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Dissolving the Inkblot: Privacy as Property Right

by Sheldon Richman

No question in jurisprudence is as muddled as that of privacy. Conservatives refuse to recognize a general legal right to privacy. Big-government liberals misconstrue the concept and apply it arbitrarily and opportunistically. They would protect a woman's decision to abort a fetus but not two business competitors who wished to discuss their pricing strategies.

The dominant liberal and conservative approaches to privacy are unsatisfactory because they are essentially unprincipled. Liberals, such as Laurence Tribe, envision a right of privacy radiating from express provisions of the Constitution, but that right is so narrow that it is self-subverting. Conservatives, such as Robert Bork, reject that vision of a right to privacy because they believe that the method used to find it will allow judges to invent rights. Conservatives seem to assume that there is no alternative vision. But there is an alternative vision, one that de-

rives privacy rights from a Lockean framework based on each person's property in his own life, liberty, and estate.

The Liberal-Conservative Debate

The right of privacy as a legal matter moved onto its current track in 1890 in a famous *Harvard Law Review* article by Louis Brandeis and Samuel D. Warren. Previously, the right to privacy had been seen in England and America as derived from the right to property and the right to make contracts. Brandeis and Warren thought that view too restrictive (it could not stop newspaper gossip columnists) and speculated that what underlay older court decisions was a general right to be left alone. "The principle," they wrote, "is in reality not the principle of private property, but that of an inviolate personality." According to that view, the principle manifests itself, for example, in the right of a person to control disclosure of facts about himself even when those facts have been

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Milton Friedman delivered the luncheon address, "Why I Am Not a Conservative," at the Cato Institute's "New Perspectives for the Nineties" seminar in San Francisco on December 7, attended by almost 300 people.

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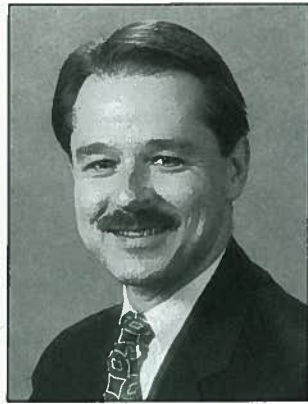
lawfully discovered by others. The right to privacy was thus loosened from its property anchor and allowed to float more or less free. Brandeis and Warren's splitting of privacy and property foreshadowed future invidious divisions of rights by various Supreme Courts, divisions that once favored narrowly construed economic over noneconomic rights but that since the New Deal have done the opposite.

The landmark privacy case in American constitutional jurisprudence is *Griswold v. Connecticut* (1965), in which the U.S. Supreme Court struck down a Connecticut law prohibiting the use of contraceptives. In the *Griswold* decision the separation of privacy and property is palpable, as can be seen in Justice Arthur Goldberg's concurring opinion. "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life."

(Cont. on p. 10)

Challenges and Opportunities

Editorial



The Cato Institute moved to Washington in late 1981 (after four years in a more academic incarnation in San Francisco), so our entire experience with the public policy business has been under Republican presidents. Washington was hardly a conservative or Republican bastion during the past 12 years—Democrats dominated Congress, the media, and the conventional wisdom—but there was always a White House at least theoretically interested in free markets and lower taxes.

Now, like everyone else in Washington, we face a different situation. Bill Clinton's arrival is being treated like the Second Coming—of John F. Kennedy, at least—and there is great anticipation of new government programs that will reverse "12 years of greed and neglect" (during which federal spending rose by \$837 billion).

Clinton managed to hold on to the Democratic coalition by promising all the interest groups what they wanted, while broadening his base by pledging to bring new ideas to Washington. The still-rising deficit will make it difficult for him to spend as much money as his supporters think they were promised. Besides, federal spending as a percentage of GNP reached unprecedented peacetime levels in the Bush years, and many observers think the political system will actually force Clinton to slow the growth of spending. Clinton and his economic advisers are sensitive to the financial markets, which will react quickly to signs that a Democratic administration plans to overspend or inflate.

Thus it's likely that the real threat in Clinton's administration is overregulation, which will not be as obvious to the markets—and perhaps not even to President Clinton. The president himself will not want to destroy the American economy, at least not before the 1996 election, but Vice President Gore's appointee to head the Environmental Protection Agency could do that all by herself, without any direction from the White House. By the time Clinton gets through appointing 5,000 Democrats to political positions in government, the nation's regulatory agencies will be crawling with Naderite lawyers who have been waiting 12 years for the chance to codify all their opinions.

Another real threat to American prosperity is health care reform, which in most of its Democratic forms seems to involve bigger government to address the problems caused by big government. Given the spending problem, Clinton may opt for expensive mandates on business rather than national health insurance, but "pay or play" is likely to lead to socialized medicine in short order.

Advocates of free trade should be worried by the little-noted fact that Laura Tyson, chairman of the president's

Council of Economic Advisers, is inclined toward protectionism. In every postwar administration, Democratic or Republican, the CEA has been the most vigorous advocate of free trade. Who will play that role if the president's top economist won't?

What's bad for the country may be invigorating for the Cato Institute. More regulation means more attention paid to *Regulation*, Cato's quarterly magazine on regulatory costs and benefits. Our 1992 books *Patient Power* and *What Has Government Done to Our Health Care?* offer a reasonable, market-oriented alternative to national health insurance. William A. Niskanen, Brink Lindsey, and James Bovard, who are among the nation's leading advocates of free trade, will be busy.

Already, members of Clinton's transition team are floating new government programs that reflect many of the failed ideas of the past, and Cato scholars are gearing up to remind the public of our experience with such programs. Doug Bandow is working on a study of national service, and we will soon publish an analysis of the claim that the nation needs massive new spending on infrastructure. A study of government job training programs will probably follow.

One might hope that a Democratic administration would recognize the dangers of foreign military intervention. Alas, the end of the Cold War seems to have freed Democrats from their reluctance to intervene, and Clinton's team seems as likely as Bush's to send American troops into trouble spots around the world. As columnist Stephen Chapman remarks, the difference between conservatives and liberals is that conservatives want to send the troops wherever our national interest is at stake, while liberals want to send them anywhere our national interest is *not* at stake—and there are actually far more of the latter. Cato's noninterventionist team, led by Ted Galen Carpenter, has its work cut out.

The good news, at last, is that, unlike the Bush administration, many of the people in the Clinton administration seem interested in ideas, and that offers the promise of a healthy national debate on public policy—and even the possibility that the Clinton team will listen, be persuaded, and adopt good ideas from whatever source. Beginning with our book *Market Liberalism: A Paradigm for the 21st Century*, Cato will be offering the new administration and the new Congress a plethora of ideas for addressing America's real problems.

David Boaz
—David Boaz

Wilder: "A Road Map for Our New President"

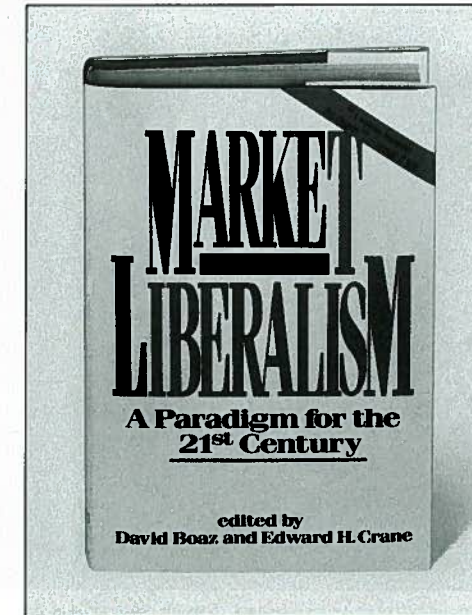
Analysts Look at Spending, Environment, Foreign Policy In Market Liberalism: A Paradigm for the 21st Century

The Cato Institute's quadrennial book of advice to policymakers, *Market Liberalism: A Paradigm for the 21st Century*, offers an optimistic view of the future while warning of the many ways that public policy is undermining freedom and prosperity.

Editors David Boaz and Edward H. Crane write: "Market liberalism provides a framework for a dynamic, pluralistic society that can yield a future of undreamed-of prosperity and human fulfillment. It seems to us that the time to unleash its potential is at hand." *Market Liberalism* makes the point that government intervention in the economy is increasingly clumsy and ineffective as society grows more complex.

Chapters in the book offer market-liberal perspectives on a wide range of current issues, including health care, education, the environment, foreign policy, trade, and poverty. Roger Pilon sets the stage by calling on the Supreme Court to recognize and enforce the liberties guaranteed in the Constitution and urging all of us to raise constitutional arguments in every public forum.

William A. Niskanen and Stephen Moore offer a guide to balancing the budget without raising taxes. Many of their proposed budget cuts also appeared in a list of cuts prepared by Leon Panetta, President Clinton's budget director. Niskanen also calls on the federal government to reduce regulation,



which costs the economy about \$500 billion a year. Bert Ely, Thomas W. Hazlett, and Lewis J. Perelman demonstrate how bureaucracy and regulation keep financial services, telecommunications, and education from serving us as well as they could. Michael Tanner proposes to solve the health care crisis by introducing market mechanisms, and Brink Lindsey urges free-traders to take the high ground by eschewing negotiated trade agreements in favor of unilateral free trade.

Several chapters trace the outlines of a post-Cold War foreign policy. Chris-

topher Layne calls for withdrawal from our far-flung Cold War military alliances, and Ted Galen Carpenter explores how to deal with inevitable nuclear proliferation. Doug Bandow warns of the potential dangers of a stronger United Nations, and Ian Vásquez proposes ending the international war on drugs.

In a concluding section on ecology, Patrick J. Michaels lays out the facts and fallacies of global warming, and Jerry Taylor points out that natural resources are becoming less scarce. Aaron Wildavsky notes that health and safety, which are dramatically better in the modern capitalist era than in any previous period, are the result of the competitive nature of capitalist societies. Thus regulations, by reducing competitiveness and economic growth, can impede health and safety. Fred L. Smith, Jr., and Kent Jeffreys conclude the book with a free-market environmentalist vision.

Gov. L. Douglas Wilder of Virginia says *Market Liberalism* offers "provocative new ideas" that "should be a road map for our new president," and Massachusetts governor William F. Weld hails it as "a futuristic vision grounded in old principles [that] charts new territory for the decades ahead." George F. Will calls the book "a serious blueprint for change."

Market Liberalism: A Paradigm for the 21st Century is available from the Cato Institute for \$25.95 cloth, \$15.95 paper.

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Larisa Piyasheva Visits from Moscow

Future Visions: Telecom, Education, Infrastructure

Cato Events

October 13: A Policy Forum on "Reaganomics, Easy Credit, and Junk Bonds" featured James Grant, publisher of *Grant's Interest Rate Observer*, and Joe Cobb of the Senate Republican Policy Committee. Grant described the federal government's increased "socialization of risk" in the 1980s and the increased private debt that cannot be attributed entirely to government policy. Cobb said that the changes in debt practices were global, so a global cause should be sought.

October 13: A Book Forum celebrated the publication of *Cleaning House: America's Campaign for Term Limits* by James Coyne, president of Americans to Limit Congressional Terms, and John Fund of the *Wall Street Journal*. The authors explained the importance of term limits to restoration of representative democracy and described the 1992 effort to pass term-limit initiatives in 14 states.

October 14: Lord Bauer, the eminent market-liberal development economist and 1992 Cato Distinguished Lecturer, spoke on "Subsistence, Trade, and Exchange: Understanding Developing Economies." Bauer focused on the indispensable role of the independent trader in economic development and the neglect of the trader in the mainstream development literature.

October 16: A Cato Institute "New Perspectives for the Nineties" city conference was held in Indianapolis. The conference featured Mayor Stephen Goldsmith of Indianapolis and J. Patrick Rooney of the Golden Rule Insurance Company along with Cato's president Edward H. Crane, executive vice president David Boaz, and regulatory studies director Brink Lindsey.

October 21: Economists James T. Bennett and Thomas J. DiLorenzo discussed how propaganda builds a permanent government at a Book Forum to honor publication of their book *Official Lies: How Washington Misleads Us*. The au-



Cato senior editor Sheldon Richman welcomes Peter Bauer to the Institute for a Distinguished Lecture on the role of the independent trader in economic development.

thors addressed the federal government's interest in "regulating the will of the people" and offered several examples of such regulation, including poverty statistics, AIDS, and the environment.

October 26: "Government versus the Telecom" was the topic of a Policy Forum with George Gilder, senior fellow at the Hudson Institute and author of *Life after Television*, and Jonathan Emord, Cato vice president for development and author of *Freedom, Technology, and the First Amendment*. Gilder said the rapid acceleration of fiber-optic technology and electronics will radically transform life by dramatically increasing our capacity for transmitting information. Emord said that the only thing holding back progress is the regulatory establishment and that the electronic media should have the same constitutional protection as the print media.

October 29: Adjunct scholar Leon T. Hadar spoke about reviving the spirit of the Levant at a Book Forum honoring publication of his Cato book *Quagmire: America in the Middle East*. Hadar described his vision of a post-Cold War Middle East in which ethnic and nationalist rivalries are depoliticized and the

peoples of the region turn their attention to trade and economic progress.

November 9-10: The *Shadow Securities and Exchange Commission*, sponsored by the Cato Institute and the Bradley Policy Research Center of the William E. Simon Graduate School of Business Administration, University of Rochester, discussed and voted on resolutions concerning corporate executive compensation and market-value accounting at its annual meeting in Washington, D.C.

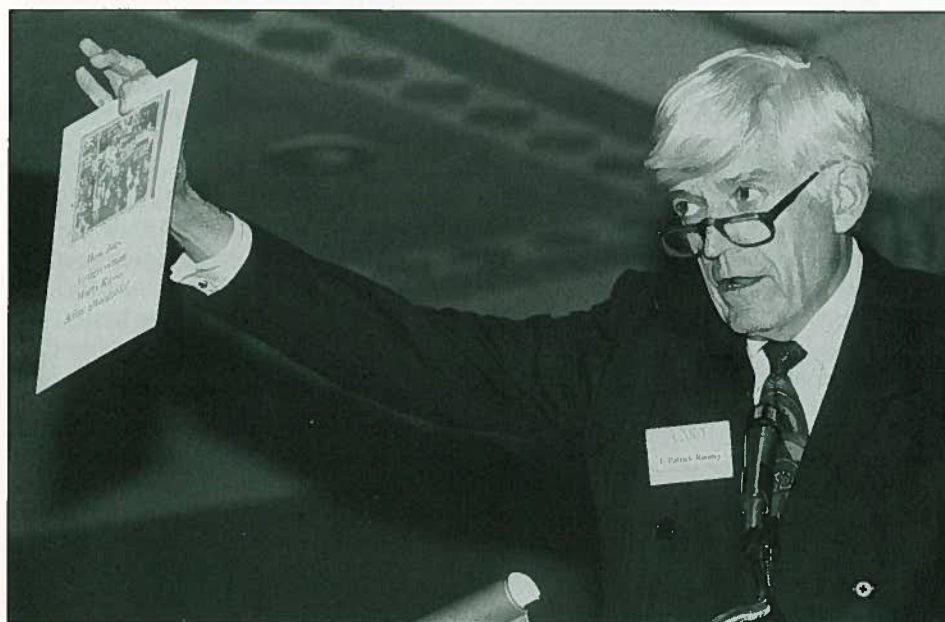
November 12: David Osterfeld explained why the world is becoming less populated at a Policy Forum. Osterfeld, author of the new Cato book *Prosperity versus Planning: How Government Stifles Economic Growth*, said that groundless fears of overpopulation go back to antiquity and that since the prices of resources and food are falling, population relative to those commodities is, in effect, declining.

November 18: Cato foreign policy studies director Ted Galen Carpenter spoke about opportunities for the new administration to declare America's strategic independence at a Book Forum

honoring publication of his new Cato book *A Search for Enemies: America's Alliances after the Cold War*. Carpenter said that in the aftermath of the Cold War, the world's conflicts will tend not to endanger America's true security interests and thus will provide no grounds for U.S. military intervention.

November 17: Lewis J. Perelman forecast "The End of Education, the Beginning of Learning" at a Policy Forum. Perelman, author of *School's Out: Hyperlearning, the New Technology, and the End of Education*, blamed the dismal state of education on the public schools' socialist organization and called for the privatization, commercialization, and decentralization of education. He also discussed his ideas on the role of high technology in education and "microvouchers," which would enable parents to buy education for their children from many providers, not just a single school.

November 18: Larisa Piyasheva, a Russian market-liberal scholar and activist, was guest of honor at a *Roundtable Luncheon*. Piyasheva, a Cato adjunct scholar, spoke about her work in teaching free-market economics to young Russian students and Russia's dimly feeble efforts at true market reform. She recently resigned as Moscow's director of privatization for lack of political support from the city administration.



J. Patrick Rooney of Golden Rule Insurance discusses Medical Savings Accounts at Cato's Indianapolis seminar in October.

November 23: A Policy Forum entitled "Clintonomics: Does America Really Need More Infrastructure Spending?" featured three skeptical economists: Charles Hulten of the University of Maryland, John A. Tatom of the Federal Reserve Bank of St. Louis, and Clifford Winston of the Brookings Institution. Hulten said that there is no evidence of underspending on infrastructure. Tatom found no direct relationship between economic growth and such spending, and Winston argued that the real problem is irrational pricing of the infrastructure.

December 1: A Policy Forum examined the question, "Can Cross-Guarantees Replace Federal Deposit Insurance?" Rep. Thomas Petri (R-Wis.) described his Taxpayer Protection, Deposit Insurance Reform, and Regulatory Relief Act of 1992. That act would replace federal deposit insurance with a private-sector system of cross-guarantees designed to protect depositors, increase the efficiency of the financial system, and shield taxpayers from risk. Tom Miller, senior policy analyst at the Competitive Enterprise Institute, criticized the plan's mandatory feature and warned that the continuing, albeit scaled-down, role of the Federal Deposit Insurance Corporation would be a wedge that might facilitate further government intervention. He called for



Writer Cathy Young (left) translated for Cato adjunct scholar Larisa Piyasheva, a leading Russian liberal, at a Cato Roundtable Luncheon in November.

complete elimination of government from the financial system.

December 2: Ghanaian economist George Ayittey explained why Africans are angry at a Book Forum honoring publication of his new Cato and St. Martin's Press book *Africa Betrayed*. Ayittey, a professor at the American University, said that the leaders who won Africa's independence from the Western colonial powers double-crossed their peoples by imposing socialist tyrannies. He explained that people in the West sanctioned such tyranny by refusing to criticize black African leaders for fear of being called racist. Ayittey added that Africans should deal with their own problems, including the carnage and starvation in Somalia.

December 14: Climatologist Patrick J. Michaels set out the case against the enhanced greenhouse effect at a Book Forum honoring publication of his new Cato book *Sound and Fury: The Science and Politics of Global Warming*. Michaels, a Cato Senior Fellow in Environmental Studies, noted that daytime temperatures have been falling and nighttime temperatures have been rising, which is beneficial to agriculture. Moreover, the slight nighttime warming during the last hundred years took place before the big postwar increase in carbon dioxide emissions. Michaels added that the greenhouse effect itself seems to offset warming by increasing cloudiness.

Bringing Competition to City Services

Policy Forum

On October 16, 1992, the Cato Institute held a "New Perspectives for the Nineties" seminar in Indianapolis. The luncheon speaker for the event was Mayor Stephen Goldsmith, a Republican elected in 1990.

Mayor Goldsmith: It is difficult for cities like Indianapolis, which have been extraordinarily successful historically, to understand that they are on a threshold where change is necessary or success will pass them by and that the best time to change and reposition themselves for the future is while they are still successful.

For years, especially as Indianapolis was gaining national prominence, we considered our competition to be Chicago, New York, Boston, Cleveland, and other large cities. We compared the costs of living and doing business here with the costs in those cities. During those years the central city was the primary workplace. There weren't a lot of businesses on I-465 or in the surrounding suburbs. People came to work in the city. There was a concentration of activity. Now we've got a drastically expanded transportation network and a vast information network. (How many of you just today have sent faxes or electronic messages or used some other device that removes barriers to communication?) Businesses no longer need to be in the central business district.

Now the market in which we compete has changed. Our market is central Indiana, and the cost of doing business and living in Indianapolis is substantially higher than it is in the surrounding counties. If we are going to be competitive, we need to act and manage our local government more like the small communities that surround us: more efficiently and more effectively.

The Changed Marketplace

Several other factors have contributed to the changed marketplace for cities. One is the accelerating decay of the urban family—a personal and economic dynamic of enormous propor-

tions. As families disintegrate, not only are important opportunities for the kids lost, but the financial cost to the city is enormous. We are now spending tens of millions of dollars in center cities because of the disintegration of the family. Personal disasters—runaways, or drugs, or failing schools, or crime, or foster care, or child abuse—all translate into economic disaster as well.

Another factor is that as recently as five or six years ago the federal government put more money into cities than it took out. Since then the federal government has determined that the way to do "good deeds" is to mandate that others do them at their own expense. In other words, the federal government treats city government the same way it does your businesses. Anyway, five or six years ago the city of Indianapolis was receiving a net cash flow of probably \$60 million a year from the federal government. Now the money is gone; it has been replaced by mandates. Most noticeable, of course, are the Environmental Protection Agency mandates that we cost out at about \$500 million over the next few years. So we have gone from plus \$60 million a year in federal cash flow to minus \$100 million a year, which is a swing of substantial proportion and a huge change in the urban marketplace.

Local Government Needs to Change

It is time for a fundamental change in local government. Actually, it's time for change in all government; but I have very little control over local government, and I have *no* control over any other government, so I will focus today on local government.

I've been around the country speaking about privatization. This may come as a surprise to many of you, but we in Indianapolis are not actually in favor of privatization. Instead, we are in favor of competition. Competition often results in privatization, because private businesses are generally more efficient than governments. But there is nothing to be gained in and of itself by privatization. The key is not to privatize but to break up monopolies.

The old idea that just because we in government are responsible for deliv-

ering a given public service means we actually have to perform that service ourselves is outdated. It makes no sense. Government as the provider of services and government as the unit responsible for causing services to be provided are two separate things. Here in Indianapolis we have probably completed about a dozen transactions that move government services into the marketplace, and we have more than 100 other efforts to do so in progress. Our golf courses have all been put up for bid, and all those bids will be let in the next month or so. Our sewer billing has gone private. The city's microfilming is done by a private company. City workers have won contracts for filling potholes and sealing pavement cracks. Those are just a few of the dozens of ways we are trying to make government smaller.

Let me discuss two of the key tools that we are using to introduce competition. The first is establishing performance measures. Our objective is not just to become more efficient, because providing services that are totally unnecessary in a more efficient way should not be the highest, best use of government funds. So, somewhere along the line, before I finish my four years, we hope to begin to measure outputs and determine whether the people in government are actually producing more in value than they are taking out of taxpayers' pockets. Making that determination will be a complicated process, but one that is nevertheless necessary.

The second tool is activity-based costing. You CFO types in the audience may know that Indianapolis has the best four-color bound certified financial report of any city in the country. We really do—the pictures are better, the graphs are better, the dollars kind of balance—and yet we have no idea how much it costs us to perform any service. We don't know how much it costs to fill a pothole or to clean a mile of sewer. We can't figure it out. It is very difficult to contract out a service if you have no idea what it costs you to provide the service. So we're trying to find out how much it actually costs us to provide services.

We believe that the market is the

most tangible expression of popular will. That's why I think Republicans are populists—we believe in the marketplace. When government taxes you and takes money out of your pocket, it is saying one of two things: that it knows how to spend your money better than you do or that there is an overriding public good that justifies government's taking and spending your money. Now, two-thirds of the things that city, state, and federal governments claim they need to do, you could really do better with your own money in the first place. Marketization of city government is one fundamental way to begin to make needed changes.

We have also started to deregulate, but deregulation is off to a fitful start because we have thousands of regulations and each regulation has many more supporters than opponents.

Another thing local government can do is curb tax increases. That is a battle of enormous dimensions. Everybody in government, including Indianapolis's best employees, can make a very convincing argument for more money. Reasonable people believe that we need more asphalt on the streets and that more kids need to receive special services. It's not until you clamp down on the money available that people begin to figure out how to do things without more dollars. We've done that in Indianapolis. We're down from 5,600 employees to 4,600 employees, and our financial surpluses are going up.

Last week I attended a meeting of a little-known group, the Marion County Tax Adjustment Board, and found out that 33 of the 49 taxing units in Marion County have enormous tax increases planned for this year—10, 20, even 60 percent increases. Township governments, school districts—you name it—virtually everybody is raising taxes, with three or four notable exceptions. That means that those well-intentioned folks have not realized how much the marketplace has changed and that when the percentage of income people pay in taxes goes up, they move out of the county.

Federal Stumbling Blocks

The federal government places stumbling blocks in the way of beneficial change at the local level. We're trying to do what I think are fairly dramatic

things in our neighborhoods, and we're trying to do them on the theory that if we allow people in disadvantaged neighborhoods to make their own decisions and control their own lives, they will do a better job—even though they're poor—than government can. People who are poor are not unintelligent. They know how to spend their money much better than does a bunch of bureaucrats.

Unfortunately, several things that the federal government forces upon us seem to sabotage our efforts. First, we have a lot of categorical revenue streams.



Stephen Goldsmith: "The key is not to privatize but to break up monopolies."

We have dollars for service A, we have dollars for service B, we have dollars for service C; but we can't tailor a program for a neighborhood or a family. More important in the city of Indianapolis—a relatively middle-wage city—if a mom who has been receiving Aid to Families with Dependent Children finds a job at \$7.50 an hour, goes to work, and goes off welfare, she is in the 110 percent marginal tax bracket. She loses money. A lot of folks are trapped in poverty, in part because the economic benefits of poverty and welfare, even in Indianapolis, exceed those of working. Those of you who run businesses know that \$7.50 an hour is not an unreasonable wage for someone entering the job market. The federal government is going to have to allow cities and states to change

the welfare structure—as some states are already trying to do—so that people bring home more money when they go to work. We're surprised when poverty increases, yet we have a federal government that encourages it.

We would like to propose major changes at the federal level. Some of those changes, such as cashing out food stamps, are controversial. The theory is that you take all the benefits and cash them out and get all the bureaucrats out of the way. There's a city activist with whom I do a little work by the name of Robert Woodson, who has estimated that only 33 cents—just one-third—of every federal poverty dollar actually gets down to people who are poor. Two-thirds are spent on the folks who give away the other third. If we get the money directly to those who need it, we'll do a lot better.

Another impediment to local change is the federal government's refusal to recognize cities; it recognizes only states. That means that every federal dollar has to pass through three layers of bureaucracy before it gets to somebody who actually needs the money. It goes from the federal to the state to the city bureaucracy, which is significant, and then it finally goes to the citizen. We in city government are not allowed to deal directly with the federal government; we have to deal through the state. I'd like to be free, sometime in my four years, to make my own mistakes in my own way.

Last night, after nine months of guerrilla combat, the public transit agency in the city of Indianapolis let a private contract for service for the disabled. I won't take you through all the steps involved in negotiating a little contract involving a public corporation that is the most incomplete, most inefficient, highest cost, lowest ridership public transit system in the country, but I will tell you that federal law was no help at all. There is a federal law that says that I cannot contract out those routes, I cannot create minority franchises, unless the existing drivers' union approves. The only reason we got service for the disabled contracted out without the union's objecting was that the disabled were thoroughly fed up with the poor service they had been receiving. You can't create competitive service delivery with federal laws like that.

Competition (Cont. from p. 7)

The federal government passed a law that you all work with in your businesses, the Fair Labor Standards Act. That law now applies to the cities, too. You know what it tells the cities? I can't negotiate with my Fraternal Order of Police and my own police department for overtime, because Congress has determined that even if my police officers are willing to work overtime for straight-time or even time-and-a-quarter pay, I have to pay time-and-a-half or double-time wages. Given tight budgets, that means that the federal government and Congress have literally removed police officers from the street corners of the city of Indianapolis. The federal government has decided that it knows better than we do how to negotiate union contracts in our city.

I could tell you about dozens of other equally ridiculous federal constraints. For example, I wanted to paint public housing high-rises. There were elderly tenants living in awful conditions in high-rise public housing about six blocks from here. I went over there in my second month in office and promised that I would paint all the apartments, which are just awful. They haven't been painted in 15 or 20 years. I got the money from Jack Kemp, who has been a great help to the city of Indianapolis, by the way. And so I was going to have all those apartments painted. Well, I couldn't because I couldn't hire private contractors to do the job. The painters have to be city employees. I finally got permission to hire private contractors as long as I agreed to pay prevailing wages. So I negotiated a special wage with the unions. Then the Department of Labor said, "Wait a minute, you can't negotiate with the unions. We're going to tell you what the prevailing wage is in Indianapolis. And by the way, only on the first three floors are you allowed to pay the prevailing wage for residential painters. On floors four through twenty you'll have to pay the prevailing wage for commercial painters."

You know what the end of the story is? Floors four through twenty are still unpainted, I still have the money, and I can't spend it. All I'm asking for is a chance to make my own mistakes with

Executive Pay, Accounting Rules Debated at Shadow SEC Conference

Should the Securities and Exchange Commission have anything to say about compensation of corporate executives and market-value accounting? Those were the topics discussed at the third annual Shadow Securities and Exchange Commission meeting held in Washington November 9 and 10. The Cato Institute cosponsors the Shadow SEC with the Bradley Policy Research Center of the William E. Simon Graduate School of Business Administration, University of Rochester. The Shadow SEC, an unofficial body, encourages the official SEC to make greater use



Shadow SEC commissioners Stoll, Miller, Cox, Jarrell, and Gilson listen to speakers at the third annual Shadow SEC meeting.

my city's money and to improve service delivery just a little bit.

Assets and Capital

Finally, if we are going to have a vibrant urban community, it must be built around asset and capital formation, not around patronizing welfare service delivery. If we are to generate assets in communities, we must encourage capital flow into those communities. Enterprise zones are one way to do it; tax-free mutual funds and low-income housing tax credits are other ways.

Even the way we spend environmental dollars matters. If any of you take the wrong way home, you will note that south of the convention center there are lots of abandoned industrial sites. I can get them for a dollar, but I can't really get them for a dollar because the EPA will make me clean them up for



Walker Todd of the Federal Reserve makes a point to Michael Jensen of Harvard.

of economic analysis and evidence in formulating regulatory policy for financial markets and makes recommendations to the SEC.

Recently, there has been debate about whether American corporate managers are overpaid, and the official SEC has begun requiring disclosure of executive compensation to shareholders. Whether financial institutions should value their assets and liabilities at market prices rather than historic cost has also been debated. The Shadow SEC heard several experts offer differing views on what official SEC policy

tens of millions of dollars. So it's cheaper for businesses to take down a forest or a corn field than to come to the central city. Clearly, we need to look at capital formation as a way to reinvigorate cities.

The ideas I have presented are not outrageously conservative. They are populist. That government should get out of certain businesses, that we need to give people more power to spend their own money and make their own mistakes and create their own successes, that local government ought to get out of the way of progress and instead facilitate it, that poor folks can be successful if they have assets and opportunities and choices, and that government should work for marketization are all ideas that cities can use to save themselves. I am determined to do all I can to make Indianapolis a success. ■

should be on those issues.

Michael C. Jensen and Kevin J. Murphy of the Harvard Business School advised the SEC to stay out of questions of executive compensation, arguing that mandatory disclosure is harmful. Jude T. Rich, chairman of Sibson & Company, supported mandatory disclosure. Other commenters said that there are no problems with the compensation process and that future problems could be averted by the removal of SEC restrictions on hostile corporate takeovers, the threat of which would restrain uneconomic pay for managers. Shadow commissioner Gregg A. Jarrell pointed out that the current disclosure requirements are the result of a perverse political process that will probably lead to more federal intervention in corporate governance.

Market-value accounting for institutions covered by federal deposit insurance was supported by George J. Benston of the Emory Business School and Walker F. Todd of the Federal Reserve Bank of Cleveland. William J. Bosies, Jr., an attorney from Louisville, and Richard E. Randall of the Federal Reserve Bank of Boston opposed such accounting for federally insured institutions because it would lead the government to unnecessarily declare some institutions insolvent.

Shadow SEC resolutions endorsed the SEC's compensation disclosure requirements but opposed regulation of amounts or methods. Resolutions objected to mandatory market-value accounting for banks and thrifts as outside SEC jurisdiction but supported regulatory changes to permit accountants to take interest-rate changes and the time value of money into account in valuing assets and liabilities. The shadow commission also commended the SEC for its partial deregulation of shareholder communications and its encouragement of active participation by institutional investors in corporate governance. Finally, the Shadow SEC recommended that the SEC continue deregulating shareholder communications.

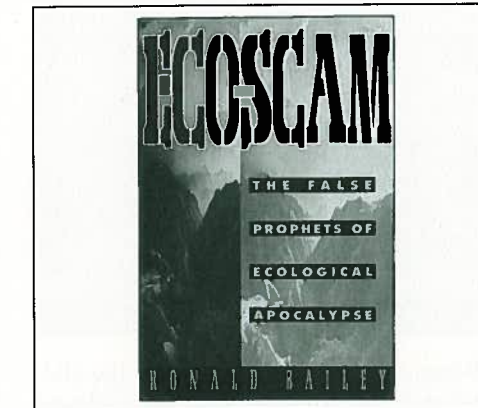
The members of the Shadow SEC are Chairman Charles C. Cox, former acting chairman of the official SEC; Nobel laureate Merton H. Miller; professors Ronald J. Gilson and Hans R. Stoll; and Jarrell, director of the Bradley Center and commission chief of staff. ■

Book Indicts "Eco-Scam"

Why Are People So Ready to Believe The Environmental Apocalypics?

Environmentalists are merely the latest in a long line of apocalypse mongers who resent modern civilization and capitalism, writes Ronald Bailey in *Eco-Scam: The False Prophets of Ecological Doom*, a new book from the Cato Institute and St. Martin's Press. Bailey, a journalist and producer of the PBS series "TechnoPolitics," writes that environmentalism is largely an assault on the West's high standard of living, unegalitarian distributions of wealth, and private property, in a word, progress. He notes that some environmental leaders openly tout ecology as the new left-wing cause to succeed the collapsed economic case for socialism.

"In this book," writes Bailey, "I hold those environmental alarmists strictly



accountable for their faulty analyses, their wildly inaccurate predictions, and their heedless politicization of science, in the hope that the next generation will not grow up feeling that their future is dismal and blighted."

Bailey takes up several specific ecological prophecies to show how hidden agendas or emotionalism, or both, interfere with scientific objectivity. He discusses the myths of overpopulation, resource depletion, global cooling, global warming, biotechnological threats, nuclear winter, and ozone depletion.

He ends the book with an analysis of the news media's self-conscious abandonment of objectivity in the coverage of environmental issues. "Crises . . . sell newspapers and TV airtime," Bailey writes. "This natural process of highlighting bad news is bad enough, but now some journalists are proudly throwing off the professional constraints of objectivity and becoming environmental advocates themselves. . . . The media are the senses of a democratic society, its eyes and ears, and if the sights and sounds we convey to our public are distorted, the policy, like a nearsighted man or deaf woman, is in danger of walking off a cliff or being run over by a howling ambulance."

Eco-Scam is available from the Cato Institute for \$19.95 cloth. ■

CATO INSTITUTE CALENDAR

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Washington • Carlton Hotel • March 4, 1993

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Financial Deregulation in a Global Economy

Eleventh Annual Monetary Conference
Washington • Carlton Hotel • March 18-19, 1993
Speakers include Lawrence Lindsey, Anna Schwartz, George Selgin, Jerry L. Jordan, Edward J. Kane, Lee Hoskins, and Yoshio Suzuki.

Technology Policy: More Government or Less?

Fourth Annual Regulation Conference
Washington • Carlton Hotel • April 22-23, 1993
Speakers include Murray Weidenbaum, Lawrence Kudlow, Peter Huber, Suzanne Huttner, James Bovard, and Charles Schultze.

Privacy (Cont. from p. 1)

Although not the first case to protect some notion of a right to privacy, *Griswold* shaped subsequent Court thinking and led directly to *Roe v. Wade* (1973), which established a limited constitutional right to abortion. It also set the terms that, ironically, led a conservative-dominated Court to uphold a Georgia law against sodomy in *Bowers v. Hardwick* (1986).

In *Griswold*, Justice William O. Douglas found that the ban on the use of contraceptives by married couples unconstitutionally intruded into a "zone of privacy"—the marital relationship—that is implied by a combination of several express guarantees in the Constitution. Douglas, writing for the majority, penned an immortal phrase when he stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

Using Court precedents, Douglas argued for a right of privacy as one of those penumbral rights.

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In his concurring opinion in *Griswold*, Goldberg cited Justice Brandeis's dissent in *Olmstead v. United States* (1928). The Framers, Brandeis wrote, "conferred, as

against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." According to Goldberg, only "fundamental rights" were protected in the zones of privacy. To the question, Which rights are fundamental? Goldberg replied that judges should not turn to their personal notions. "Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"

Other concurring justices preferred to strike the Connecticut law on the ground that it violated the section of the Fourteenth Amendment that prohibits states from depriving persons of life, liberty, or property without due process

"The Constitution is meant to protect persons, their liberty, and their property. Privacy is inherent in and inseparable from that intent."

of law. Those justices revived the old, and unfortunately abandoned, idea of substantive due process, but they applied it only to noneconomic rights.

For a majority of the Supreme Court, it was but a short jump from *Griswold* to the controversial ruling on abortion in *Roe*. Justice Harry Blackmun, writing for the majority, said, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Yet Blackmun disagreed with the appellants that the woman's right is absolute. He wrote that the state "may properly assert important interests" related to, among other things, the protection of potential life and that "at some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."

The minority opinions in *Griswold*

went to the heart of Douglas's and Goldberg's methods. Justice Hugo Black disputed the substitution of the "broad, abstract and ambiguous" term "privacy" for the more concrete language of the express guarantees in the Bill of Rights. "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." Similarly, Justice Potter Stewart wrote, "With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

It is the liberals' ad hoc reasoning in those cases that gives plausibility to the criticism of the liberal Court by Robert Bork and other conservatives. In *The Tempting of America*, Bork notes that the concern with marriage in *Griswold* was later dropped in *Eisenstadt v. Baird* (1972) when the issue shifted to the use of contraceptives by unmarried people. Given the mercurial way in which the liberals incrementally unveiled their right to privacy, it was impossible to know what would come next.

Bork does not object to the idea of penumbras emanating from the Bill of Rights; he just does not believe that any of the statutes stricken in the privacy cases violated so-called penumbral rights. Nor does he wish to defend the anti-contraception statute. His focus is on the legal argument and how it creates "an unconfined judicial power." "No matter what your moral views on any of these matters [dealt with in the privacy cases]," he writes, "nothing in the Constitution addresses them."

To the liberal claim that laws against contraception and abortion fall to the due process clause of the Fourteenth Amendment, Bork responds that due process refers only to procedures and that "substantive due process" is a contradiction in terms. Finally, Bork finds no case for privacy in the Ninth Amendment, which he says is as obscure as it would be had an inkblot covered it on the original parchment.

Where the Liberals and Conservatives Go Wrong

To understand where the Court's majority went wrong in *Griswold*, one must distinguish the method of inter-

pretation from its application. Douglas's method was to look for the logical implications (which is how I read "penumbras formed by emanations") of the express guarantees in the Bill of Rights. As Douglas put it when he agreed with an earlier Court that the right of association can be found in the First Amendment, "While it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."

That is sound as far as it goes. The problem is not the penumbras but that Douglas found only what he wanted to find and no more. (In 1965 he found a right to marital privacy, but in 1942 in *Wickard v. Filburn* he could not find a right to grow wheat on one's own land even for one's own use.) For Douglas, the penumbras contained so-called personal, noneconomic rights relating to speech, press, religion, and the like. Yet other zones of privacy are logically covered by the same guarantees that Douglas used; those zones relate to economic activities. Since the Constitution refers to property several times, it is hard to see how a right to privacy emanating from those guarantees can exclude commercial matters, such as a discussion of prices by competitors. Besides, all "personal rights" require the use of property, if only a place to stand, and hence are "economic rights" as well. One cannot distinguish economic from personal rights on the ground that only the former have third-party effects. So do personal rights. Bork is correct when he says in reference to sodomy that "knowledge that an activity is taking place is a harm to those who find it profoundly immoral." The point is that it is a "harm" (a subjective state in someone who objects) that does not violate anyone's rights. The same is true of price "fixing." (The Constitution's interstate commerce clause is not properly read as a plenary power to regulate commerce since it is constrained by other clauses.)

The arbitrariness of Douglas's reasoning in *Griswold* can be seen in his "notions of privacy surrounding the marriage relationship." As he put it, the case concerned "a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship." He

apparently would have had no problem with a ban on only manufacture or sale because enforcement would not have required searches of the marital bedroom.

Note the arbitrariness: First, the marital relationship was deserving of protection, but commercial relationships were not. Second, for Douglas, some ways of intruding on the marital relationship were apparently permissible, as long as they had less than "maximum destructive impact" on the relationship. While the state may not barge into the bedroom looking for contraceptives, it may outlaw their manufacture and sale to make sure they never get to the bedroom. But that is only a less ham-handed form of disrupting the marital relationship.

"To determine whether one has a right to privacy with respect to some act, a judge need only ask what the property rights are."

Third, Douglas excluded unmarried couples from protection. It was left to a later Court to extend the protection to them. In *Eisenstadt* the Court broadened the right to privacy on the ground that a married couple consists of *individuals*, and all individuals, married or not, face the fundamental decision of whether or not to have children.

The conservatives have their problems as well. Stewart and Bork demand to know what specific guarantees in the Bill of Rights are violated by a state law against contraception or abortion. They do not accept the holistic reading of the Constitution that the identification of penumbral rights entails. "Nobody has ever quarreled with the proposition that certain zones or aspects of privacy or freedom are protected by the Constitution," writes Bork. But finding those zones in particular guarantees is not the same as finding a general

right of privacy in the penumbras, which, Bork says, only creates a "loose canon in the law." The *Roe* Court "did not even feel obliged to settle the question of where the right of privacy or the subsidiary right to abort is to be attached to the Constitution's text," Bork complains. He finds the various references to implicit liberty and the nation's traditions "pretty vaporous stuff."

Thus, he applauds the Court's upholding of a Georgia law against sodomy in *Bowers* (1986). The conservative majority refused to apply the principles of the earlier privacy cases because homosexual sodomy had nothing to do with family, marriage, procreation, or the nation's history and tradition. (The liberals were hoist with their own petard. As does unpopular speech, untraditional ways of living most need protection.)

Bork's real objection is to any holistic reading of the Constitution. Instead, he favors what John Hart Ely called a "clause-bound interpretation." The idea is to read each guarantee in the Bill of Rights as if no others existed, taking care not to acquire any cumulative sense of what the Framers had in mind. That is a dubious theory of interpretation, but in at least one case Bork is not "clause-bound" enough: he prefers to read the Constitution as if the Ninth Amendment were not there. (Conversely, the liberals who abhor clause-boundedness do not mind reading the commerce clause that way. That clause must be read in the full context of the general protection accorded property in the Constitution.)

Finally, the conservatives reject substantive due process, which they see as a contradiction in terms that authorizes judges to legislate. If the term sounds odd, it would be odder still to dismiss the idea. As Roger Pilon writes, "By 'law' [in due process of law] the drafters could hardly have meant mere legislation or the guarantee would have been all but empty." In other words, if a legislature may "duly" pass any substantive law it wishes, life, liberty, and property are hardly secure. Substantive due process is an indispensable restraint on legislative caprice.

Thus, both the liberals and the conservatives misunderstand privacy. The conservatives engage in a narrow and unnatural reading of the Constitution

Head Start Offers No Long-Term Benefits

Budget Deal Hiked Spending, Governors Back Item Veto

The 1990 budget deal between President Bush and Congress has resulted in larger deficits, increased the national debt by more than \$500 billion, and generated the nation's worst five-year fiscal performance ever, writes Stephen Moore, director of fiscal policy studies at the Cato Institute. According to "Crime of the Century: The 1990 Budget Deal after Two Years" (Policy Analysis no. 182), the budget deficit from 1991 through 1995 will be \$1.3 trillion higher than it would have been had Congress met the Gramm-Rudman-Hollings goals. During the two years of the budget deal, government expenditures have accelerated at a faster pace than at any time in 30 years, writes Moore, and the domestic budget has grown by \$118 billion, or almost 20 percent above inflation. Meanwhile, he adds, since October 1990, America has lost more than 100,000 jobs, and the unemployment rate has climbed from 5.5 to 7.4 percent.

U.S. Policy Hurts Haitian People

The United States must end its embargo against Haiti and its policy of repatriating Haitian refugees, both of which guarantee continued misery for

the Haitian population, according to a study by Ian Vásquez, assistant director of the Cato Institute's Project on Global Economic Liberty. The hemispheric trade embargo that has been imposed against Haiti since the military overthrow of President Aristide has destroyed over 50 percent of Haiti's private-sector jobs, affecting nearly 1 million people, Vásquez writes in "Doing What We Can for Haiti" (Policy Analysis no. 183). Fuel blockades have forced Haiti's poor to burn scarce wood, causing soil erosion and deforestation. Water needed for irrigation is being diverted for hydroelectric power. The sanctions have led to malnutrition, disease, and famine. Meanwhile, the soldiers and elite who are meant to be the target of the embargo profit by hoarding and selling smuggled goods.

The study shows how proposals for aggressive intervention to solve Haiti's problems ignore nearly a century of failed foreign aid programs and intervention.

Medical IRAs Are Key to Health Care Reform

Establishing tax-deductible Medical IRAs would be the best way to provide

cost control and consumer flexibility in health care, as well as allow the temporarily unemployed to remain insured, Michael Tanner, director of research at the Georgia Public Policy Foundation, writes in a new Cato study, "Health Care Reform: The Good, the Bad, and the Ugly" (Policy Analysis no. 184) analyzes a variety of current proposals for health care reform, including national health care, "play or pay," managed competition, and the Heritage Foundation proposal.

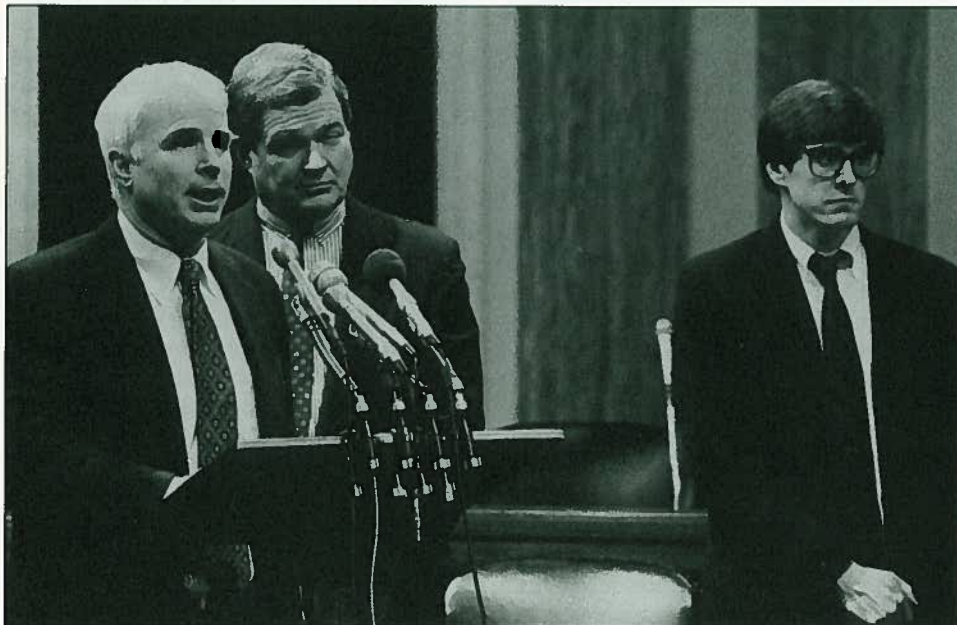
Third parties currently pay 76 cents of every dollar spent on health care, giving consumers no incentive to question costs and every incentive to demand more services. Tax-deductible Medical IRAs, the study finds, would return decisions about health care spending to consumers and create incentives to shop wisely. Medical IRAs would also let consumers save for health care in their retirement years.

A single-payer, government-operated system could lead to \$339 billion in additional taxes, create dangerously long waiting periods for medical care, and lessen the availability of modern medical technology, Tanner writes. A play-or-pay plan, which would require employers to either provide health insurance or pay a tax to fund health insurance for their employees, would lead to an estimated loss of between 630,000 and 3.5 million jobs, cost taxpayers \$36 billion a year in higher taxes, and cost businesses an additional \$30 billion in health care costs.

According to Tanner, the Heritage Foundation's proposal for compulsory health insurance would increase government control over the personal lives of citizens; create another entitlement program; and allow more extensive government regulation of the insurance industry, which would almost certainly lead to higher prices.

CIA Should Not Engage in Economic Espionage

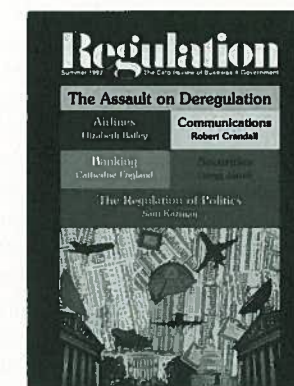
The Central Intelligence Agency should not gather economic intelligence, says Cato adjunct scholar Stanley Kober in "The CIA as Economic Spy: The Misuse of U.S. Intelligence after the Cold War" (Policy Analysis no. 185).



Sens. John McCain and Kit Bond join Stephen Moore, Cato's director of fiscal policy studies, to release a Cato survey that found that 92 percent of governors and former governors support a line-item veto for the president.

Regulation: Deregulation Is Under Assault

The "Assault on Deregulation" is the theme of the Summer 1992 issue of *Regulation*, the Cato Institute's review of business and government. The issue includes articles on regulatory reform in the airline industry by Elizabeth E. Bailey, in communications by Robert W. Crandall, and in financial indus-



tries by Catherine England. Other contributors are Gregg A. Jarrell on government reaction to the takeover boom of the 1980s, Barry Adler and Lawrence Weiss on corporate bankruptcy, Sam Kazman on campaign reform, Cassandra Chrones Moore on the Interest on Lawyers' Trust Accounts program, George Hoffer and Edward Millner on the dubious efficacy of auto safety regulations, and Indur M. Goklany on the irony of proposing restrictions on the provision of health care while giving environmental agencies a free hand to address marginal health risks.

Also in the issue, John R. Lott, Jr., of the Wharton School of the University of Pennsylvania reviews Al Gore's *Earth in the Balance: Ecology and the Human Spirit*; editor William A. Niskanen takes Supreme Court Justice Antonin Scalia to task for his opinion in the *Lucas* property rights case; and senior editor Brink Lindsey critiques a study by the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine that calls for government investment in "precommercial" civilian technology.

According to Kober, proposals to use the CIA as the intelligence-gathering arm of a national industrial policy ignore both the worldwide failure of such policies and the agency's past inability to produce accurate economic estimates and forecasts.

Kober also points out that involving the CIA in international economic affairs would have great potential for corruption and abuse, because CIA data would necessarily aid some firms more than others, and that using the agency as an economic spy might make adversaries of other democratic capitalist countries.

Governors Make Recommendations

A Cato Institute survey of 118 governors and former governors reveals a strong consensus that both a line-item veto for the president and a balanced-budget amendment to the Constitution would be effective tools for reducing the federal budget deficit.

In "How Governors Think Congress Should Reform the Budget: Results of a Survey of U.S. Governors and Former Governors" (Policy Analysis no. 186), Stephen Moore, Cato's director of fiscal studies, reports that 92 percent of the governors believe that a line-item veto for the president would help curtail federal spending; the governors, by a two-to-one margin, approve of a balanced-budget amendment to the Constitution; and 55 percent of the governors think that Congress has too much authority over the federal budget, whereas only 2 percent think the president has too much authority.

Intervention in Somalia Sets Bad Precedent

Proponents of the U.S. intervention in Somalia view it as the prototype of a post-Cold War U.S. foreign policy of intervening for purposes other than defense of America's security interests, says Ted Galen Carpenter, director of foreign policy studies at the Cato Institute, in "Setting a Dangerous Precedent in Somalia" (Foreign Policy Briefing no. 20).

Carpenter warns that if the United States abandons its own security as the standard by which to decide to use force, there is virtually no limit to the arenas in which American lives may be sacrificed. He urges the American peo-

ple to reject the policy the Somalian intervention represents and U.S. leaders to never again allow American troops to be used as the hired guns of the UN Security Council.

The United States Should Welcome the Eurocorps

The Clinton administration should embrace the Eurocorps as a security structure that would make possible significant reductions in U.S. military commitments to Europe, says Jonathan G. Clarke, a retired British Foreign Service officer, in "The Eurocorps: A Fresh Start in Europe" (Foreign Policy Briefing no. 21).

By welcoming the Eurocorps, Clarke argues, the United States would signal that, instead of clinging to NATO as the primary vehicle of U.S. influence in Europe, Washington intends to shift the focus of U.S.-European relations from security to economic issues—the future U.S. *raison d'être* in Europe and an area in which institutional ties and the habit of consultation need to be cultivated.

Head Start Is a Scam

Head Start programs are neither a necessary nor a sufficient condition for helping poor children succeed, according to a Cato study by John Hood of the John Locke Foundation. In "Caveat Empor: The Head Start Scam" (Policy Analysis no. 187), Hood argues that, contrary to the claims made by Head Start's architect, there is no evidence that the program provides any long-term benefits to children. Studies that purport to show otherwise either examined model programs, which are unlike actual Head Start programs, or show only short-term academic gains—not long-term effects on rates of graduation, teen pregnancy, crime, and unemployment.

Instead of expanding Head Start, Hood says, we should end it. The \$2.2 billion appropriated for Head Start in fiscal year 1992—\$3,410 per child—would be better spent on vouchers or tax relief to allow parents to send their children to private or parochial schools in their communities. Making it possible for poor children to attend quality elementary and secondary schools would be a far better investment in their future than would be increased government intervention in the lives of American preschoolers.

Privacy (Cont. from p. 11)

in order to avoid seeing what they do not wish to see, while the liberals find in the Constitution not penumbras but a Rorschach test that reveals only what they wish to see. In both cases it comes down to an inkblot. Both approaches allow their adherents to disparage most freedoms and exalt the few freedoms allowed by their respective moral and political philosophies.

Propertarian Privacy

Fortunately, there is a coherent, objective alternative to the liberals' arbitrary right of privacy and the conservatives' crabbed, clause-bound notion of constitutional freedom. It is a model of privacy re-anchored in natural property rights (beginning with self-ownership). That the propertarian model of privacy has the full force of the Constitution behind it is evident in the purposes listed in the preamble to the Constitution, in the recurring express references to property, and in the protection of unenumerated rights in the Ninth Amendment.

The notion of propertarian privacy is unabashedly based on a holistic reading of the Constitution. As Justice John Marshal Harlan said, the rights in the Bill of Rights are not a "series of isolated points" but "a rational continuum." When one begins with the preamble; proceeds through the delegation of limited federal powers and on through the Bill of Rights, including the guarantee of unenumerated rights and the Tenth Amendment's reiteration of the limitation of federal power; and winds up at the Fourteenth Amendment's limit on state governments—and when one reads all that against the "higher law background"—one cannot reasonably deny that the document is meant to protect persons, their liberty, and their property. Privacy, the realm beyond the reach of forcible intervention, is inherent in and inseparable from that intent. If property is not a sanctuary from entreaty and command, what is it? The Founding Fathers understood that.

The propertarian approach to privacy is not only morally sound, it also has an impeccable case-law pedigree. As noted, before 1890 privacy was not separated from property. For example, in his opinion in *Boyd v. United States*

(1886), a search and seizure case involving a businessman, Justice Joseph Bradley wrote that the constitutional guarantees securing people in their persons, houses, papers, and effects transcend the concrete case and "apply to all invasions on the part of government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging in his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property."

More recently, that model of privacy was invoked by Justice John Paul Stevens. In *Moore v. East Cleveland* (1977), in which the Court struck down a zoning law that prohibited a woman from living with two grandsons who were not brothers, Stevens, in a concurring opinion, said that the test to be applied was "whether East Cleveland's housing ordinance is a permissible restriction on [Mrs. Moore's] right to use her property as she sees fit." There was no need to resort to vaporous (as Bork puts it) freedoms "deeply rooted in this Nation's history and tradition."

And in his *Bowers* dissent, Blackmun argued that the law against sodomy violated (quoting Charles Fried) the "moral fact that a person belongs to himself and not others nor to the society as a whole" (emphasis added). But as Stephen Macedo suggests, Blackmun weakened his argument by resorting to the vague Brandeisian freedom "to define one's identity."

Propertarian privacy has all the advantages of the big-government liberals' contrived right of privacy and none of the disadvantages. It is not a warrant for judges to do whatever they wish. To determine whether one has a right of privacy with respect to some act, a judge need only ask what the property rights are. Thus, the use of contraceptives is protected because each party owns himself or herself (the first property right) and at least one owns the contraceptive device. No rights are violated. The same is true for the woman who wishes to live with her grandsons and for persons who engage in consensual homosexual sodomy, use drugs or pornography, grow wheat on their land, buy the services of a prostitute, or "fix" prices with business com-

petitors. Those actions are perfectly consistent with property rights. (In fact, competitors cannot "fix" prices; they can only agree to *ask* the same price. Buyers are free to abstain from purchasing or to purchase from someone who is not a party to the agreement.)

On the other hand, child abuse, even in one's home, is not protected because the child is a self-owner. (As to abortion, the salient fact is that the fetus comes into existence inside the body of a self-owner. Philosopher Judith Jarvis Thomson has argued that the issue of fetal rights distracts from the more fundamental issue of whether the state may force a woman to be an incubator.)

The property rights standard makes distinguishing privacy violations from nonviolations a matter of principle. For example, an employer tells a prospective employee that he may not smoke—even at home—if he takes the job. Violation of privacy? Contrary to the ACLU's position, no. As a condition to a voluntary exchange, it violates no rights. The prospective employee can turn down the job.

Another example: A private firm compiles a computer data base on consumers in order to rent it to direct marketers. Privacy violation? Not if the information was originally provided freely by the consumers (or otherwise lawfully obtained) and all contractual restrictions are observed. But if information was given confidentially, divulgence should be actionable. To be sure, data can be misappropriated, stolen by computer crackers, or used in ways that violate contractual obligations. That is why there are criminal and civil courts.

(Incidentally, people naively and too readily give up personal information to private firms. The computer columnist Jim Seymour writes that he routinely ignores questions on applications, "and I can't recall a single incident, in 20 years, when I was refused whatever I was seeking simply because I didn't fill in every blank on the form.")

The liberal and conservative obfuscation of the privacy issue has led to a constitutional miasma that threatens to violate natural rights by construing the right to privacy either too broadly or too narrowly. Propertarian privacy dispels the miasma to reveal the clear path laid out by the Founding Fathers more than 200 years ago. ■

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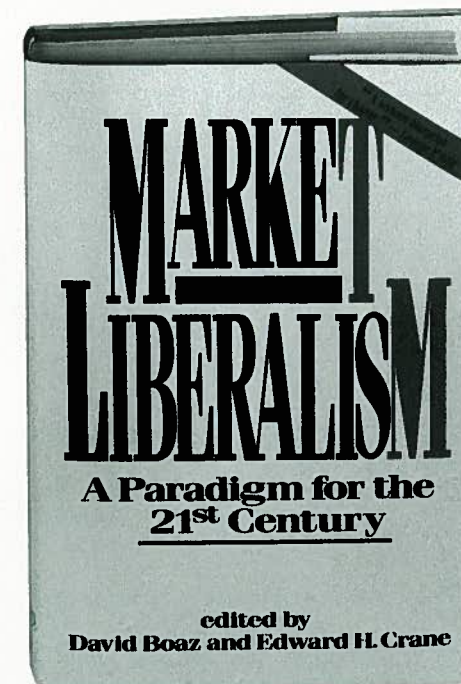
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“To be governed...”

None dare call it blackmail

Teachers at Wilson High School in the District [of Columbia] are refusing to write letters of recommendation for college-bound seniors unless their parents write to at least three city officials protesting teacher fur- loughs and low pay.

— *Washington Post*, Oct. 1, 1992

The Prince George's County [Md.] Council . . . voted to limit homeowners' tax assessment increases to 5 percent — but only if voters reject the ballot measure, Question D, that would restrict countywide property tax collec- tions.

— *Washington Post*, Oct. 2, 1992

Yes, minister

Career Bureaucrats Brace for the Frustration of Breaking in New Bosses
— headline in the *Washington Post*,
Nov. 5, 1992

So we need a tax increase

Government waste ranging from the petty to the absurd has totaled \$310 billion in taxpayer money in the past 12 years, the chairman of the House Government Operations Committee said yesterday.

— *Washington Post*, Oct. 22, 1992

Read our lips: It's none of your business

The National League's owners voted decisively . . . to reject a proposal by Florida-based investors to buy the Giants and move them to the Tampa- St. Petersburg area, clearing the way for the team to remain in San Fran- cisco. . . .

Florida Sen. Bob Graham said moves were underway to challenge baseball's exemption from the antitrust laws.

“I am outraged by what has just happened,” he said.

— *Washington Post*, Nov. 11, 1992

Once?

Many Asian Americans cherish the old-fashioned virtues stressed by the Republicans, such as hard work and family solidarity, and tend to disdain the kind of welfarism once advocated by the Democrats.

— Stanley Karnow in the
Washington Post, Nov. 23, 1992

We're from the government and we're here to help you

“Right now, health care is purchased by 250 million morons called U.S. citizens,” [Wall Street analyst Kenneth S.] Abramowitz said. Managed care, he said, will “move them out, reduce their influence, and let smart profes- sionals buy it on our behalf.”

— *National Journal*, Oct. 31, 1992

The new class

In hilly Hampstead, a tweedy neigh- borhood in north London known for its rich literary heritage and its equally rich literary pretensions . . . the pres- ent-day glitterati of Hampstead ap- parently have lost the decisive battle in their war to keep McDonald's from opening a restaurant. . . .

The rest of London just doesn't understand.

“We are certainly not snobs,” Pa- mela Shipkey, of the Heath and Old Hampstead Society, told reporters re- cently. “We voted Labor at the last election.”

— *Washington Post*, Nov. 4, 1992

Give that man a raise

A janitor working his way through the bowels of the Capitol early yester- day inadvertently picked up a box containing 13 original bills and re- lated documents and dumped it in a trash compactor.

— *Washington Post*, Oct. 6, 1992

And let's see, a laser beam does what to its target?

“I am going to focus like a laser beam on the economy,” [Bill] Clinton said last week.

— *Washington Post*, Nov. 8, 1992

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