

Taking the Constitution Seriously

by Roger Pilon

Now I know there are some who say, well, that's not within the Constitution, but there are a lot of things not in the Constitution that we do all the time."

—Sen. Harry Reid (D-Nev.)

Fox News Sunday, Jan. 25, 1999

Over the past year of presidential scandal, much was heard about the Constitution and its impeachment provisions. By year's end, to their credit, most House Republicans and a few Democrats had followed those provisions despite sometimes deafening calls from pollsters, most Democrats, and a few Republican "elders" to censure the president—the "middle way" that, if more than a slap on the wrist, would have compromised both the separation of powers and the Constitution's prohibition on bills of attainder. In thus resisting popular opinion, House Republicans reaffirmed that we are a nation governed by a constitution, not by shifting political winds. They held that Congress is not a sitting constitutional convention, empowered to rewrite the Constitution in response to the latest polls. And they demonstrated that Congress, no less than the president, is bound by the rule of law.

That kind of fidelity to constitutional principle is all too rare in modern Washington. During most of the 105th Congress, in fact, Republicans were no less likely than Democrats to ignore constitutional limits on their power. When they needed the Constitution, as in the impeachment battle, they called upon it. But otherwise, like Democrats since the New Deal, they simply assumed that Congress had plenary power to address an endless range of national "problems."

To be sure, Republicans often talked of

Roger Pilon holds the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute and is director of Cato's Center for Constitutional Studies.



Roger Pilon, director of Cato's Center for Constitutional Studies, welcomes Chief Justice William H. Rehnquist to the Cato Institute for a private lunch with officers and the staff of the Center for Constitutional Studies in October.

limited government, but the talk was invariably pragmatic, not constitutional. They argued that state and local governments could do a better job of providing education or health care, for example, not that the federal government had no authority over such issues. And they discussed federalism in the language of "good government"—as in federal-state "partnerships"—not in the language of checks and balances, as the Founders intended. Never did they ask such basic questions as "Where in the Constitution do you find authority to fund 100,000 new teachers?" And when it came time to act—the transportation bill, the 4,000-page Omnibus Appropriations Act—all talk of limited government was forgotten.

Not even the incoming Republican freshmen seem ready to infuse new blood into the party, as the 74 "radicals" did in 1995. In fact, the tone may have been set by class president Jim DeMint of South Carolina, tapped by party leaders for a Republican issues task

Continued on page 10

In This Issue



Friedman on Microsoft, p. 3

Boaz on school choice	2
Washington, D.C., vs. Silicon Valley	3
Can the Internet save retirement security?	6
16th Annual Monetary Conference	9
The power of the jury	12
New editor for <i>Regulation</i>	13
Studies on Microsoft, Social Security, Kosovo, term limits	14

Let the Children Go



Aurelia Davis went to the Supreme Court in January to get justice for her daughter LaShonda. LaShonda was taunted by a boy in her fifth-grade class. He grabbed at her, rubbed against her, and whispered that he wanted to “get in bed” with her. LaShonda’s mother said that despite repeated complaints, school officials in Forsyth, Georgia, did nothing to stop the boy.

So Aurelia Davis sued the school district, claiming that under Title IX of the 1972 Education Amendments, which prohibits sex discrimination, schools should be financially responsible for a student who sexually torments another student. More and more such suits have been brought around the country.

At the Supreme Court hearing, several justices seemed skeptical of creating what Justice Anthony Kennedy called “a federal code of conduct” for every classroom in the country. Indeed, it would probably be unwise for the federal courts to prescribe student conduct rather than let parents, teachers, and administrators handle those problems.

But another question was not raised before the Court: Why should a mother have to spend *six years* taking a case all the way to the Supreme Court to get her daughter a safe fifth grade? Why didn’t she just put LaShonda in another school? (Of course, LaShonda has long since moved on to high school, and her accused harasser has moved to another town.)

We know the answer, of course. Students are assigned to schools by the government, and in most cases the only alternative to the assigned school—and even the assigned classroom—is to pay a good deal of money for a private school. If Georgia had a school voucher program, Mrs. Davis could have told the principal, “Get this problem fixed by the end of the semester, or we’re out of here.” Instead, she had to go to the Supreme Court, where she may still not get what she wants.

Under a voucher or scholarship plan, the state or local government undertakes the responsibility of paying for the education of every child in the district, but it doesn’t require every student to attend a government-run school. Instead, each parent receives a scholarship (or voucher) that can be spent for a child’s education at the local public school, a different public school, or a private school.

Newspapers are full of stories about education problems that could be solved by the implementation of a choice plan. In November, the *Washington Post* told of Greg Nelson, who had recently moved from Oregon to the Washington, D.C., area. He chose to live in distant Loudoun County, Virginia, rather than closer-in Fairfax County because he preferred the smaller schools there. Research

shows the benefits of smaller schools, and it’s unfortunate that so many school districts continue to build schools too large to provide the personal attention that children need. But if Virginia had a scholarship system, Mr. Nelson could live (more or less) where he wanted to, and still choose the kind of school he wanted his children to attend.

A few weeks earlier, the Baltimore *Sun* ran this headline: “It’s a school, but the aura is of prison.” The horrifying front-page article told how Southern High School in Baltimore keeps its doors and windows bolted to try to keep out intruders and control violence. But some students hide out in the stairwells, where guards rarely patrol and where the floors are covered in “cigarette butts, broken glass and chicken bones—muck enough to cause more than one student to fall.” The principal says, “I’m sure there are streets in Baltimore you won’t walk down. I ask my students not to go into Stairwells 5 and 6 for the same reason. It’s about personal safety.”

Student Sandy Pearce says, “Look at the words, ‘lockdown,’ ‘work release’—it’s like we go to a jail.”

Wouldn’t it be good if Sandy could use her scholarship to go to another school? But under the current system, all she can do is circulate a petition for better conditions.

Critics of the voucher system say that we shouldn’t “give up” on public schools, we should all pull together to make them better. That’s fine rhetoric for a campaign speech. But any particular child will be six years old only once, and will be in elementary school for only a few years—while changing something as unwieldy as a large public school system takes much time and effort.

Why should Aurelia Davis have to spend years fighting a legal battle to get a safe school for her daughter? Why should Greg Nelson have to live 30 minutes further from his job to find a school district he likes? Why should Sandy Pearce be stuck in a school where her life is literally in danger?

Parents and children suffer while politicians and school administrators say, “Give us just a little more time. We’re setting up a task force that will devise a selection process for a comprehensive commission that will hold hearings to develop a master plan to implement a scheduled improvement in our community’s schools.”

Meanwhile, children suffer in schools that don’t fit their values, don’t nurture their intellectual and personal development, and may even be unsafe. Let the students get a better education. Let the families choose. Let the children go.

“Why should a mother have to wait six years to get her daughter a safe fifth grade?”

—David Boaz

Washington's war on Silicon Valley?

Scholars, CEOs Debate Technology Regulation

What has happened to the vision of a dynamic, unregulated Silicon Valley? With some companies embracing the antitrust attack on Microsoft and stepped-up campaign contributions from computer companies, some observers fear that the computer industry will be brought into the mutual shakedown scheme carried on inside the Beltway. "Washington, D.C., vs. Silicon Valley," the second annual Cato Institute-Forbes ASAP conference on Technology and Society, held in San Jose, November 19-21, reminded the high-tech community that freedom is essential to innovation.

In the opening address, Cypress Semiconductor chairman T. J. Rodgers said that market institutions and trade are the foundations of the wealth we have come to take for granted. Leading science fiction writers warned of the advent of a "regulation chip" installed in every computer, or of our being so coddled by technology that we become "a nation of sissies" with safety our main concern. David Friedman of Santa Clara University and author K. Eric Drexler spoke of the transformation of human society by encryption and nanotechnology; in its own way, each of those technologies will empower individuals and undermine old authorities. Novell chairman

Eric Schmidt described the evolution of a new networked economy, with prices tending ever more toward uniformity in response to rapidly transmitted information.

Controversy over the Justice Department's

were to benefit consumers or the computer industry, it would be "the first time in history" that any such suit had done so. Friedman criticized the business community for its frequent shortsightedness in supporting the expansion of government powers.

The conference also drew attention to the power of markets to fix pernicious problems caused by government meddling. Scholar Andrew J. Coulson and entrepreneur J. B. Holston outlined the enormous inefficiency of today's education establishment and described how competition, newly evolving technologies, and for-profit companies could markedly improve the state of education. Larry Ellison of Oracle expressed strong support for parental choice and school vouchers. A powerful panel featuring Intuit chairman Scott Cook, Chilean reformer José Piñera, and Financial Engines CEO Jeff Maggioncalda described how to use technology and markets to replace the collapsing government-run Social Security system.

The conference, organized by Cato's director of information studies Solveig Singleton, can be viewed with RealPlayer on Cato's Web site, www.cato.org.



Nobel laureate Milton Friedman (left) and his son, economist David Friedman, were among the speakers at Cato's second annual Technology and Society conference in San Jose.



Novell chairman Eric Schmidt discusses the impact of information on the economy.

antitrust attack on Microsoft ran throughout the conference. Ed Black of the Computer and Communications Industry Association argued that capitalism requires antitrust "checks and balances." Nobel laureate Milton Friedman, however, noted that if the antitrust suit against Microsoft

Cato Policy Report is a bimonthly review published by the Cato Institute and sent to all contributors. It is indexed in *PAIS Bulletin*. Single issues are \$2.00 a copy. ISSN: 0743-605X. ©1999 by the Cato Institute. • Correspondence should be addressed to Cato Policy Report, 1000 Massachusetts Ave., N.W., Washington, D.C. 20001. • INTERNET: catocato.org • WEB SITE: <http://www.cato.org>

CATO POLICY REPORT

David Boaz Editor
David Lampo Managing Editor
Marian J. Council Art Director
Casey J. Lartigue Jr. Editorial Assistant

CATO INSTITUTE

William A. Niskanen Chairman
Edward H. Crane President and CEO
David Boaz Executive Vice President
Robert N. Borens V. P., Development
Ted Galen Carpenter ... V. P., Defense & Foreign Policy Studies
James A. Dorn V. P., Academic Affairs
William Erickson V. P., Finance and Administration
Patrick S. Korten V. P., Communications

Virginia Anderson Manager, Information Services
Doug Bandow Senior Fellow
Diana Brady Director of Administration
Gary Dempsey Foreign Policy Analyst
Ivan Eland Director, Defense Policy Studies
Michael Gough Director, Science and Risk Studies
Daniel Griswold Assoc. Dir., Center for Trade Policy Studies
Edward L. Hudgins Director, Regulatory Studies
Elizabeth W. Kaplan Copyeditor
M. Christine Klein Director, Sponsor Relations
David Lampo Publications Director
Robert A. Levy Senior Fellow, Constitutional Studies
Brink Lindsey Director, Center for Trade Policy Studies
Aaron Lukas Trade Policy Analyst
Timothy Lynch Asst. Director, Constitutional Studies
Derrick Max Director, Government Affairs
Stephen Moore Director, Fiscal Policy Studies
Darcy Olsen Entitlements Policy Analyst
Tom G. Palmer Director of Special Projects
Alan Peterson Director of Computer Operations
Roger Pilon Director, Center for Constitutional Studies
Jacobo Rodriguez Asst. Director, Global Economic Liberty
Greg Scandlen Fellow in Health Policy

Solveig Singleton Director, Information Studies
Dean Stansel Fiscal Policy Analyst
Michael Tanner Director, Health and Welfare Studies
Jerry Taylor Director, Natural Resource Studies
Peter VanDoren Asst. Director, Environmental Studies
Ian Vásquez Director, Global Economic Liberty
Julia Williams Director, Public Affairs
James M. Buchanan Distinguished Senior Fellow
Earl C. Ravenal Distinguished Senior Fellow
James Bovard Associate Policy Analyst
Barbara Conry Associate Policy Analyst
Peter J. Ferrara Associate Policy Analyst
Lawrence Gasman Senior Fellow in Telecommunications
Patrick J. Michaels Senior Fellow in Environmental Studies
Gerald P. O'Driscoll Jr. Senior Fellow
P. J. O'Rourke Mencken Research Fellow
Tim Penny Fellow in Fiscal Policy Studies
José Piñera Co-chair, Social Security Privatization
Jim Powell Senior Fellow
Teller Mencken Research Fellow
Cathy Young Research Associate

Does Congress need to authorize military forays?

Epstein, Mao, and Friedman Discuss Liberty

◆ **October 1:** At “**Papers, Please! National IDs in the Nineties,**” Rep. Bob Barr (R-Ga.) argued that the government has the burden of proving that there is a need for national ID cards. Dan Griswold, associate director of Cato’s Center for Trade Policy Studies, argued that national ID cards are unnecessary, won’t work, and compromise our basic liberties.

◆ **October 5:** The day before the case was argued before the Supreme Court, *Del Monte Dunes v. City of Monterey* was discussed at a Policy Forum, “**Just Whose Property Is It, Anyway?**” Del Monte Dunes Corporation’s attempt to develop its oceanfront property has been consistently blocked by the city of Monterey, California, since 1981. Gideon Kanner, professor of law emeritus at the Loyola Law School in Los Angeles and a lawyer for Del Monte Dunes, debated Robert Brauneis, associate professor at the George Washington University School of Law.

◆ **October 7:** Although U.S. troops have fought overseas on numerous occasions since World War II, Congress has never been asked to declare war. At a Policy Forum titled “**Does Congress Need to Authorize U.S. Military Action Overseas?**” Rep. David E. Skaggs (D-Colo.) argued that President Clinton should not act in Kosovo without specific congressional authority. Louis Fisher of the Congressional Research Service said the 1973 War Powers Resolution should be repealed because it gives too much power to the president to act without a congressional declaration of war. Stanley Kober, research fellow in foreign policy studies at Cato, argued that the Founding Fathers clearly were wary of presidents’ waging undeclared wars and therefore vested the war power in the legislative branch. Robert F. Turner, associate director of the Center for National Security Law at the University of Virginia Law School, argued that the Constitution gives the president general control of the nation’s foreign affairs and that, as commander in chief of the armed forces, he can send troops into combat without congressional approval.

◆ **October 9–12:** A **Cato University Seminar** on economics, history, and law was held in

San Francisco. The speakers were David Friedman, professor of law at Santa Clara University; Randy Barnett, professor of law at Boston University Law School; David Kelley, executive director of the Institute for Objectivist Studies; and David Boaz, executive vice president at the Cato Institute.

◆ **October 14:** Richard Epstein of the University of Chicago Law School discussed his book *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* at a Book Forum. Epstein examined the extent to which government can compel involuntary exchanges of property to achieve a public benefit.

◆ **October 15:** At a Book Forum for *The Promise and Peril of Environmental Justice*, Christopher H. Foreman Jr. contended that some serious environmental problems do have a disproportionate effect on low-income people and minorities but that the approach of advocates of “environmental justice” diverts attention from more serious health issues.

◆ **October 16:** The implications of the European Union’s decision to enhance protection of personal data were discussed at a Policy Forum, “**What the EU’s Privacy Directive Means for the United States.**” Speakers were Peter Swire, John E. Calfee, and Solveig Singleton.

◆ **October 19:** Section 4705 of the Balanced Budget Act of 1997, which ended private payments by Medicare recipients to doctors for Medicare-covered services unless doctors agreed not to participate in the Medicare program for two years, was discussed by Lois Copeland, Marty Corry, and Roger Pilon at a Policy Forum, “**Should Senior Citizens Be Able to Contract Privately for Medicare Services?**”

◆ **October 20:** About two weeks before congressional elections, authors Major Garrett and Tim Penny discussed their book *The Biggest Lies in American Politics* at a Book Forum. Garrett, of *U.S. News & World Report*, and Tim Penny, a former member of Congress (D-Minn.) and now a fellow in fiscal policy studies at the Cato

Institute, discussed four of the biggest lies of American politics: (1) all tax cuts are good for the economy, (2) big money is corrupting the political system, (3) the Republicans believe in smaller government, and (4) the Democrats are the compassionate party.

◆ **October 22:** The Cato Institute cohosted with *The Economist* the 16th Annual Monetary Conference, “**Money in the New Millennium: The Global Financial Architecture.**” Speakers included Lawrence Summers, deputy secretary of the Treasury; William Poole, president of the Federal Reserve Bank of St. Louis; Michael Mussa and Hubert Neiss of the International Monetary Fund; Laurence Meyer of the Federal Reserve System; and Randall Kroszner of the Graduate School of Business at the University of Chicago.

◆ **October 27:** Cato held a City Seminar in Philadelphia on “**Liberty in the New Millennium.**” The speakers were Steve H. Hanke of John Hopkins University and Ted Carpenter, Roger Pilon, and José Piñera of the Cato Institute.

◆ **October 29:** Judith Kleinfeld, professor of psychology at the University of Alaska, discussed her study, “**The Myth That Schools Shortchange Girls,**” at a Policy Forum. Kleinfeld argued that girls do well in school and that low-income boys are the students we should worry about most.

◆ **November 5:** Before 1996 there was a growing consensus that the old regulatory models for telecommunications were falling behind market innovations. Congress responded with the Telecommunications Act of 1996 to deregulate the industry. At a Book Forum for the new Cato book *Regulators’ Revenge: Whatever Happened to Telecommunications Deregulation?* Cato’s director of information studies Solveig Singleton argued that the act has replaced regulated monopoly with regulated competition. Commissioner Harold Furcht-gott-Roth of the Federal Communications Commission contended that the telecommunications industry law has worked well for many industries that were under much more burdensome regulations in the recent past.



James A. Dorn, editor of *China in the New Millennium*, welcomes Zhang Shuguang (right) and Mao Yushi (left) of Beijing's Unirule Institute to a Cato Policy Forum.

◆**November 19:** With the demise of socialism, the welfare state has been left as the primary ideological rival to classical liberalism. Discussing his book *A Life of One's Own: Individual Rights and the Welfare State* at a Book Forum, philosopher David Kelley examined the moral and philosophical foundations of the contemporary welfare state. Kelley argued that the welfare state is based on the faulty moral and philosophical premise that people have a moral right to goods and services (food, shelter, health care, retirement income). Communitarian philosopher William Galston defended the morality of income transfers.

Jeffrey Sachs of Harvard and Clive Crook of *The Economist* were among the speakers at Cato's 16th Annual Monetary Conference.



◆**November 19–21:** “Washington, D.C., vs. Silicon Valley” was the theme of the second annual Cato Institute–*Forbes* ASAP Conference on Technology and Society. Held in San Jose, the conference addressed why some Silicon Valley companies have embraced the antitrust attack on Microsoft. Speakers included Cypress Semiconductor chairman T. J. Rodgers, David Friedman of Santa Clara University, author K. Eric Drexler, Novell chairman Eric Schmidt, Nobel laureate Milton Friedman, Larry Ellison of Oracle, Intuit chairman Scott Cook, and Financial Engines CEO Jeff Maggioncalda.

Virginia Postrel defends the dynamic future against its “stasist” enemies.



Michaels of Cato.

◆**November 16:** What do Pat Buchanan, Ralph Nader, “right-wing” nativists, and “left-wing” environmentalists have in common? According to *Reason* magazine's editor Virginia Postrel, they share a devotion to “stasis.” The true enemies of humanity's future are the people who insist on circumventing competition and experiment in favor of their own pre-conceptions, said Postrel at a Book Forum for *The Future and Its Enemies: The Growing Conflict over Creativity, Enterprise, and Progress*. David Frum of the Manhattan Institute argued that Postrel's view would move classical liberalism from a philosophy of procedural rights to one of substantive policy.

◆**November 20:** Since the late 1970s, China's economic liberalization and opening to the outside world have increased prosperity and advanced civil society. However, the lack of a true market economy—which depends on the rule of law and private property—means that the future of China's market system is unclear. At a Book Forum to celebrate Cato's release of *China in the New Millennium: Market Reforms and Social Development*, Mao Yushi of the Unirule Institute of Economics in Beijing contended that China must follow the path of market liberalism. “As long as there is a human society, there must be negotiation between the supplier and the demander; there must be free choice; there must be competition. In order to have a negotiation between supply and demand, we must have ownership—to protect one's property, to protect one's personal security.” The book was edited by James A. Dorn, Cato's vice president for academic affairs. ■



Rep. David Skaggs argues that the president should not send troops into overseas conflicts without congressional authorization.

◆**November 12:** The Cato Institute held a **City Seminar** at the Waldorf-Astoria Hotel in New York. The speakers were syndicated columnist Robert Novak and José Piñera, Steve Moore, Roger Pilon, and Patrick

Most Cato Forums and conferences can be viewed with RealPlayer on the Cato Institute's Web site, www.cato.org, both live and afterward.

Social Security Meets the 21st Century

The *Cato Institute* and *Forbes* ASAP sponsored the second annual *Conference on Technology and Society*, “Washington, D.C., versus Silicon Valley,” in San Jose, November 19–21, 1998. Following are excerpts from the panel on “Money Management, Capital Flows, and Social Security in Cyberspace.” The speakers are Scott Cook, chairman of *Intuit Corp.*; José Piñera, the architect of Chile’s privatized social security system and co-chairman of *Cato’s Project on Social Security Privatization*; and Jeff Maggioncalda, president and CEO of *Financial Engines*. These speeches and the rest of the conference can be viewed in *RealPlayer* video at www.novell.com/webcast/.

Scott Cook: A recent survey showed that more Americans in their 30s believe in UFOs than believe that Social Security will be there for their retirement. That shows great wisdom because they are probably right. There may be UFOs, but there is no way Social Security will be there for their retirement. This is not a small problem. Social Security is by far the largest government program, the one that affects every worker, and it is broken.

Let’s go through some of the numbers. When the Social Security program was started, the maximum tax you’d pay was \$60 a year. That was 60 years ago. Now, the maximum is \$8,109. It is, for two-thirds of Americans, more than their federal income tax. Meanwhile, the program has made \$9.5 trillion in promises it can’t keep.

The problem is demographics. In 1950 there were 16 workers for every recipient. Social Security is a pay-as-you-go program, not a funded investment program. So the ratio of workers to recipients is key. It’s about three now, and in a couple of decades it will be two workers supporting every retiree.

Now, what’s the return you get for the \$8,000 contribution you put in each year if you’re at the maximum? Well, you get less than 2 percent. That’s worse than stocks, worse than bonds, worse than mutual funds, worse than passbook savings. In fact about the only interest rate in the world that is comparable is the measly interest rate you get on a checking account. And that’s if the government honors its promises, which it can’t.

So what’s the rationale for this program?

Some people say it protects the needy. Let’s think about that. First of all, this is a regressive tax—it taxes most highly the people with the lowest incomes because taxable income is capped. For us CEOs, it’s a microscopic amount of money. For the people who work in our tech support center, it’s an immense tax. What’s more, the people who get hurt most by Social Security in its current form are, in fact, the poor and minorities. Why? Because poor and minority workers pay a higher percentage of their incomes: they start work earlier in their lifetimes, so they have more years during which they are paying a higher percentage of their incomes, and they live for a shorter period of time, so they collect less.



Scott Cook: “Social Security turns our retirees into welfare recipients.”

Let’s not even focus on the numbers for a minute; let’s focus on the morality. What the Social Security system does is turn our retirees—our parents and their peers—into a nation of welfare recipients, dependent on the government dole for their economic livelihood. Think what that does to their incentives and their belief in free markets. Once you’ve determined that your livelihood is a function of the government dole, you rally to protect that dole. And thus, in many people’s view, the most powerful lobby in Washington is the American Association of Retired Persons.

So how do we fix the system? There are proposals to increase taxes or reduce benefits. The payroll tax of 12.4 percent would have to increase by almost 50 percent, to almost 20 percent, to make up the shortfall. Or you’d have to cut benefits by almost

a third when the real return on Social Security is already less than 2 percent. If you apply either of those fixes, the return goes negative.

Another option is to have the government invest the Social Security tax revenue in stocks. Unfortunately, that leaves the current system in place. It’s still a welfare system. You have the government in control of the largest investment fund in the world. Now, how fairly and wisely do you think the political system would allow the federal government to invest in company stocks? You can bet it won’t be an economically rational system.

The problem with all three of those solutions is that they are not the fundamental change that is needed. They are a Band-Aid on a failure. The fundamental problem is that our retirement is being provided for through a state monopoly, through socialism instead of free enterprise, through welfare instead of individual responsibility. What’s needed is a much more substantial fix.

José Piñera: The good news is that there is a solution: allow workers to opt out of the pay-as-you-go (paygo) government system. Every worker should be given the choice of either staying in the government-run system or opting out with his FICA taxes—12.4 percent of his wages, adding employer and worker contributions—and investing that money in a private individual retirement account. Invested in an adequate portfolio of bonds and shares, that money will get positive returns and therefore grow exponentially during the entire working life of 40–45 years, so that every worker will accumulate wealth as he grows old.

Some of you may be thinking, “Well, but that is impossible.” That’s exactly what they told me 18 years ago when as secretary of labor and social security in Chile I proposed to do precisely that. And we did it. In 1980 we approved a bill giving every Chilean worker that choice. In the first month of the new system, 25 percent of the labor force decided to leave the government system and move to the private one. At the end of the first year 70 percent of the workers had moved, and today 93 percent of Chilean workers carry around a retirement passbook and are shareholders of Chilean and international companies.

“I told the official, ‘Cato has www.socialsecurity.org. You can still register titanic.gov.’”

—José Piñera

Now, some people might say, “Well, okay, the system of private individual retirement accounts works, but how do we do the transition from the current system?” Yes, the transition entails a challenge, since there are complex financial and political issues. To explain the alternatives I used this metaphor in Chile 18 years ago: “The government-run paygo system is like the *Titanic*. The workers are passengers and the ship is going directly toward the iceberg of an aging population.” The proof of the iceberg is not just the financial imbalance of the system but the low and eventually negative rate of return that young workers will get from their FICA taxes. Whatever you do in terms of fixes of the current system—increasing payroll taxes, reducing benefits, increasing the retirement age—diminishes that rate of return and aggravates the problem for young workers. So there is really no solution within the paygo system, because that system is structurally flawed since it destroys the essential link that should exist between contributions and benefits, ultimately between effort and reward. The only thing you can do is to slow the speed of the ship going toward the iceberg and in that way prolong the agony.

So when people tell me that it’s very difficult to change from one system to another—to take the passengers from the *Titanic* to a nearby ship, the system of private individual accounts—my answer is yes, it is difficult to transfer passengers in high seas from one ship to another. But let me tell you something: it is much easier to do it before you collide with an iceberg. So you have to do it. The issue is now or later. The United States still has 10–12 years before the final collision, when the baby-boomers begin to retire and the system runs out of money.

In Chile we followed three transition rules. First, we guaranteed benefits to the elderly. It is the decent thing to do. You cannot tell an 80-year-old widow that because the founder of the paygo system, Prussian chancellor Otto von Bismarck, was dead wrong, her benefits will be reduced next month. Promises must be kept. Second, all new entrants to the labor force go into the new system. The door of the old system had to be closed because it would have been irresponsible to go on adding to a system that we knew was unfunded and unsustainable.

The third rule—the silver bullet in terms of the political economy of the transition—was to give every worker who already was in the social security system the choice I mentioned before. To those who decided to move out, we gave a “recognition bond” recognizing their accrued rights under the paygo system. Now, since the government does not have that money today, the paygo system is totally unfunded, that recognition bond is a zero-coupon bond that the government will pay only when the person reaches retirement age. But the worker has a government security that is tradable in the market, and in this way he cuts the link with the paygo system the moment he moves out. When he reaches 65 he has both the accumulated money in the new account and the proceeds of the recognition bond.

Now let me explain why I believe the technological revolution that is transpiring here in Silicon Valley gives a turbo-charge to this proposal of individual retirement accounts. In Chile 18 years ago people would say, “How will the private sector manage millions of accounts on a daily basis?” At that time, of course, the industry of processing information was in its infancy. Today the question is a joke. Probably with a laptop computer you can manage all the accounts of every worker in the country—well, at least in my small country of 6 million workers. You may need a somewhat bigger computer in your country. But I have no doubt that, with the advance in microchips, Moore law, and all that, managing a hundred million accounts may be a challenge but not a problem. And the costs of doing it are going down at incredible speed.

Second, some people in this country have told me, “The idea is good, but people don’t know how to manage money.” I am always puzzled that they trust people to choose among contending presidential candidates with positions on complex domestic and foreign affairs, but they don’t trust them to invest their own money. Whenever someone tells me that I ask, “Is it you that doesn’t know how to manage your money?” And they always answer, “Of course I know; it’s my neighbor who doesn’t.” That is nonsense. People are born free and with an immense capacity to learn; they manage those challenges that are essential to their daily lives.

A proof: those millions that are now deciding on their 401(k) or IRA accounts. The Internet will be a very useful tool in this education process.

The third concern is market risk. What if shares go down? First, the perspective of a retirement system should be the long run, the entire working life, and shares have always gone up substantially, say 10 percent a year on average, in a period of 40–45 years. Now, if you want to sleep better even though at the cost of eating a little less in the future, you can decide to put your whole portfolio in Treasury bills. Today you can get a long-term rate of 5 percent. So with, say, inflation prospects of 1.5 percent, you can lock in for 30 years a 3.5 percent real rate of return guaranteed by the U.S. government. That’s much better than the zero real rate of return that the paygo system will entail for workers entering the labor force today. And as we have seen, there are companies that are able to advise people online about the most adequate risk-reward portfolio at a very low cost. The Internet will allow people to choose portfolios and constantly revise them to exactly match their preferences about risk and old age and their views about the market.

Fourth, the paygo system depends on workers’ paying a payroll tax. But as more people will work and earn money in cyberspace, the government will lose the ability to tax those earnings. The artificial and so-called intergenerational contract, which incidentally I have never been able to read and do not know who signed for me, will simply collapse as a result of the free decisions of people.

Finally, the Web is a great tool to mobilize the grassroots and develop pressure for change. At www.socialsecurity.org, Cato has a Web site with an interactive calculator that allows visitors to calculate the extraordinary benefits to every one of them of introducing a system of private individual accounts. Every visitor is transformed into a militant for change. Some people are realizing that. Some time ago I met a high official of the Social Security Administration. He said jokingly, “I am mad at you for two reasons. First of all you’re taking away my job. Second, Cato has taken the domain name socialsecurity.org, so whenever anyone goes online to learn

Continued on page 8

“We’ve developed some technology that will help in what I think is a democratization of high-quality investment advice.”

—Jeff Maggioncalda

FORUM *Continued from page 7*

about Social Security they’re going to a site that argues that the country should do away with government-run Social Security!” I laughed and answered, “Well, you are giving me another reason why we should privatize the system. You are so slow and we are so fast. You should have been the first ones to register that name. But we did it. Socialsecurity.org is ours. But let me give you an idea: you can still register titanic.gov.”

Jeff Maggioncalda: I want to discuss the realities of individuals (a) having control over decisions and (b) being faced with the complexity of making investment decisions.

The prospect of millions of people making investments for their retirement is not entirely new; we’ve had individual retirement accounts and 401(k) plans for quite some time. And to some degree they can be thought of as an experiment in what might happen if we were to privatize a large body of assets like Social Security. At Financial Engines, we’ve developed some technology that will help in what I think is a democratization of high-quality investment advice.

Financial Engines was founded by Bill Sharpe, who is a Nobel laureate in economics at Stanford University. He developed most of the underpinnings of modern portfolio theory, and he spent a couple of decades advising the largest pension fund managers in this country who are faced with the same basic responsibility that 401(k) participants are: how do you invest a pool of assets in order to fund some future liability? We are working with money managers who represent over 8 million participants in 401(k) plans.

Our solution to the problem that individuals are having investing their money is to package a lot of the techniques that have been delivered to fund managers and make the package available to individuals. The package doesn’t just help them pick better funds. The technology frames the problem differently, so that what you can look at is not so much the specific products you need to buy as the outcomes that might result from selecting those products. So you can focus on the way you want to live, and we as an investment manager or investment adviser

recommend the product set that most optimally will deliver that outcome.

The fundamental question that people really care about is, Am I going to reach my goals? That’s why people invest. Investing, I believe, is not an end unto itself, although right now most of the people out there who are carefully managing their investments are hobbyists. They love the sport of investing. The majority of people don’t. They wish they didn’t have to. They just want to be able to get some certainty that they’re going to have enough money to be comfortable when it comes time to retire.

What Financial Engines does may seem radical to the individual, but it’s consistent with what the largest pension fund managers have been doing for a long time. We assess liability. We frame the problem in terms of the amount of retirement income you as an



Jeff Maggioncalda: “If individuals understand the impact of their decisions, they’ll come up with much more efficient solutions.”

individual want every year in today’s dollars.

The next thing we do is look at the specific investments in an individual’s household portfolio, including more than 9,500 mutual funds and 5,500 stocks that we track on an ongoing basis. And then we simulate how those specific investments might perform over the time that is relevant to you. We’ll forecast the chance that the specific investments that you own will allow you to retire with the amount of income you want. And this is all consistent with what we know as professionals about the way the markets work. But of course there are lots of other possibilities for market performance. We generate thousands of different possibilities—high inflation, low inflation, bear markets, bull markets, bonds do well, bonds don’t do well, and so forth—and we look at the way

your specific set of investments would have fared in all of these different scenarios. And so rather than doing what most software does today, which is allow you to put in one expected rate of return that is the same for every single year, we show you that there’s a range of returns and there are certain scenarios under which you’re not going to fare very well.

We can tell you that there’s a chance you’ll reach your goal, say, a 45 percent chance. We can also tell you what the downside risk is. There is a 5 percent chance that, when you retire, you’ll have less than X to live on. And if you’re uncomfortable with that outcome, we give you a very straightforward way to change your decisions. So, for instance, you might say, “Let me try decreasing my risk.” Then we give specific fund recommendations and show you what the new outcomes are. So you’ve just taken less risk, but then you’re likely to have less income in retirement than you want. So you might say, “Let me try increasing my savings.” We show you what the consequence of that is. And now with two clicks of the mouse, you’ve totally changed the outcomes of your investment decisions. You’ve received specific fund advice and you’ve improved your chances of success from 45 percent to 90 percent. And what you’ve had to do is save a lot more money. But if you’re risk averse, you should have the option of doing that. And if you’re risk seeking, you should be able to take a lot of risks and save less money. And ultimately, we believe, if individuals understand the impact of their decisions, they’ll come up with much more efficient solutions because the solutions are tailored to the individual preferences of the investor.

Our software asks for personal information about yourself, the annual retirement income that you want, and your portfolio. Then the Forecast section tells you the chance, based on what you’re doing right now, that you’ll reach your retirement income goal. Next the Advice section recommends a set of specific investments that are optimal for your preferred level of risk, given your age and everything else; the Advice section also takes into account the fact that you already own certain stock and funds in certain accounts. So our advice is entirely personalized to your total household portfolio. ■

16th Annual Monetary Conference

IMF's Role in Asia Debated at Conference

The economic difficulties faced by Asia—along with the reforms initiated by Asian countries and recommended by the International Monetary Fund—provided the backdrop for Cato's 16th Annual Monetary Conference, cosponsored with *The Economist*. Lawrence H. Summers, deputy secretary of the Treasury, spoke out against countries that deny their citizens the right to convert the domestic currency and invest abroad. "Such measures represent substantial intrusions on freedom. They make unsustainable policy errors more tempting. They repel new capital inflows."

At the October 22 conference, titled "Money in the New Millennium: The Global Financial Architecture," Summers argued that the growth of communications systems such as the Internet makes currency controls unlikely to be successful. Summers



Deputy Treasury Secretary Lawrence H. Summers criticizes capital controls at Cato's monetary conference.



José Piñera listens as Steve H. Hanke discusses the Asian financial crisis.

did say, however, that countries need to "calibrate their efforts to seek capital to the capacity of their domestic financial systems."

The ability of the U.S. economy to avoid getting swept up in the Asian economic storm was a major point of discussion. William Poole, president of the Federal Reserve Bank of St. Louis, said that he is "optimistic" that the United States will work through the current global economic difficulties "with no significant

damage to the U.S. economy."

The IMF's role in the Asian economic crisis put Michael Mussa, IMF chief economist, and Hubert Neiss, director of the IMF's Asia Department, on the hot seat. Both defended the IMF's record. Neiss said that, despite good progress made by Asian countries, "it is a matter of considerable concern that broader economic recovery is not yet at hand. Growth in Asian countries could resume next year. So much depends on the external environment."

They received little support from the audience or the other speakers. Cato chairman William Niskanen, who testified in May before the Joint Economic Committee about the IMF, called for the IMF's abolition. "My views on this issue have evolved from no more funding without IMF reform—to no more funding, period—to no more IMF. The IMF has not proved to be generally effective in promoting the type of economic policies that are necessary to avoid a financial crisis."

More than 260 people attended the conference, organized and directed by James A. Dorn, Cato's vice president for academic affairs and held in the Cato Institute's F. A. Hayek Auditorium. The event was broadcast live on the World Wide Web for the second consecutive year. Videotapes of the conference and other Cato programs can be found online at www.cato.org/realaudio/audiopages.html. ■

Cato Calendar

Liberty in the New Millennium

Miami • Biltmore Hotel

March 24, 1999

Speakers include Ed Crane and José Piñera.

Liberty in the New Millennium

Palm Beach • Ritz-Carlton

March 25, 1999

Speakers include Ed Crane and José Piñera.

Liberty in the New Millennium

New York • Waldorf-Astoria

April 12, 1999

Cato University

San Diego • Rancho Bernardo Inn

August 1-7, 1999

Spend a week discussing ideas with
people who share your values.

Cato University presents a week-long seminar at the
beautiful Rancho Bernardo Inn near San Diego,
August 1-7, 1999.



RANCHO BERNARDO INN
The Way The World Is Supposed To Be.®

* Mark your calendar now and watch
for details in the mail.

“Most of what the federal government does today, to put it plainly, is illegitimate because done without constitutional authority.”

CONSTITUTION *Continued from page 1*

force. At a Heritage Foundation orientation in early December, DeMint said that his class, owing to the smaller Republican margin in the House, will not follow the “crash-and-burn strategy” of the revolutionaries of 1995 but instead “will have to be more careful about stirring up trouble.” If DeMint’s point is one of style only, that is fine. But at that same meeting, Ernie Fletcher of Kentucky, freshman class representative to the leadership, was heard to say: “We want to pick out a few main issues that we can promote as our agenda, and they will not be issues that are divisive.” And John Sweeney of New York, freshman class representative on the Republican Steering Committee and a former top aide to Gov. George Pataki, chimed in with the “good government” theme: “There is a higher calling [than partisanship]—this is about governing.”

Governing is indeed what Republican leaders seem to have enjoyed most since they took over Congress in 1995. For in the ensuing four years, despite the rhetoric of less government, not a single federal department, agency, or program of any significance was eliminated; the tax code grew vastly more complex, along with federal regulations and the criminal code; and federal spending expanded far more than it did during 40 years of Democratic rule. Thomas Jefferson’s observation is thus confirmed: “The natural progress of things is for government to gain ground and for liberty to yield.” Economists of the Public Choice school have explained that natural progress by pointing to the concentrated benefits and dispersed costs that invariably attend government programs. But the Founders too had a basic understanding of that dynamic—as in James Madison’s discussion of “factions.” In fact, it was precisely to thwart that natural progress that they wrote a constitution that limited government.

To serve its ends, however, the Constitution must be taken seriously. House Republicans have done so in the extraordinary business of impeachment. But if that effort is itself to be taken seriously, they must also abide by the Constitution in the ordinary business of governing. Their contempt for presidential dishonesty is well taken, as is their respect

for the oath to tell the truth and the more general oath of office. But they too take an oath to support the Constitution—yet daily ignore that oath. The time has come to build on this recent resurgence of constitutional respect. Toward that end, there follows a concise constitutional primer, focusing on the broad principles of the document; a quick history of the demise of those principles; and a few thoughts about what must be done to restore constitutional government in America.

A Concise Constitutional Primer

Over the 20th century, the federal government has assumed a vast set of powers. Not only has that upset the balance between federal and state governments; run roughshod over individuals, families, and firms; and reduced economic opportunity for all; but most of what the federal government does today, to put it plainly, is illegitimate because done without constitutional authority. To fully appreciate that point, however, it is necessary to look first not to the Constitution but to the Declaration of Independence, where the Founders set forth the philosophy of government that 11 years later would inform the Constitution.

When they met in 1776 to declare our independence, the Founders drafted a document that has inspired millions around the world ever since. The principles they set forth are clear, simple, and sound, which explains their enduring power. As we know, they begin with the phrase, “We hold these Truths to be self-evident,” the most important in the document. For in so beginning, Jefferson placed us in the natural law tradition—the tradition of “self-evident” truths, grounded in reason—which holds that in human affairs, whatever the positive law may say, there is a higher law of right and wrong by which to judge positive law and from which to derive it. That starting point is crucial. Indeed, the issue came up repeatedly in the recent impeachment hearings; for if there can be no “truth” in human affairs, the rule of law is unattainable.

America is thus grounded in a higher law of right and wrong, accessible to all who will use the power of reason to discover it. And that law shows that we are all created equal; that we are endowed with equal rights to life,

liberty, and the pursuit of happiness; that we create government not to give us those rights but to secure them; and that the powers of government, to be just, must be derived from the consent of the governed. What could be more clear? We are born free. We have a right to be free. We create government to secure that freedom. We give government its powers.

To appreciate how those principles guided the Framers of the Constitution, it is important to notice the basic dilemma the Framers faced: to create a government at once strong enough to secure our rights yet not so powerful or extensive as to violate them. Toward that end, they instituted an extraordinary set of checks and balances: the division of powers between the federal and state governments; the separation of powers, along functional lines, among the three branches of the federal government; a bicameral legislature, its chambers differently constituted; provision for judicial review of the political branches, which was extended to state actions as well after ratification of the Civil War Amendments; the addition, two years after the Constitution was ratified, of a Bill of Rights; and the periodic election of political officials, to name a few. But the most important check—all but forgotten today—is the doctrine of enumerated powers.

That doctrine, stated simply, says that if you want to limit power, don’t give it in the first place. Grounded in the idea that all power comes from the people, as the Declaration argues, the doctrine appears at the very beginning of the Constitution, in the Preamble, which states: “We the people . . . do ordain and establish this Constitution.” It is repeated in the very first sentence of Article I: “All legislative Powers herein granted shall be vested in a Congress”; by implication, not all powers were “herein granted,” as Article I, section 8, shows. And it is stated, as if for emphasis, in the Tenth Amendment, the final member of the Bill of Rights: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Constitution, in short, is a document of delegated, enumerated, and thus limited powers.

The doctrine of enumerated powers is the very foundation of the Constitution, as

“The Constitution is a document of delegated, enumerated, and thus limited powers.”

the *Federalist Papers* make clear throughout. Indeed, we went for two years without a bill of rights because many of the Founders thought one unnecessary. “Why declare that things shall not be done which there is no power to do?” asked Alexander Hamilton, echoing James Wilson’s observation that “every thing which is not given is reserved.” The best way to guard against overweening government, it was thought, was to give only certain powers from the start. In America, we established a government of *limited* powers, which we enumerated in our founding document.

Individual Freedom, Individual Responsibility

But if that approach to government leaves us free to run our own lives, it also leaves us responsible for ourselves—the other side of freedom. Yet there, precisely, is where too many Americans have failed, making demands upon government that contribute to the growth of government and the loss of freedom. There too is where Congress has failed: by catering to such demands, out of a mistaken understanding of “representative” democracy, members have abandoned their oaths to uphold the Constitution.

The idea that government should be called upon not simply to secure our rights but to solve our problems is not new, of course. In fact, we have seen it from the beginning. In 1794, for example, James Madison, the principal author of the Constitution, was faced with an early welfare bill, whereupon he rose from the floor of the House, as a congressman from Virginia, to declare that he could not “undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.” Two years later, when faced with a similar bill, Madison’s colleague from Virginia, William B. Giles, alluded to the oath of office when he declared: “[The House] should not attend to what . . . generosity and humanity required, but what the Constitution and their duty required.” In so speaking, Madison and Giles stood for principle: there simply was no power under the Constitution for Congress to enact such measures, however worthy they might otherwise be.

How often do we hear such a point made today? Almost never. On the contrary, President Franklin Roosevelt well stated the modern view in 1935 when he wrote to the chairman of the House Ways and Means Committee: “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.” Today, the political branches respond with alacrity to constituent demands and leave constitutional questions to the courts. And modern courts have let almost all of that legislation stand, notwithstanding the absence of any constitutional authority for it. How has that happened?

The Demise of Limited Government

The answers, in detail, are long and complex, but they can be summarized briefly. For nearly 150 years we lived largely under the original plan. Things were not perfect, of course, nowhere more so than in the Constitution’s implicit recognition of slavery, which took a bloody Civil War to end. But the natural tendency of government to grow that Jefferson had noted was checked, in large part, by statesmen in the political branches and, ultimately, by the courts, along lines set forth in the Constitution. Thus, in 1887, 100 years after the Constitution was written, President Grover Cleveland faced a bill appropriating \$10,000 to purchase seeds for Texas farmers suffering from a drought, which he vetoed, saying: “I can find no warrant for such an appropriation in the Constitution.” And when the political branches failed, the courts stood as the ultimate institutional check on government growth, even if their check was not always certain or well grounded.

All of that changed during the New Deal, but the seeds of the change had been sown much earlier, during the Progressive Era, when many stopped seeing government as a “necessary evil” and started asking it to solve various social and economic “problems.” Today, that attitude is everywhere; but it was novel a century ago. What is more, few thought there was any power under the Constitution for government to address such issues. Thus, as late as the 1930s, the Supreme Court found one New Deal program after another unconstitutional. Exasperated, FDR threatened to pack the Court with six addi-

tional members. Even Congress balked at that. But the Court capitulated and, under intense pressure, began fundamentally rereading the Constitution, essentially eviscerating the doctrine of enumerated powers.

Two provisions were at issue, the General Welfare Clause and the Commerce Clause. Article I, section 8’s General Welfare Clause was meant to check Congress’s spending power: Congress could spend toward an enumerated end, but that spending had to serve the general welfare, not just the welfare of particular parties or sections. The New Deal Court turned that shield into a sword: it read the clause as giving Congress an *independent* power to spend for the general welfare, then added that it would not police the word “general” but would leave it to Congress to police itself. The Commerce Clause was also meant primarily as a restraint—on states, which under the Articles of Confederation had erected protectionist barriers to the free flow of commerce. To address that problem, Congress was given the power to regulate, or “make regular,” commerce among the states. But the New Deal Court read the clause as giving Congress the power to regulate, for any purpose, anything that even “affected” interstate commerce—which, of course, is everything.

Thus, by rereading those two clauses the Court paved the way for the modern welfare state. Today, there is virtually no end for which the federal government cannot tax and spend and no activity the federal government cannot regulate. Only the Bill of Rights—rightly described as an afterthought—stands between the citizen and ubiquitous government; and even that the Court reread in 1938, reducing economic liberty to a second-class status. Ironically, it was Redford Tugwell, one of the principal architects of the New Deal, who best captured what had happened: “To the extent that [our New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them.”

What Is to Be Done?

Thus, modern “constitutional law” rests largely on sand. As Northwestern University Law Professor Gary Lawson wrote in 1994 in the *Harvard Law Review*: “The post-New

Continued on page 12

CONSTITUTION *Continued from page 11*

Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” It is time now for Congress, where the problem began, to start saying that. As in today’s impeachment matter, candor is the start of the corrective process.

It is fashionable to contend, of course, that the real problem is with the American people and their demands upon government. But when pressed, honestly, most Americans prefer to control their own destinies rather than have government regulate their lives. More to the point, however, even if majorities had called for ubiquitous government, that is no reason for Congress to respond as though it were under no constitutional restraints. After all, if a majority wanted to establish a state religion, Congress would hardly be justified in doing so—and not simply because the First Amendment prohibits it but, as Hamilton and Wilson said, because no power is given to do so. Indeed, are we to suppose that, prior to the addition of the Bill of Rights, Congress could have established

a state religion?

The first step in restoring constitutional government, then, is for every member of Congress, when facing some proposal, to ask the question Madison and Giles asked: Is there authority under the Constitution to enact this proposal? If not, that ends the matter. The question goes to the root, of course, but that is its strength. Indeed, it is the basic political question: What is your warrant for controlling a matter that rightly belongs to me? Nothing less than sovereignty is at issue.

But Congress needs also to start rescinding the many programs that never should have been enacted in the first place. That cannot be done overnight, of course, but the process should begin. A more immediate problem, however, is the vast body of “law” that is now “legislated” by the executive branch—in blatant disregard of the separation of powers. Over the years, Congress has delegated its lawmaking powers to a branch that has no such power. Nowhere is that abuse more prevalent than in the current administration’s rule by executive order and “national emergency.” Indeed, we are living

at the moment under 11 “national emergencies,” each enabling the president to “legislate” over American citizens.

Finally, when congressional conference committees meet to iron out differences in Senate and House versions of a bill, but then attach measures that have never been considered by either chamber—and worse, attach those measures to appropriations bills, as happened with the recent Omnibus Appropriations Act—abuse is heaped on abuse. That members should be presented, at the last minute, with a 4,000-page bill, to be voted up or down, speaks volumes about how far we have come.

We have come to this state because Congress is trying to do too much—and, not surprisingly, is doing it poorly. The mark of a good Congress is not the number of bills it passes: “do-nothing” gridlock was built into the system, after all, to help limit government to its essential functions, as constitutionally enumerated. Rather, the mark of a good Congress is governing constitutionally. That is not simply a matter of honor. It is a matter of the oath of office. At this moment in the nation’s history, that is no small matter. ■

Cato Books

A historical look at jury independence

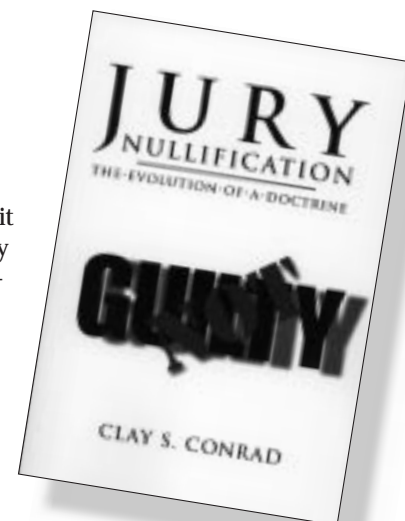
Jurors Should Know Their Rights

The atomic bomb introduced Americans to the nuclear age. The result is that many Americans still fear anything with the word “nuclear” in it. In a similar way, the general American population was first exposed to the concept of jury nullification in the closing days of the O. J. Simpson trial. Most people have a negative view of jury nullification because of Johnnie Cochran’s closing arguments. Cochran’s argument also brought publicity to George Washington University law professor Paul Butler. Butler advocates race-based jury nullification (e.g., black juries should acquit black defendants for nonviolent offenses even when the evidence of guilt is clear).

A new book from the Cato Institute by Clay Conrad attempts to reintroduce the concept of jury nullification to a general audience. In *Jury Nullification: The Evolution of a Doctrine*, published by the Cato Institute and Carolina Academic Press, Conrad concludes that there is nothing “wrong” with jury nullification; nullification is part and parcel of what a jury is all about. Conrad argues that the nullification power has sometimes been abused, as has all power. The abuses have been exaggerated to discredit the nullification idea itself.

Central to the history of trial by jury is the right of jurors to vote “not guilty” if the law is unjust or unjustly applied. When

jurors acquit a factually guilty defendant, we say that the jury “nullified” the law. The Founding Fathers believed that juries in criminal trials had a role to play as the “conscience of the community” and relied on juries’ “nullifying” to hold the government to the principles of the Constitution. John Adams wrote,



Cato books published in Japan, Korea, Italy

Peter VanDoren Becomes Editor of *Regulation*

Peter VanDoren has been named editor of *Regulation* magazine, succeeding Edward L. Hudgins. Hudgins will assume an expanded role as director of regulatory studies, thus significantly increasing the Cato Institute's commitment to careful analysis of the costs and benefits of regulation.

VanDoren has been assistant director of environmental studies at Cato since 1997. Before joining Cato, he taught political science at Yale, Princeton, and the University of North Carolina. He is the author of *Politics, Markets, and Congressional Policy Choices* (University of Michigan Press, 1991) and *Chemicals, Cancer, and Choices*, forthcoming from Cato. He is also the author of numerous articles in such journals as *Political Science Quarterly*, the *Southern Economic Journal*, the *Journal of Policy Analysis and Management*, and *Regulation*. He holds a B.S. from the Massachusetts Institute of Technology and a Ph.D. from Yale University.

♦ Cato books are proliferating around the world this season. *The Future of Money in the Information Age*, edited by James A. Dorn, was published in Italy by Feltrinelli. José Piñera's *Labor Market Reform in Chile* was published in Korean by the Korea Center for Free Enterprise. David Boaz's *Libertarianism: A Primer* was published in Japan by Yosensha. *Libertarianism* is also

now available in audiocassette—8 cassettes, 12 hours, read by the noted libertarian author and professional reader Jeff Rigggenbach. The audiocassette set is available from Cato for the discount price of \$45.

♦ Greg Scandlen has joined the Cato Institute as a fellow in health policy. He has been working in health policy for 20 years, including 12 years in the Blue Cross/Blue Shield system, where he was the director of state legislative research. He later organized and was CEO of the Council for Affordable Health Insurance, an insurance association dedicated to medical savings accounts and other free-market reform. He has published several newsletters on health policy, including *Health Benefits Letter* and *Patient Power Report*, and consults on health policy with a variety of organizations.

♦ Michael Gough, director of science and risk studies, has retired. He will become an adjunct scholar of the Cato Institute and will continue to write on environmental, scientific, and risk issues, as well as consult in those areas. His most recent book is *Silencing Science*, written with Steven J. Milloy.

♦ "The suggestion that free people can be limited by the government in deciding how much of their own money they should spend

on protecting their health and extending their lives is repugnant to the democratic principles upon which our country was founded," according to an amicus brief filed October 6 with the U.S. Court of Appeals for the D.C. Circuit. The brief, filed by the Cato Institute, Citizens Against Government Waste, the American Civil Liberties Union of the National Capital Area, and other policy groups, asks the appeals court to declare section 4507 of the 1997 Balanced Budget Act unconstitutional. That provision, upheld by a lower court, says that Medicare recipients can contract with doctors of their choice for any medical service, but only if the doctors agree not to participate in the Medicare program for two years. Because nearly all doctors receive a substantial portion of their income from Medicare, section 4507 effectively stops any private contracting between Medicare beneficiaries and doctors. By pressuring physicians not to serve senior citizens outside the Medicare framework, federal officials not only harm consumers but violate one of our most basic constitutional rights. "The right of personal autonomy involved in this case—the right of a competent individual, in consultation with a licensed physician, to obtain desired medical services at his or her own expense—is fundamental. . . . The government's position is an affront to our nation's democratic principles." ■

"It is not only the juror's right, but his duty to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the instruction of the court." Thomas Jefferson wrote, "I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution."

Conrad traces the doctrine of jury nullification from its roots in England up to the present. Although opponents of jury nullification often point to the civil rights era when some all-white juries refused to convict whites accused of brutalizing and killing blacks, Conrad notes that jury nullification was also used to protect people who were prosecuted under the Fugitive Slave Act in the years before the Civil War. Jurors routinely refused

to convict people who were helping slaves attain their freedom.

Yet over the last century and a half, the power of jurors has been derided and ignored by American courts, to the point that today few jurors are aware that an important part of their role is, in the words of the Supreme Court, to "prevent oppression by the government." Several state constitutions explicitly say that juries shall have the power to judge the law as well as the facts in criminal cases, but those provisions have been watered down by judicial rulings.

Jury Nullification has drawn much praise. Randy Barnett of the Boston University School of Law says, "This is the most important book on the independence of juries since Lysander Spooner's *Trial by Jury* in 1852. It is meticulously researched and balanced. The

enjoyment of reading it stems as much from the beauty of Clay Conrad's writing as from the comprehensiveness of his analysis and the fascinating and important nature of his subject." Stephen B. Presser of the Northwestern University School of Law says, "Mr. Conrad's book is sure to become the standard work on jury nullification. It is the best and most informed defense of the notion that jurors have the right as well as the power to depart from the instructions of the judge that I have encountered."

Conrad is currently an attorney in private practice in Houston, Texas. He previously served as a staff attorney for the Texas Criminal Defense Lawyers Association.

Jury Nullification can be purchased for \$22.50 (paper) by calling Cato Institute Books at 1-800-767-1241. ■

Is Social Security moral? Can it be reformed?

“Network Effects” Don’t Justify Antitrust

In its antitrust case against Microsoft, the Justice Department has invoked a variety of “novel economic theories to justify new antitrust doctrines and to revive old ones,” say economists Stan Liebowitz and Stephen E. Margolis in the study, “Science Fictions: Network Effects, Microsoft, and Antitrust Speculation” (Policy Analysis no. 324). Those theories, which invoke such factors as “network effects,” “path dependence,” and “lock-in,” are “fundamentally flawed,” say Liebowitz and Margolis. The new theories find little support among economists because “there is a poor connection between theories of path dependence and the real-world behavior of entrepreneurs and consumers.” The authors conclude that “reexamination of the empirical evidence demonstrates that the claimed examples of lock-in are not market failures,” and that, “with regard to Microsoft, as elsewhere, neither theory nor fact supports the call for antitrust enforcement measures.”

◆Flying the Overregulated Skies

“To achieve the full benefits of an open aviation market, Congress should grant foreign-owned carriers the right to provide domestic air service in the United States,” writes Kenneth J. Button in a new Center for Trade Policy study, “Opening U.S. Skies to Global Airline Competition” (Trade Policy Analysis no. 5). Button, professor of public policy at George Mason University and former head of aviation policy at the Organization for Economic Cooperation and Development in Paris, contends that “foreign competition and investment would provide the ultimate, free-market check on ‘predatory pricing’ and domestic price collusion and would negate any arguments for imposing federal regulations and antitrust sanctions.” Button highlights the inconsistency between the theory and the practice of America’s “Open Skies” policy. He argues that all restrictions on foreign ownership and competition should be dropped. “For American air travelers,” the author concludes, “opening U.S. skies would yield a greater choice of carriers and lower fares, both at home and around the world.”

◆Giving Encryption Keys to Government Could Prove Risky

In the new Cato paper, “Encryption Policy for the 21st Century: A Future without Gov-

ernment-Prescribed Key Recovery” (Policy Analysis no. 325), director of information studies Solveig Singleton says that government access to encryption keys is a “grave danger to privacy.” Encryption technology is essential “to protect consumers and businesses against spies, fraud, and theft over the computer networks used in electronic commerce.” But government policy that seeks to restrict U.S. exports of strong encryption technology is “doomed,” and “government-prescribed key recovery and export controls are a grave danger to the privacy of law-abiding citizens and businesses, not only in the United States but around the world.” More than 7,500 human rights groups “combat torture, mysterious disappearances, and government massacres by disseminating information such as reports of witnesses of government brutality.” Government access to encryption keys would place all such activity in serious jeopardy.

◆U.S. Fourth in Economic Freedom Index

Does economic freedom lead to prosperity? Economists have long debated just that question. According to *The Economic Freedom of the World: 1998/1999 Interim Report*, copublished by 54 independent institutes including the Cato Institute, the evidence says yes. That most comprehensive index of economic freedom found a strong relationship between economic freedom and prosperity. Hong Kong continued to be the most economically free country in the world in 1997, followed in order by Singapore, New Zealand, and the United States. The index ranks 119 countries using 25 separate indicators of economic freedom that fall into seven major categories ranging from the size of government to monetary policy and security of private ownership. Coauthors James Gwartney and Robert Lawson note that “the summary indexes of economic freedom presented here are more comprehensive, and they are based on more complete data and the use of statistical procedures more value-free than any prior measure.”

◆The Morality of Privatizing Social Security

“The most important arguments for Social Security privatization are moral, not economic,” says Daniel Shapiro, associate professor of philosophy at West Virginia Uni-

versity. In “The Moral Case for Social Security Privatization” (Social Security Paper no. 14), Shapiro argues that “a privatized Social Security system meets moral criteria far better than does our current, bankrupt, pay-as-you-go system.” That is true, he says, not only from the classical liberal or libertarian perspective, “but from virtually every perspective in political philosophy,” including those of egalitarians, welfare theorists, and communitarians. He concludes that “the moral shroud that used to surround Social Security is an illusion: there is no moral argument for Social Security.” A private system is justified, Shapiro argues, “regardless of which political values one thinks most important.”

◆Throw the Bums Out

“One of the most significant reasons for the GOP’s failure to tame the budget is that senior Republicans have not lived up to the party’s campaign’s promises,” says Aaron Steelman, a former staff writer at Cato. In “Term Limits and the Republican Congress: The Case Strengthens” (Cato Briefing Paper no. 41), the voting behavior of members of Congress on 31 of the most significant budget, tax, and regulatory issues since 1995 was examined. In 27 of the 31 votes analyzed, junior Republicans (who had served 6 years or less in the House and 12 years or less in the Senate) voted for fiscal restraint in greater proportions than senior Republicans (who had served more than 6 years in the House and 12 years in the Senate). Steelman concludes that, “if the public wants Congress to reduce the size and scope of government, term limits may be imperative.”

◆Anti-Merger Mania

“Antitrust laws have become a weapon of convenience for special pleaders of all stripes who are apparently willing to go to almost any length to protect their own selfish interests by stopping mergers,” says William F. Shughart II, the Frederick A. P. Barnard Distinguished Professor of Economics and holder of the Robert M. Hearin Chair in Business Administration at the University of Mississippi. In “The Government’s War on Mergers: The Fatal Conceit of Antitrust Policy” (Policy Analysis no. 323), Shughart argues that the result is that “antitrust authorities

all too often succeed, not in keeping prices from rising, but in keeping them from falling.” Shughart argues that “antitrust has a dark side” and that “it has been deformed in its application into a kind of domestic equivalent of trade protectionism.” He concludes, “The time for modest reform of antitrust policy processes has passed. Root-and-branch repeal of what Federal Reserve chairman Alan Greenspan a generation ago referred to as a ‘jumble of economic irrationality and ignorance’—and what modern scholarship has shown over and over again to be a playground of special pleaders—is called for.”

◆Currency Board for Russia

In “The Case for a Russian Currency Board System” (Foreign Policy Briefing no. 49), economist and Cato Institute adjunct scholar Steve H. Hanke says that “the devaluation of the Russian ruble this year was predictable, especially considering Russia’s poor monetary history.” The solution is “a competitive, parallel currency system” and the creation of a currency board system that would tie the ruble’s value to the dollar. But “to work in Russia, a currency board system must be ultraorthodox,” so that it can “command the respect and confidence of the justifiably skeptical Russian people.” Hanke points out that the Russian people have been victims of “state-manipulated money” ever since the time of Peter the Great. “To put the ruble on a sound competitive footing, the Russian government should enact a currency board system law immediately and announce that it will be implemented as soon as possible.”

◆Social Security Transition Cost Myths Debunked

“Regardless of the transition financing mechanism, moving to a market-based Social Security system will ultimately be less costly than trying to prop up the current program,” writes William Shipman, a principal with State Street Global Advisors and co-chairman of the Cato Institute’s Project on Social Security Privatization. In “Facts and Fantasies about Transition Costs” (Social Security Paper no. 13), Shipman says that critics who point to the transition costs involved in moving to a market-based Social Security system “ignore the enormous unfunded liabilities of the current

system. Any valid discussion of the transition costs must compare those costs with the costs of maintaining the current system, including the costs of meeting those unfunded liabilities.” Shipman concludes, “Transforming Social Security to a market-based system of individual accounts does require a transition period, a cost, and a change in the timing of cash flows. However, any cost is reasonably less than staying with the present law.”

◆First, Free the Lawyers

Laws prohibiting the unauthorized practice of law (UPL) serve “no legitimate public purpose” and “should be repealed or struck down by the courts as unconstitutional,” George C. Leef writes in a new Cato study, “The Case for a Free Market in Legal Services” (Policy Analysis no. 322). An adjunct professor of law and economics at Northwood University, Leef says that licensure requirements do little to ensure adequate skills. “By imposing a costly barrier to entry, they distort the market for legal services.” The free market, reinforced by remedies for fraud, breach of contract, and negligence, establishes powerful incentives for competence, fair dealing, and efficiency. Voluntary certification programs would help consumers identify attorneys who have demonstrated proficiency at prescribed tasks and would “not restrict contracting options or deprive people of occupational freedom,” Leef observes.

◆1-800-911-NATO

NATO military intervention in Kosovo “would complete the process of transforming NATO from a defensive alliance into an on-call police force,” says a new Cato study. Sending NATO forces into Kosovo “will set an entirely new precedent: NATO can conduct ‘out-of-area’ operations even if the government of the country in question objects to it,” warns Gary Dempsey, foreign policy analyst at Cato. In “Washington’s Kosovo Policy: Consequences and Contradictions” (Policy Analysis no. 321), Dempsey traces the history of the region and describes the various stages of the ethnic conflict that has plagued Kosovo this century. “The conflict in Kosovo is not simply a matter of Kosovar Albanians suffering under a brutal and repressive regime—which they are—but a complex clash of mutu-

ally exclusive political claims that is aggravated by conflicting historical grievances—real and imagined.”

◆Deregulate the Electricity Industry

“Policymakers have decided to restructure rather than eliminate the monopoly-franchise state-regulated system that gave us our currently inefficient electric power system,” but that approach cannot work, says Peter M. VanDoren, associate director of environmental studies at Cato. In “The Deregulation of the Electricity Industry: A Primer” (Policy Analysis no. 320), VanDoren argues that policymakers need to “repeal the monopoly-franchise restrictions that prevent competition and eliminate public utility regulation.” Consumers might reject that proposal “because they believe that market forces will not constrain the behavior of the current monopoly transmission and distribution systems,” but “scholarly evidence suggests that regulation does very little to constrain utility pricing. In the few areas of the country where actual competition exists, electric prices are lower than they are elsewhere.”

◆Don’t Abolish the Exclusionary Rule

“Abolishing the exclusionary rule has been a high priority for conservatives for more than 30 years,” but the effort is “fundamentally misguided on constitutional grounds,” says Timothy Lynch, associate director of Cato’s Center for Constitutional Studies. In “In Defense of the Exclusionary Rule” (Policy Analysis no. 319), Lynch points out that “the exclusionary rule is the only effective tool the judiciary has for preserving the integrity of its warrant-issuing process.” There have been numerous attempts to circumvent the rule, including, most notably, the New Hampshire practice (struck down by the Supreme Court in 1971) of police officers’ issuing search warrants to themselves and a failed section of the 1995 crime bill offered by Senate Judiciary Committee chairman Orrin Hatch (R-Utah), which “sought to completely eliminate the exclusionary rule in federal criminal prosecutions.” Lynch concludes, “Make no mistake, abolishing the exclusionary rule would give executive branch agents a license to bypass the warrant application process and to disregard the terms of search warrants.” ■

◆ **Tell it to the Russians**

Portuguese novelist Jose Saramago . . . won the 1998 Nobel Prize for Literature yesterday. . . .

A communist . . . his views are always inspired by his deep concern for his fellow man.

—*San Francisco Chronicle*,
Oct. 9, 1998

◆ **Any old argument will do**

Senate candidate Blanche Lincoln paused to reflect on her devotional habits. . . .

For all those who disagree [with her support for legal abortion], she encourages them to “witness it,” using the Christian term for proselytize, “go tell it to your family, your church, anyone you can. The problem is, if we start to depend on government to implement our faith, then our faith has no value.” . . .

Her concern for others leads her to preserve government programs helpful to farmers and the elderly in Arkansas, something she says her opponent’s libertarian streak won’t allow him to do. “Christ calls on us to reach out to one another, to the homeless, the elderly, those who need help,” she said.

—*Washington Post*, Oct. 29, 1998

◆ **Calling the Racial Classifications Board**

Federal agencies are under orders to increase their percentage of Hispanic employees sooner rather than later. . . .

But even commendable goals, when implemented as a crash political program, can be problematic for those who must

implement them. For example: Who is Hispanic? . . .

Finding out who is a Hispanic—once you have decided what a Hispanic is—is difficult since the government cannot by law ask employees for such information as race, religion or national origin.

—*Washington Post*, Oct. 20, 1998

◆ **Tough on ethics**

Former White House chief of staff Leon E. Panetta told a jury yesterday that [former agriculture secretary Mike] Espy’s conduct fell short of stricter ethical standards imposed by President Clinton.

—*Washington Post*, Nov. 19, 1998

◆ **Chocaholics will suffer until then**

Codex Alimentarius, the United Nations body which sets food product standards for world trade, has failed to reach agreement on whether non-cocoa butter vegetable fats should be included in chocolate, said a spokeswoman Thursday . . . adding that it could take until the year 2000 or 2001 before the body reaches agreement.

—Dow Jones, Nov. 30, 1998

◆ **And the core function of elementary schools would be?**

Efforts by Virginia and other states to sharply curtail college remedial courses are misguided and often based on inaccurate information, a new study says.

The study, by the Institute for Higher Education Policy, . . . argues that remedial education is a core function of colleges.

—*Washington Post*, Dec. 12, 1998

◆ **Being a Kennedy is now an occupational group?**

Clinton found sympathy and solidarity among an occupational group for whom scandal or potential scandal is a daily reality: “People in politics in general understand the kind of personal attack he’s had to withstand and recognize a guy who is standing up under a great deal of pressure,” said Rep. Joseph P. Kennedy II (D-Mass.).

—*Washington Post*, Aug. 6, 1998

◆ **18 years? Get a job**

“It is very troubling and very, very disturbing that this has happened,” [Rep. Christopher H.] Smith said. “In my 18 years as a congressman, this is the first time I have ever had a no-show at a public meeting.”

—*Washington Post*, Aug. 6, 1998

◆ **Getting priorities in order**

Over the next couple of weeks, Congress is expected to increase Head Start’s funding and also fund more research on how well the program actually works.

—*Today*, NBC, Sept. 8, 1998

◆ **Cheaper than the Lincoln Bedroom**

Want to sleep in a dictator’s bed? Swim in a former tyrant’s mosaic-lined pool?

Romania’s cash-strapped government is lining up a luxury package for tourists with a taste for the unusual: a stay at palaces and villas belonging to the late Communist leader Nicolae Ceausescu.

A night at one of Ceausescu’s homes will probably cost \$3,000 to \$4,000, said Mihai Nica, a government official.

—Associated Press, Aug. 24, 1998

CATO POLICY REPORT

1000 Massachusetts Ave., N.W.
Washington, D.C. 20001

ADDRESS CORRECTION REQUESTED

CATO

Nonprofit Organization
U.S. Postage Paid
Washington, D.C.
Permit No. 3571
