price Fixing Doesn't Work Either

In "Compulsory Licensing vs. the Three 'Golden Oldies': Property Rights, Contracts, and Markets" (Policy Analysis no. 508), law professor Robert P. Merges criticizes compulsory licensing schemes for digital content, citing two major problems with the idea. First, although compulsory licensing could lower transaction costs somewhat once the system was established, the intense lobbying effort that will inevitably surround the fee-setting process is likely to negate those savings, he argues. Second, compulsory licensing is subject to "legislative lock-in," as legislative inertia makes prices extremely difficult to change. That is likely to lead to below-market prices, causing underproduction of digital content. In contrast, he says, the "golden oldies" of property rights, contracts, and markets are more than sufficient to allow content holders, distributors, and consumers to arrive at fair market prices and to create institutions that allow efficient payment of royalties.

◆Hey, Big Spender

The last three years of Republican-dominated government have made it clear that the GOP has abandoned any commitment it may once have had to fiscal responsibility, argues Veronique de Rugy in "The Republican Spending Explosion" (Briefing Paper no. 87). Indeed, each of Bush's first three budgets has increased spending at a faster rate than those of any president since Lyndon Johnson. Some defenders of the president argue that spending on defense and entitlements is the primary culprit, but de Rugy rejects that claim, noting that real nondefense discretionary spending has increased by 23 percent during the first three years of the Bush administration. Since Republicans captured Congress in 1995, beneficiaries of GOP spending hikes have included the Labor Department (up 99 percent), the Education Department (up 94 percent), and the Commerce Department (up 71 percent). Those departments are hardly vital to national defense or homeland security, de Rugy notes. She argues that the president and Congress share responsibility for the lack of spending discipline, as either could have acted to slow runaway spending growth. ■

Veronique de Rugy

Cato Calendar

Milton Friedman Prize Presentation Dinner
San Francisco • Ritz-Carlton
May 6, 2004

The Republican Revolution 10 Years Later: Have We Made Any Progress?
Washington • Cato Institute
May 20, 2004
Speakers include Newt Gingrich, Dick Armey, Ed Crane, Thomas Edsall, Major Garrett, and Stephen Moore.

Looking Worldwide: What Americans Can Learn from School Choice in Other Countries
Washington • Cato Institute
May 27, 2004
Speakers include Charles Glenn, Andrew Coulson, Eugenia Toma, Harry Patrinos, and James Tooley.

Cato City Seminar
New York • Waldorf-Astoria
June 10, 2004

Cato University
San Diego • Rancho Bernardo Inn
July 24–30, 2004
Speakers include Tom G. Palmer, Nathaniel Branden, Deroy Murdock, Richard Stroup, Jane Shaw, and Piotr Kaznacheev.

Arguing for Liberty: How to Defend Individual Rights and Limited Government
Cato University
Quebec City • Chateau Frontenac
October 28–31, 2004

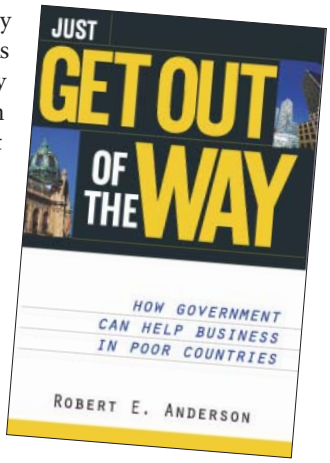
Experts often recommend complex regulations based on those of rich countries

Developing Countries Need Simple Rules

Few Americans appreciate how well the basic institutions of our society function. We are blessed with a relatively honest and efficient bureaucracy, an educated and law-abiding electorate, and a generally fair and effective legal system. Corruption, incompetence, and violence are relatively rare. As a result, economic policy debates in the United States tend to revolve around relatively esoteric issues: should companies be required to expense stock options? Does the tort system need a cap on punitive damages? Should the top income tax rate be 33 percent or 35 percent?

Unfortunately, the blessing of good institutions can create a blind spot when Western policymakers advise their colleagues in poor countries about economic reform. Like fish in water, they have trouble imagining a world without honest and efficient institutions and the culture that supports them. Policymakers in the developing world do not have the luxury of making such naive assumptions. They must build the institutions of a free society from scratch, while simultaneously cultivating public acceptance and support for them.

Just Get Out of the Way: How Government Can Help Business in Poor Countries by Robert E. Anderson is a valuable corrective for policymakers in rich countries facing the "fish out of water" experience of developing effective policies for countries that lack good institutions. Policies that assume highly trained and trustworthy public officials are simply unrealistic in nations that lack such officials, Anderson argues. Furthermore, institutions that have evolved in wealthy countries over the course of centuries might *not* be suitable for poor countries with much lower levels of economic development. One example is the banking system. Anderson argues that the American model of deposit insurance is unlikely to work well in poor countries. Many banks in those countries are government-run Ponzi schemes. Governments need to get out of the banking business, he contends, and should refrain from guaranteeing the deposits of private banks. Instead, disclosure regulations should ensure that depositors have accurate information, and individual depositors should take responsibility for depositing in financially healthy banks.



Privatization of state-run industries is another method of minimizing the corrupting potential of government economic control. Anderson recommends that countries privatize state-owned companies by selling them to the highest cash bidders, with no strings attached. That will maximize both economic efficiency and government revenues. Government should not attempt to spread the ownership of firms among many small shareholders, he argues, nor should it attempt to judge bidders on criteria other than price.

Anderson recommends a "hands-off" approach in two other policy areas as well: bankruptcy law and competition. In both cases, he argues that government control of private business is to be avoided wherever possible. With regard to bankruptcy law, this means that companies that are not able to renegotiate their debts should be liquidated rather than placed under court-supervised restructuring. In competition policy, he urges government officials to focus on reducing government barriers to competition, which are likely to be more substantial than any created by anti-competitive practices in the private sector.

Just Get Out of the Way is available in hardcover for $24.95. It can be purchased in bookstores, at www.catostore.org, or by calling 800-767-1241. ■

"William Blackstone identified three 'great and primary rights' of individuals: personal security, personal liberty, and private property."

SELF-DEFENSE *Continued from page 1*

for killing one burglar, 10 years for wounding the second, and 12 months for owning an unregistered shotgun. The prosecutor claimed Martin had lain in wait, then caught the burglars "like rats in a trap."

The wounded burglar was released after serving 18 months of a three-year sentence. He then sued Martin for injury to his leg, claiming it prevented him from working and interfered with his martial arts training and sex life. He was awarded £5,000 of taxpayer money to prosecute the suit.

Martin's sentence was reduced to five years on a finding that he had had an abusive childhood, but he was denied parole because he had expressed no remorse for killing "one so young" and posed a danger to other burglars. As the *Independent* newspaper reported, "Government lawyers say burglars 'need protection.'" "It cannot possibly be suggested," the attorneys argued, "that members of the public cease to be so whilst committing criminal offences, and whilst society naturally condemns, and punishes such persons judicially, it can not possibly condone their (unlawful) murder or injury." The Law Commission advised the government: "Even a criminal who had committed a serious offence must be allowed to exercise his civil rights."

The impact of such policies on public safety has been stark. An amazing trend of nearly 500 years of declining interpersonal violence in England reversed abruptly in 1954 as violence began to increase dramatically. In 2001 Britain had the highest level of homicides in Western Europe, and violent crimes were at three times the level of the next worst country. "One thing which no amount of statistical manipulation can disguise," the shadow home secretary, Oliver Letwin, pointed out in October 2003, "is that violent crime has doubled in the last six years and continues to rise alarmingly." Indeed, with the exception of murder, violent crime in England and Wales is far higher than in the United States. And while the American murder rate has been in decline for more than a decade, the English murder rate has been rising. You are six times more likely to be mugged in London than in New York City. More than half of English burglaries are "hot burglaries"(someone is at home), while in America, where burglars admit to fearing armed homeowners more than the police, only 13 percent are "hot burglaries." As for the effectiveness of stringent gun control, since handguns were banned in 1998, handgun crime has more than doubled. Gun crime has recently been described as spreading "like a cancer." Units of British police are, for the first time in their history, routinely armed, and American policemen are being hired to advise British departments.

Withdrawal of the Right to Self-Defense

The right to self-defense runs deep in the Anglo-American tradition. William Blackstone, whose *Commentaries on the Laws of England* was published 10 years before the American Revolution and was an immediate bestseller on both sides of the Atlantic, identified three "great and primary rights" of individuals: personal security, personal liberty, and private property. He put personal security first. For Blackstone and generations of common lawyers, the right to personal security was not the expectation that government would protect everyone—that was then, and remains today, impracticable. It was the right of the individual to protect himself, with force if necessary:

> [I]f the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force. . . . For the law, in this case, respects the passions of the human mind; and . . . makes it lawful in him to do himself that immediate justice, to which he is prompted by nature. . . . It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another.

Self-defense was universally regarded as the primary law of nature, so fundamental that England's great jurist insisted, "It is not, neither can it be in fact, taken away by the law of society." On that point Blackstone was wrong, as we have seen.

The practical elimination of the right to self-defense was not the work of a day. As we review the steps by which this result was achieved, two basic questions spring to mind: why did the British people permit it to happen, and why did British governments insist upon it? Starting in 1920 British governments reversed centuries of common law with the first serious limits on privately owned firearms. The motive was not crime control but fear of revolution. The statute required anyone wanting to keep a firearm to get a certificate from his local police chief certifying that he was a suitable person to own a weapon and had a good reason to have it. This certificate had to be renewed every three years. Unfortunately, the definition of "good reason" was left to the police, and the Home Office, through guides to police classified until 1989, systematically narrowed it. First, police were instructed that it would be a good reason to have a revolver if a person lived in an isolated house "where protection against thieves and burglars is essential, or has been exposed to definite threats to life on account of his performance of some public duty." (Note that the only threat to life that was deemed a sufficient reason to own a handgun was one related to "some public duty.") By 1937 police were to discourage applications to possess any firearm for house or personal protection. In 1964 they were advised that "it should hardly ever be necessary to anyone to possess a firearm for the protection of his house or person" and that "this principle should hold good even in the case of banks and firms who desire to protect valuables or large quantities of money." Finally, in 1969 the Home Office announced that "it should never be necessary for anyone to possess a firearm for the protection of his house or person." Since those changes were secret, there was no opportunity for public debate.

Stage two came in 1953 when the government introduced the Prevention of Crime Act that made it illegal to carry in a public place any article "made, adapted, or intended" for an "offensive purpose" without lawful authority or "reasonable excuse." An item carried for defense was, by definition, an "offensive" weapon. Police were given broad power to stop and search everyone. Individuals found with offensive weapons were guilty until proven innocent. In Parliament the government admitted the act was "drastic" but insisted the public should be discouraged "from going about with offensive weapons in their pockets; it is the duty of

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"The safety of individual citizens has taken a back seat to the political preference for order and power."

SELF-DEFENSE *Continued from page 15*

society to protect them." Objections raised during the debate echoed Blackstone and traditional common law practice. One MP reminded government ministers that "there are many places where society cannot get, or cannot get there in time. On those occasions a man has to defend himself and those whom he is escorting. It is not very much consolation that society will come forward a great deal later, pick up the bits, and punish the violent offender." Lord Saltoun pointed out: "The object of a weapon was to assist weakness to cope with strength and it is this ability that the bill was framed to destroy. I do not think any government has the right, though they may very well have the power, to deprive people for whom they are responsible of the right to defend themselves." However, he added, "Unless there is not only a right but also a fundamental willingness amongst the people to defend themselves, no police force, however large, can do it."

Under common law there was an obligation to help someone being attacked. In keeping with their reversal of common law practice, the government began to warn the public not to go to the aid of anyone in distress. It was best to "walk on by" and leave the problem to the professionals. The 1953 act, which the government claimed it needed to protect the public against juvenile delinquents, has been rigorously enforced against law-abiding people. And the scope of the law is so broad that a legal textbook explains, "Any article is capable of being an offensive weapon," although the authors add, if the article is unlikely to cause an injury, the onus of proving intent to do so would be "very heavy."

The third stage in the suppression of the right to self-defense came in 1967 when a broad revision of criminal law was passed. Tucked within the complex statute was a section that altered the traditional standards for self-defense. Everything was now to depend on what seemed "reasonable" force after the fact. If the victim of an attack harmed or killed his assailant, he could be charged with assault or murder. And it was never reasonable to defend property with force. According to the *Textbook of Criminal Law,* the requirement of reasonableness is "now stated in such mitigated terms as to cast doubt on whether it [self-defense] still forms part of the law." The author adds, "For some reason that is not clear, the courts occasionally seem to regard the scandal of the killing of a robber as of greater moment than the safety of the robber's victim in respect of his person and property."

Dismantling Traditional Public Protections

At the same time that it was insisting upon sole responsibility for protecting individuals, the government began to dismantle its traditional means of protecting the public. It adopted more lenient approaches toward offenders. For both ideological and practical reasons, sentences for crimes were sharply reduced and fewer offenders were incarcerated. It was argued that prisoners were not rehabilitated in prison, and, of course, it is expensive to keep them there. Those under 21 were almost never sent to prison. Cautions, payment of fines, and community service have become the preferred punishments for crimes. Judges have had to provide a written justification for any sentence involving incarceration. Those few offenders sent to prison were routinely released after serving only a third of their sentence. When the public became outraged by the rise in violent crime, the time served was increased to half the sentence. The reluctance to use prison persists. So although existing prisons are overcrowded, the commissioner for prisons announced that he won't build more unless prisons can demonstrate a better rate of rehabilitation.

For the sake of cost cutting, the government also "rationalized" police stations. The consolidation of country stations has left most of rural Britain without a police presence. Police were also withdrawn from foot patrols and replaced by surveillance cameras. England and Wales now have far fewer police officers per head of population than America, France, Germany, and Italy. The upshot is not surprising: British police catch far fewer offenders than their American counterparts and bring fewer to justice, and those who are convicted serve less time. A government report of June 2002 pointed to the great gap between crimes reported—5.2 million in 2001–2002—and convictions, 326,000. In 2002 fewer than 1 in 10 of London street robberies were reported as "cleared up."

The British public is finally becoming aroused by the soaring rate of violent crime and their mandated helplessness. The government is promising action, but that action does not include relinquishing its monopoly on force and restoring any measure of the right to self-defense, a right government ministers and police like to refer to as "vigilantism." Instead, the Blair government means to reduce crime by bringing about more convictions and to do this by eliminating other ancient rights. In July 2002 it announced that the venerable double-jeopardy rule that prevents anyone being tried twice for the same crime would be scrapped, retroactively. Hearsay evidence will be admitted in court, jurors will be informed of a suspect's previous record, and the number of jury trials will be reduced. As the director of Liberty, a British civil liberties group, pointed out, however, "Eroding the rights of suspects won't give victims the rights they have waited too long to receive."

Millions of people in Britain live in fear. Elderly people are afraid to go out and afraid to stay in. The government has insisted upon a monopoly on the use of force—but it can only enforce that monopoly against the law abiding. By practically eliminating self-defense, it has removed the greatest deterrent to crime, people able and prepared to defend themselves. Peter Hitchens, a British columnist, recently pointed out, "In Britain now we have the worst of both worlds, police who can't or won't protect us, and no right to protect ourselves." He blames the change on indulgent lawyers, judges, civil servants, and juries. They have certainly played an important part. But they were empowered by legal changes that permitted the government to remove the most basic of all rights. It is unclear why the British people tolerated this.

Perhaps it was because the 1953 act that removed the right to carry anything for protection, on the promise that society would protect everyone, came in the wake of new government programs for cradle-to-grave welfare, national health insurance, and government housing. To many people, and to the government itself, personal protection must have seemed like just one more area where the state could handle things for the individual. From the government's point of view, there was no need to run the risk of people causing trouble by trying to defend themselves. The professionals would handle it. Of course there is no way "society" can protect everyone all of the time. And the government has always known that. The safety of individual citizens has taken a back seat to the political preference for order and power. The result would not have surprised Blackstone. And it should be a lesson to Americans. ■

Regulation: *Perverse incentives and unintended consequences*

Endangered Species Act after 30 Years

The winter issue of *Regulation* features articles on campaign finance regulations, agricultural subsidies, antitrust law, endangered species protection, and more. Mercatus scholar Daniel R. Simmons and Randy T. Simmons of Utah State University examine the perverse incentives created by the Endangered Species Act 30 years after its passage. They find evidence for at least one perverse effect: since the passage of the act, landowners have been more likely to destroy habitat near endangered species to prevent them from settling on their land. Because of such unintended consequences, they argue, the act has done little to restore endangered populations to health.

Economist Russell L. Lamb argues that increased vertical integration of agriculture has helped to stabilize agricultural prices, undermining the traditional argument that farm subsidies are needed to stabilize prices. Farmers, he notes, increasingly enter into long-term agreements with specific agribusiness firms rather than sell their products on the more volatile spot market. To facilitate the phaseout of agricultural subsidies, Lamb advocates a buyout program in which the least productive farmers would be given financial incentives to leave the industry, while those who chose to remain in the industry would be required to operate without subsidies.

In the cover story, Northwestern University law professor Robert H. Sitkoff considers the arguments for and against regulation of corporate political activity. Rent seeking by corporate lobbyists is a serious concern, he says, but a less-recognized problem is extortion of legitimate businesses by politicians. Corporate campaign contributions, he concludes, are more likely to be an act of self-defense than an act of bribery.

The University of Maryland's Tim Brennan argues that, in the Microsoft antitrust case, legal theory got ahead of courtroom realities. Most economists would have found the prosecutors' arguments in the Microsoft case simplistic, he argues, but a more nuanced case would have been difficult to defend in court. Brennan warns that, as economic theory becomes more complex, misapplication and oversimplification of economic doctrines will become more common, often to detrimental effect.

Regulation can be purchased at newsstands, from the Cato Store at www.catostore.org, or by calling 1-800-767-1241. One-year subscriptions are available for $20.00. ■

Is the Earth warming? If so, is that a problem?

Global Warming: Science and Economics

Global warming is an issue fraught with controversy. Not only do climate scientists disagree over the amount of future warming and the extent of human causation, but economists are also divided over what actions, if any, should be taken to solve the problem. At a December 12 Cato conference, "Global Warming: The State of the Debate," climate change experts debated the accuracy of global warming models, the advisability of government intervention, and the extent to which human ingenuity could mitigate the harms of global warming without government restrictions on the use of fossil fuels.

Arizona State University's Robert Balling noted that CO_2 emissions do appear to be a major cause of recent global temperature increases but argued that implementing the Kyoto protocols would have almost imperceptible effects. Cato's Pat Michaels agreed, arguing that there is clear scientific evidence that the Earth will warm less than a degree over the next century and that small variations in greenhouse gas emissions will have a negligible effect on climate change. Michael Schlesinger of the University of Illinois disagreed with the previous speakers, pointing out that the complexity of climate models and the many areas of potential uncertainty make it possible that small changes in emissions could have large effects.

Cato chairman William Niskanen welcomes Thomas Schelling, Distinguished University Professor at the University of Maryland and former president of the American Economic Association, to Cato's December 12 conference on the science and economics of climate change.

Robert Mendelsohn of Yale discusses the costs and benefits of programs to reduce greenhouse gas emissions.

Cato's Jerry Taylor, William Cline of the Institute for International Economics, and Paul Portney of Resources for the Future display differing reactions to an argument about the economics of climate change.

Even if we can expect substantial warming in the future, however, that doesn't necessarily justify the costly and intrusive policies mandated in Kyoto, said economist Gary Yohe. Future technologies might dramatically reduce the costs of reducing greenhouse emissions. And even if projected warming occurs, there are many practical ways human beings can cope with the increase, from moving to cooler climates to investing in air conditioners. Furthermore, as University of Alabama professor John Christy stressed, the detrimental effects of global warming are dwarfed in less developed countries by pressing short-term issues, such as poor sanitation and air quality.

Nevertheless, some panelists argued that action was needed. Paul Portney, president of Resources for the Future, argued that each side in the debate could learn from the other. Global warming alarmists, he said, underestimate the costs of implementing the Kyoto protocols and assume that human beings will do nothing to mitigate the harms of warming absent gov-

ernment intervention. However, he said, skeptics exaggerate the costs of doing something about the problem. The world should begin laying the groundwork now so that humanity can respond effectively if warming turns out to be worse than expected. William Cline, senior fellow at the Institute for International Economics, took a very long-term view of the problem. He calculated the relative costs of action and inaction over the next 300 years and concluded that an international agreement is needed to discourage the use of fossil fuel by requiring countries to levy carbon taxes.

Cato's Peter Van Doren argued that the scientific controversy needn't be settled before policymakers act, since markets typically satisfy people's preferences whether or not those preferences are rational. He noted that there are market-oriented alternatives to the draconian requirements of the Kyoto protocol. For example, tradable emission permits would make the costs of mitigating climate change explicit and would give society a flexible way to deal with the problem if a consensus emerges that reductions are needed. ■

News Notes

Moller, Cannon Join Cato Policy Staff

Mark Moller has joined the Cato Institute as a senior fellow in constitutional studies and the editor in chief of the *Cato Supreme Court Review*. Before joining Cato, Moller practiced law with the Appellate and Constitutional Law Practice Group at the law firm of Gibson, Dunn & Crutcher. He engaged in a number of high-profile representations, including serving as a member of the team that successfully litigated *Bush v. Gore* before the Supreme Court and as an adviser to judicial nominee Miguel A. Estrada during his Senate confirmation hearings. Moller earned his J.D., with honors, at the University of Chicago Law School in 1999 and a Masters in common law legal history and theory from the University of Cambridge, where he studied with noted legal historian J. H. Baker.

Mark Moller

Michael F. Cannon has joined the Cato Institute as director of health policy studies. Previously, Cannon served as a domestic policy analyst for the U.S. Senate Republican Policy Committee, where he advised Senate leadership on health, education, labor, welfare, and Second Amendment policy; as health care policy analyst for Citizens for a Sound Economy Foundation in Washington, D.C., and as director of government affairs for the National Center for Policy Analysis.

Michael F. Cannon

Cato senior fellow **Patrick Michaels** has received the 2003 Climate Science Paper of the Year award from the Association of American Geographers. **Ed Crane** has been awarded the 2003 Sovereign Fund Award for Advancing Freedom.

"To Be Governed..."

◆Spending lots of money with nothing to show for it? Sounds like good training for the presidency

[Gov. Howard] Dean has been forced into the new strategy in large part by his heavy spending in the first two contests. He raised $41 million last year, a record among Democratic presidential candidates, but spent most of it by the time the Iowa and New Hampshire contests were over.

That leaves Dean claiming just $3 million in his treasury. Campaign Chairman Steve Grossman conceded in a phone interview Friday that the spending in the first two states was "enormous."

"Perhaps we were not as disciplined when we had momentum and when things were going our way," Grossman said.

—*Los Angeles Times,* Jan. 31, 2004

◆Baby steps to honesty

Gov. Mark R. Warner brought his tax campaign to McLean yesterday. . . .

Warner joked with the group several times about the political peril of even mentioning tax increases in Virginia.

"I know no one likes to say it, especially in Richmond," he said. "They like 'revenue enhancements' or 'user fees,' they're much more melodious. But let's call it what it is—a tax reform plan."

—*Washington Post,* Jan. 24, 2004

◆The welfare state at work

A tax office official in Finland who died at his desk went unnoticed by up to 30 colleagues for two days. . . .

The head of personnel at the office in the Finnish capital, Helsinki, said the man's closest colleagues had been out at meetings when he died.

He said everyone at the tax office was feeling dreadful—and procedures would have to be reviewed. . . .

Finnish citizens pay among the highest taxes in the world, but enjoy one of the best welfare systems.

—BBC, Jan. 19, 2004

◆Because in Los Angeles's $4.8 billion budget, there are no lower priorities than police and fire protection

California Gov. Arnold Schwarzenegger (R) announced billions of dollars in budget cuts and fee increases Friday. . . .

Los Angeles Mayor James K. Hahn (D) said Friday that if the legislature approves Schwarzenegger's request, the city would lose at least $45 million and could be forced to fire police officers and firefighters.

—*Washington Post,* Jan. 10, 2004

◆Protecting consumers, uh, sellers

On Oct. 21, New York Gov. George Pataki signed into law a bill designed to curb predatory pricing of motor fuel. . . .

The law, as signed, will prohibit retail pricing of motor fuel below 98 percent of cost. . . .

"We are grateful for Gov. Pataki's wisdom and strength in signing this bill in the face of stiff opposition from Wal-Mart and the Retail Council of New York State," said Thomas J. Peters . . . of the Empire State Petroleum Association.

—*Fuel Oil News,* Dec. 2003

◆And certainly a dedicated anti-smoking ideologue would know more about restaurant economics than restaurateurs

Selby Scaggs, the owner of the Anchor Inn Seafood Restaurant in Wheaton [Md.], is convinced that there is nothing healthier for his business than cigarette smoke. . . .

After Montgomery County's indoor smoking ban took effect Oct. 9, Scaggs's alcohol sales dropped 40 percent, and the [computer] game business fell by more than half. . . .

"These laws either have no impact or are good for business," said Stanton A. Glantz, director of the Center for Tobacco Control Research and Education at the University of California at San Francisco.

—*Washington Post,* Dec. 28, 2003

◆Republican budget austerity

One congressional district in the area around DeKalb, Ill., appears to be faring exceptionally well in the Labor and Health and Human Services appropriations conference report. The 14th Congressional District, one of the richest in the state, looks to get 43 percent of all the projects earmarked for Illinois, even though it has only about 5 percent of the population.

Nearly one-third of the $16,445,000 headed for the district would go to Northern Illinois University in DeKalb. . . .

We can be sure of one thing: The proud 14th's success has got nothing to do with who represents it in Washington. That would be House Speaker J. Dennis Hastert (R), who picked up a graduate degree at Northern Illinois University.

—*Washington Post,* Dec. 12, 2003

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