

MIMESIS

LAW

Cross: Roger Pilon, Defending Liberty At Cato

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Ed. note: David Meyer-Lindenberg interviews [Roger Pilon](#), libertarian luminary and founder and director of Cato's Center for Constitutional Studies.

Q. You were born in Vermont late in 1942 and raised in upstate New York, in a village of 150 people “in the foothills of the Adirondacks” with a beaver pond outside your family’s home. Growing up, you were an athlete, a musician, the founder of your town’s first rock-‘n’-roll band, and a Boy Scout and later camp counselor.

A recurrent theme in your work is that we’ve become so inured to the unwieldy, pervasive federal government that we find it hard to imagine things being different. To truly appreciate a time before the modern state, we’d have to go back to before the Progressive Era and the New Deal.

All the same, were things different—less overregulated, overlawyered, and full of militarized, forfeiture-happy cops—in the America you grew up in? At the very least, was the culture less politicized? Since then, have we gone further astray? Alternatively, do we find it too easy to idealize the recent past? Have things always been like this?

A. Well this should be fun! Who doesn’t like talking about himself? And it’s a lot cheaper than talking to a shrink—and probably just as rewarding, if not more so. So thanks for the invitation.

Let’s start with a couple of corrections. I wasn’t raised in a village (nor did it take one to raise me!) but grew up instead in the country, five miles north of the little village of Galway, NY (pop. 150 or so); and yes, across from a beaver pond, north of which it was all wooded hills into the Adirondacks—it was rural. Thus, contra Q2 below, it was as a kid that I trapped muskrats and beaver and sold the pelts, fished and hunted, went to one-room schools from K-4, rode my bike everywhere from age 7, and worked along with the owner in a general store up the road for 50 cents an hour.

Summers before my junior and senior years in high school and after my first year of college I worked as a milkman. It was a two-man operation: The farm’s owner and I pasteurized and bottled milk three days a week and delivered milk on our separate routes the other three days, to campers around Sacandaga Reservoir. And on Saturdays when I returned from my milk route I often played for round and square dances with my band—guitar, bass, vocal, and I called square dances. Those are a few of the things I did as a kid.

Now to your questions: Things *were* different then, and it isn't simply that you see more and see things differently as an adult, looking back, than as a kid. Sure, the '40s and '50s had their politics—but not the “politicization” of almost everything, like today. Just look at tapes of TV shows from that time, especially of comedians. And songs were mostly about *love*—imagine that! I could write a whole book about the differences, so let me just say this.

Setting aside the civil rights struggles that were coming to the surface in places in the '50s—no small matter—if you grew up where I did or in many other parts of America, the post-War focus of most people was simply on living life—on work, family, experiencing life's many events and stages. Most people weren't out trying to change the world through political action. There was no 24/7 news!

That would change, starting mainly in the mid-'60s, but the seeds were sown earlier. To tick off just a few factors at play: prosperity; TV; the emergence of a large youth culture with music separate from adult music; attacks on corporate culture; the sexual revolution, including *Playboy* and the pill; Sputnik and the explosion of the college population; President Kennedy asking what you can do for your country; the civil rights movement; Vietnam; and '60s radicals moving into the institutions—the academy, the media, the foundations, the mainline churches, and of course government. Those factors and more precipitated a cultural revolution, some of it good, some not so good like the politicization of nearly everything.

Q. You graduated high school in or around 1960, but you didn't complete undergrad until 1971. During the eight years or so you weren't enrolled in an academic program, you worked a truly astonishing number of jobs. The full list is too long to reproduce here; you did everything from trapping beaver and muskrat (including in your family's pond?) to selling milk, cigars and aluminum siding to working at a ski resort to, of all things, professional gambling.

Why'd you put off college? Where'd that incredible appetite for hard work come from? Could today's slacktivists, 23-year-olds who find it tough to sign a Change.org petition, hope to match a record like that? Do you ever regret giving up betting on the ponies at Belmont? (What made you pick that job, anyway? Was it as fun as it sounds?)

And because we never shy away from trite questions here at Fault Lines: did your upbringing and early adulthood help mold your libertarian views? Was Roger Pilon, the free-market philosopher, born out of Roger Pilon, the guy who used to strip fuzzy animals of their pelts for cash on the barrelhead?

A. Again, a few facts, in barest summary: I started as an engineering major at Syracuse University in 1960, but three weeks in I realized that I didn't really want to be an engineer, so I switched to music and finished the year, but still didn't know what I wanted “to be.”

Truth to tell, although I was salutatorian of my high school class, my rural upbringing didn't really prepare me for the bigger world: I had no idea, for example, what a liberal arts major was or “did” with that degree. I thought of college as something like a trade

school. So I decided to drop out for a year or two to figure out what I wanted to be. It turned out to be seven years! And during that time I moved from across the beaver pond to Schenectady, Albany, Long Island, and eventually, after traveling through Europe, New York. But first I joined a “city” rock band (playing mostly in bars and fraternity houses, no square dances) while working briefly as an aluminum siding salesman, much longer as an insurance salesman, and finally as a cigar sales supervisor (long story), and a professional gambler (the ponies—till my luck went bad!). But all this time I was also an autodidact, and there’s a clue for what I take to be your main question.

That was a great seven-year stretch after Syracuse, starting at age 18. Between carousing with the guys (and girls)—from bars to ski slopes, beaches, and more—my intellectual odyssey went from Dostoyevsky to Bill Buckley’s *National Review* and “Firing Line,” Barry Goldwater, Ayn Rand, Milton Friedman, philosophical tracts of various kinds, and more. During that time (1961-68) the world was changing, of course, and so was I, though not entirely with it.

So to your question: My upbringing and early adulthood did help to mold my libertarian views, for sure, although “nature” was doubtless at play too. I recall talking to Clarence Thomas about this back in 1993: We both remembered, as seven-year-olds, hating bullies. Although I was a wiry little wrestler then, that’s a mark of a libertarian—a live-and-let-live concern for justice.

Then too, earning money from an early age gives one a sense both of responsibility and of what’s possible. Is that still possible, you ask? Sure, but there are many more impediments today: child labor and minimum wage laws, organizational structures including increasingly inflexible career paths, and paternalism generally, including helicopter parenting. I was mercifully free from and even oblivious to much of that. Maybe it’s growing up in the country; but it’s also growing up in a less structured culture.

Q. You got a BA in philosophy at Columbia University’s School of General Studies. It’s not exactly the most hands-on discipline, giving rise to the question of why you traded that rock-‘n’-roll life of yours for a life of contemplation. What was the plan? Were you always going to be a libertarian tastemaker and legal scholar of renown? Back then, was getting a JD on your radar?

You worked as a taxi driver to put yourself through undergrad. What car did you drive? Got any stories from your time on the mean streets of John Lindsay’s NYC? And did an 18-year-old Tom Friedman ever get in your cab and engage you in a conversation that changed your life?

A. Basically you’re asking about how I decided to go straight and become a philosopher and, eventually, a lawyer. *Very* briefly: For some time I had toyed with going back to college. (Remember, in the ’50s most people didn’t go to college, especially those who grew up where I did; that changed over the ’60s.) You ask what car I drove: At 19 I was a good insurance salesman; at 20 I was driving a brand new T-Bird convertible; at 22 a Jaguar XKE! Give up all that, and the life that went with it, just to go to college?

In any event, the thought never left me. Still, a while after I got back from Europe I went down to Wall Street to see about getting a job there. At one firm I took an exam, after

which the guy I was interviewing with looked at the results and said: “Why don’t you go back to college? Go up to Columbia.” Well I did, even though I was thinking, “How’s a country bumpkin like me ever going to get into a school like Columbia?”

So I walked onto the Columbia campus and asked the first student I saw where the admissions office was. Fortunately, he pointed me to the School of General Studies (GS). Little did I know that Columbia had three undergraduate colleges: Columbia College, for men straight out of high school; Barnard, for women; and GS, where at the time you had to be at least 21 to apply—it was mostly for returning students. (With today’s anti-discrimination law, that’s all changed.) I talked to a GS admissions officer, took an entrance exam, arranged for my Syracuse transcript to be sent—and lo and behold, I was admitted! And it turned out to be the perfect place for me: The average age of students was 24; the variety of backgrounds was vast; and the education I got over the next three years was excellent—in philosophy, in fact, it was the same faculty as in the college, and the classes usually included both the kids in the college and the older GS students.

Why philosophy? Over those seven years I had grown increasingly politically aware and increasingly disenchanted with the way I saw things going. Ironically, I walked on to a quiet Columbia campus for the first time on the morning of April 23, 1968. That afternoon, all hell broke loose as Mark Rudd and the Students for a Democratic Society took over the president’s office, which they held and trashed until the NYC police drove them out two weeks later.

Thus, “the plan,” as you ask, formed gradually toward the end of that seven-year hiatus, was to become a philosophy professor so that I might be among those “standing athwart history yelling ‘Stop!’” as Buckley had so colorfully put it. My values, and those of SDS, were miles apart, and I saw it essentially as a matter of fundamentally different philosophies—one right, the other misguided, and deeply so. By that point in my odyssey I was well settled and fairly well versed in the then-young conservative-libertarian movement.

When I started classes that summer, like others at GS I was a serious student. I did well, despite driving a taxi nights and weekends during my time at Columbia, and soon received scholarship assistance. And when the campus erupted again in 1970, I prevailed upon my professors to hold classes in their apartments and to give us real grades, not just pass/fail, and they did. I also started a weekly column in the *Columbia Owl* titled “From the Right Side,” and organized a group of like-minded students as columnists. You ask if I have cab-driving stories. Is the Pope Catholic? Some other time. The law degree? That came much later.

Q. You went on to the University of Chicago, where you picked up a master’s and doctorate in philosophy and met your wife, the philosopher and political analyst Juliana Geran Pilon. What attracted you to Chicago? With whom did you study? Who influenced your views at this time?

Getting a doctorate generally means committing to academia for the long haul. Was that true of you? Were you going to shape politics with an academic’s tools, as many law profs attempt to do, or retreat into your study and never come out?

Colleges are notorious for their hostility to conservative and libertarian thought, and non-progressive professors are still a rarity. Back in the '70s, did you encounter hostility from faculty, your supervisors or your peers for your views? Were you denied career opportunities, something many libertarian law profs say happened to them? And is that hostility present in the kids you now teach? Has libertarianism made headway among young people, or are progressives still winning the fight for “hearts and minds?” What’s to be done?

A. Lots of questions there; a few answers here. I worked my way through graduate school too, not in a cab but selling Great Books of the Western World and, later, the new 15th edition of the Encyclopaedia Britannica. Given my ideas, Chicago was a natural choice—the home of the Chicago School in economics, for example. Much as I learned at Columbia, I learned even more at Chicago.

Barely had I arrived when I told the man who would become my dissertation director, Alan Gewirth, that I wanted to write my dissertation on the theory of rights. He and my second reader, Alan Donagan, were just then beginning their seminal work in moral philosophy, so the timing was perfect. And my third reader was Milton Friedman—talk about a dream team!

Finally, Richard Epstein arrived at Chicago a year later, just as he was beginning his important work on the law of torts. I met him shortly after he arrived when he came across the Midway to give a talk to graduate students in the philosophy department. Thereafter we often discussed legal issues. In fact, in 1976 I reviewed his four strict liability articles for *Law & Liberty*, a publication of the Institute for Humane Studies (IHS), placing them in a Hayekian and Nozickian context. Those four members of the Chicago faculty most influenced my thinking and the dissertation that has informed my work ever since.

The other influence was my wife, Juliana, and not surprisingly it went both ways. An immigrant in 1962 from communist Romania, she needed no instruction about the virtues of freedom. But she did need to see how important it would be for her to reach beyond her intense study in “hard” philosophy—epistemology, metaphysics, logic, and the philosophy of science—to the moral and political side of the discipline, because she had an important story to tell during the ideological turmoil of the time—and I was only too happy to encourage her thus to add to her philosophical portfolio, work she’s done exceedingly well ever since. We met shortly after I arrived. The year before she had returned to Chicago, where she did her undergraduate degree, after a year of graduate work at Princeton. Thus did she too become part of the movement in which I had become increasingly involved—and we’ve stayed involved ever since. I lucked out in finding Juliana!

You ask about my (our) commitment to academia. We were indeed looking toward careers in academia: Chicago, after all, has a reputation for being the teacher of (college) teachers, but fate had other plans. When Juliana and I came on to the academic market in the mid-'70s, it had collapsed. To make a long story short, in nearly all disciplines there were hundreds of applicants for every job.

Anticipating this, fortunately, I had kept one foot in academia and the other in politics and the conservative-libertarian movement—and it was the latter that finally saved us. Thus, we were Hyde Park election judges in 1972. That year I also won a Richard M. Weaver Fellowship from the conservative Intercollegiate Studies Institute (ISI). We attended movement events and brought conservative and libertarian speakers to campus. In 1975, Juliana spoke about her recent trip back to Romania at the 15th annual convention of the Young Americans for Freedom (YAF), where we made contacts that would eventually bring us to Washington. In 1976 we were alternate delegates for Reagan at the Republican National Convention. And earlier that year I was “discovered” by IHS when I spoke up at the Philadelphia Society’s national meetings in Chicago, after which IHS put me on its speaking circuit.

But we continued trying to break into academia as well. Finally, one of our movement contacts resulted in a trek to California in January, 1977 where we split a position and a half for one semester as visitors in the philosophy department at California State University, Sonoma. While there, however, Juliana got an offer from Emory University, so it was back East to Atlanta, where I was able to persuade the dean of the law school to let me be a visiting professor. But those appointments lasted only two years, toward the end of which we were saved again by the movement when I was awarded a National Fellowship by Stanford’s Hoover Institution, so it was across the country once again, this time with our first child soon at hand.

We spent a year at Hoover, Juliana this time as the visitor, and the next year next door at IHS (then located in Menlo Park). And all this time we continued to publish and speak and to work the academic market, but all to no avail, because it remained overwhelmed with applicants, and because, in our case, ideology was the kiss of death. Indeed, the most glaring example involved the Georgetown philosophy department. A faculty committee had narrowed applicants in my field down to the 12 they interviewed at the December, 1978 APA meetings, and then narrowed that dozen down to one, me. But even before I flew up from Atlanta to meet the rest of the faculty, the department chairman called to say that ideology had raised its ugly head. A week after the visit he called again, despondent, to say that the faculty had voted closely to not even fill the opening. The main objection? The strong letter of recommendation in my dossier from Milton Friedman, he said—this was after Friedman had won the Nobel Prize! So it went elsewhere as well—too many stories to tell here.

You ask about the ideological situation today. At my Cato bio page I have a couple of recent speeches that go into detail on the subject. The problem varies by college and discipline, of course, but it’s still very much with us. Fortunately, it’s getting much more attention today than when we were coming along. But academic ideological discrimination goes far toward explaining the growth especially of conservative and libertarian think tanks, where Juliana and I have found productive homes. And our odyssey shows how important it was not to have put all of our eggs in one (academic) basket.

Q. After you received your doctorate in 1979, you went to work for the Institute for Humane Studies, a libertarian think tank in Menlo Park, CA. What were your responsibilities? Weren’t

you worried you'd get sunstroke? You continued to publish articles, but were you already politically active? Did you help with Ronald Reagan's presidential campaign?

In 1981, you signed on with the Reagan administration and left for Washington, where you became Special Assistant to the General Counsel at the U.S. Office of Personnel Management. Why the move from philosophy to politics? What were your new duties? And what did you want to accomplish? You didn't have a law degree yet; did that cause any problems? Were you determined to leave your mark on what turned out to be one of the most influential conservative presidencies of the 20th century?

A. I've already pretty much answered the first set of questions. Just two comments on those: First, in November, 1976 I defended my dissertation, even though I had one more chapter to add, because Professor Donagan was on sabbatical that year but would be returning to Chicago for a few days just then, so we all wanted to take advantage of that for the defense. But as noted above, soon thereafter Juliana and I got the offer from Cal State, and it was followed by an itinerant existence filled with other writing and speaking opportunities, none of which could be declined in that dreadful academic market; so that final chapter never did get written until the summer of 1979, after which the degree was awarded. Second, apart from the 1976 convention, we did not work in the Reagan campaign, but as noted above, we were very active in its intellectual arm.

Turning to the second set of questions, back in 1975 Juliana and I met University of Maryland Professor Don Devine at that YAF convention where Juliana was speaking, and a year later he invited us to an IHS/Liberty Fund conference he had organized at Maryland. Then we ran into Don again in 1978, when Reagan came to Atlanta with his campaign operation.

So given the dismal academic situation, when I saw, shortly after the 1980 election, that Don was heading up the OPM transition team, I wrote to see about a job. Months later, after he'd been confirmed as OPM director, we met again, and shortly thereafter he offered me a job, first as his special assistant, then as special assistant to the general counsel, and finally as a professor at the Federal Executive Institute (FEI). So the short answer to the question of why I moved from philosophy to politics is, with a family at hand, I needed a job. OPM was far from an exact fit: It oversees the civil service, covering everything from personnel rules to federal retirement, federal health benefits, training, and more. That last was closest to my interests; hence the FEI stint.

But given the still uncertain career future, and the two years of law school teaching I had under my belt, plus that most of my publishing, speaking, and conference work was in law, I thought it wise to pick up a law degree. So at age 40 I began that, at night, just up the street from OPM at George Washington. It was a grind, for sure, but an interesting one. I lectured in two of the courses I took. And for one of my seminar papers I used a speech I gave at a 1987 ABA convention Bicentennial Showcase Program on economic liberties and the judiciary. (The balance of your questions is best answered at Q6.)

Q. You rose rapidly through the ranks of the federal government. From your start at the Office of Personnel Management, you joined the State Department, where you served as director of policy

for the Bureau of Human Rights and Humanitarian Affairs. Ed Meese then brought you to Justice, where you became director of the Asylum Policy and Review Unit.

Refugees and asylum seekers are obviously a trendy subject. Even back in the '80s they were rarely far from the news. For example, during your tenure in '87, Reagan led a controversial push to have asylum officers hear cases instead of immigration judges. (He was ultimately partly successful: for the most part, USCIS asylum officers are now the first people to hear cases, though judges remain involved.)

What was your position on this at the time? And now? More broadly, you're a proponent of American individualism, a position that's often maligned as "American exceptionalism." How easily is that learned? Do immigrants, refugees, asylum seekers need time to acclimate to the American way of life? Can one truly learn the principles of self-reliance and personal responsibility by taking part in modern American society, with the state involved in everything? And without a philosophical commitment to the small-government values of the Founders, will the people who wish to become Americans want to rein in the growth and intrusiveness of the state?

A. State, especially at HR, was a better fit than OPM, especially since my focus there was on Cuba and Eastern Europe, including the Soviet Union. In early 1987, for example, I was an advisor to the head of the U.S. delegation to the U.N. Human Rights Conference in Geneva where the U.S. introduced, for the first time, a resolution condemning Cuba's human rights record, based on a report I had organized. In that capacity I got to see U.N. corruption up close. One of the things I tried to do during my stint at HR was dispel the conventional idea that, when it came to human rights, economic liberty was less important than political and civil liberty, which in the world of European (and American) socialists was anathema.

But your questions focus more on the political asylum issue, so let me turn to that. As you say, Ed Meese brought me over to Justice from State to head up a new Asylum Policy and Review Unit he was creating to oversee the Immigration and Naturalization Service on asylum policy and check its denials of asylum in particular cases, which I did.

The origins of the office are worth noting. In 1985, when a Ukrainian sailor named Miroslav Medvid jumped off a Soviet ship into the Mississippi River and swam to shore, not once but twice, seeking political asylum, the INS sent him back both times. Hearing about this, President Reagan was furious, so he ordered Meese to set up the office. In addition to reviewing particular cases, we also were charged with writing new asylum regulations that included hearings before asylum officers, which I supported and still do, and we did that too.

Your final questions can be answered only "in general." Obviously, some immigrants, refugees, and asylum seekers need more time than others to acclimate to the American way of life. As for learning the principles of self-reliance and personal responsibility by taking part in modern American society, I submit that the record shows that immigrants, on the whole, understand and practice those principles better than many native-born Americans—but I grant that the modern welfare state undercuts both that finding and our

traditional openness to immigration (not to be confused with open borders). Finally, if those who wish to become Americans do not share a philosophical commitment to the small-government values of the Founders, not only are they not likely to want to rein in the growth and intrusiveness of the state, but they're likely to demand even more government growth and intrusiveness.

The issue here is fundamental: Can a nation accept, as immigrants, people whose principles are diametrically opposed to their own? That question has a wide variety of applications around the world today. But in America, we've been able to avoid it to a large extent because our motto, *e pluribus unum*, presupposes a limited government, which allows for pluralism in many areas. Because government is a monopoly, however, the more of life it takes over, the more it will impose its single standard in everything from retirement to health care, education, economic affairs, and, as in many countries, even news and religion—and we see how pluralism fares there. But this issue goes well beyond the acceptance of immigrants. Lincoln was right when he said that a house divided cannot stand. In America today we are deeply divided, mainly over the size and scope of government. One side subscribes to the limited government views of the Founders, the other does not. And so our \$20 trillion debt and our vastly greater unfunded liabilities do not get addressed. This cannot go on.

Now to the leftover Q5 questions: What did I want to accomplish when I joined the Reagan administration? Like many other movement people, including many in the Republican Party who also served in the administration, I saw Reagan's victory as the triumph of a long uphill struggle against the forces of Progressivism that had dominated the 20th century. But like all new political appointees, especially movement people, I came soon to see that turning electoral victory into policy change is yet another uphill struggle, and an exceedingly difficult one. The law degree wasn't the issue. The battleship of state was, for it turns very slowly, when it turns at all.

However determined one may be to leave one's mark, the institutional inertia in Washington is huge. That's partly built into the Constitution, but the larger part has been built on top of the Constitution over the 20th century, unconstitutionally. And that's the part on which I've focused most of my work since I left the administration.

Q. In 1989, a year after you left the Justice Department with a brand-new law degree from GWU, you signed on with Cato to found the legendary Center for Constitutional Studies. What made you decide Cato was the right home for this project? Whom did you know there? How was it funded? Who were your first hires? Was CCS an instant hit, or did it take some time for you to find your footing after eight years in government?

A. For a fuller answer, see my essay "[On the Origins of the Modern Libertarian Legal Movement](#)," 16 Chap. L. Rev. 255 (2013) (the introduction to the review's symposium on the movement) and Damon Root's excellent *Overruled: The Long War for Control of the Supreme Court* (2014). Cato was not simply the right but the *only* home for this project, the aim of which was to work toward restoring the Madisonian vision of liberty through constitutionally limited government, secured ultimately by courts serving as "an impenetrable bulwark against every assumption of power in the Legislative or

Executive.” To put that project in context, here’s a brief and very incomplete history of the run-up to the center’s creation in early 1989.

In the mid- to late-’70s, University of San Diego Professor Bernard Siegan and I were almost the only ones urging the Court to chart a principled course between the dominant liberals’ judicial activism and the emerging conservatives’ judicial restraint, especially regarding economic liberties. That view was central to an IHS/Liberty Fund philosophy and law conference on the theory of rights that I put together in 1979, the proceedings from which appeared that year in a symposium issue of the *Georgia Law Review*.

In 1981 I and an aide to Charles Koch helped put together a philosophy of law program for the spring meetings of the Philadelphia Society; my speech from that program, focusing on this view of the judicial role, was then published in ISI’s *Intercollegiate Review*. And in other articles, speeches, and conferences before and after I continued to press the argument. In fact, in 1983, on a paper napkin at lunch with Cato president Ed Crane and *Cato Journal* editor Jim Dorn, I sketched out the program for an all-day Cato conference on economic liberties and the judiciary, which Cato ran the next year.

Bernie and I spoke at the conference, but the lead-off debate between then-Judge Antonin Scalia and Richard Epstein was the scintillating introduction of these ideas to Reagan’s Washington, and so we were off and running at last in the nation’s capital. Those proceedings were published in 1985 in the *Cato Journal* and again two years later in a book with a foreword by Judge Alex Kozinski. In 1986, Cato published Steven Macedo’s *The New Right v. the Constitution*. A year later, when I was at State, I gave one of Cato’s “distinguished lectures” on “Human Rights and Politico-Economic Systems.” And that same year the Federalist Society, still young, held a George Mason University Law School conference on “Constitutional Protections of Economic Liberty” at which I spoke. Finally, that 1987 ABA speech I mentioned at A5 (Bernie spoke in that program too) was published in 1988 in *The Freeman*, which then submitted it to the Bicentennial Commission, and that led to the commission’s Benjamin Franklin Award, presented to me in 1989 by the commission’s president, former Chief Justice Warren Burger. Again, that is just a brief summary of this growing movement.

But even though this “third way” between or, perhaps better, “above” Brennan “activism” and Borkian “restraint” had been building for nearly a decade and a half, the movement was still hit-and-miss: It lacked an institutional center to focus, refine, and promote the vision more broadly and systematically. You ask why it was located at Cato: Because Cato, as just outlined, had been receptive to this basically libertarian approach to the role of the courts under the Constitution. Liberal think tanks generally supported judicial activism; conservative think tanks like the Heritage Foundation and the American Enterprise Institute, the home then of Judge Bork, were in the judicial restraint camp at that time.

So in early January, 1988, with the Reagan administration’s end in the offing, I met over lunch with Cato’s executive vice president, David Boaz, and outlined what I had in mind. Then in September, I discussed my ideas more fully with Ed Crane. He asked me to draft a proposal. I did—an 18-page, single-spaced plan for a center for constitutional studies

and another 18-page draft listing 60-some proposed studies. Ed took the proposal to Cato's board. I joined Cato in mid-October. And after securing initial funding from board members, other individuals, and foundations, we announced the creation of the center early in 1989.

In truth, the "center" has always remained small. The first year it was just me and a summer intern—that first summer, University of Pittsburgh law student Scott Bullock, now the president of one of our sister organizations in the movement, the Institute for Justice. In the second year I hired Tim Lynch, fresh out of Marquette Law School, who would go on to create and head up Cato's Project on Criminal Justice. And to this day we remain relatively small: my staff includes only three senior fellows, an administrative/research assistant, four one-year legal associates just out of law school, and a couple of seasonal interns.

We are structured as we are because our main function, in addition to our own work, is to help "orchestrate" the work of others by commissioning and promoting that work. Thus, we've published books, monographs, and op-eds of our own and outside scholars; held forums and conferences; done radio and TV; testified in Congress and in state forums; taught courses; given speeches around the world, but especially at law schools; developed a highly regarded amicus brief program, directed by my right-hand man for nearly a decade, Ilya Shapiro; and to cover the Court's October '01 Term, we published our first *Cato Supreme Court Review*, released at our first Constitution Day Symposium in September, 2002, both of which saw their 15th anniversary last September. As SCOTUSblog founder Tom Goldstein wrote of the review, "Unquestionably, the definitive volume on the Supreme Court's term." And we release it just two and a half months after the term ends!

Q. During the '90s, you and CCS were at the forefront of the fight against civil asset forfeiture. In many ways that body of law—which then as now authorizes a) on-the-spot seizures of people's property without charging them with a crime and b) puts the property itself on trial while relegating the owner to the status of a third-party claimant—was even worse in the '90s than the post-CAFRA mess that bedevils us today.

You were one of a very few people not only to speak out publicly and repeatedly against the menace of forfeiture law, but to attack the absurdity of its philosophical underpinnings. In 1996 you testified before Henry Hyde's civil asset forfeiture reform commission, where you argued that his reform bill, H.R. 1916, didn't go far enough because it didn't abolish the "personification doctrine"—the absurd, literally medieval idea the government uses to justify accusing inanimate objects of wrongdoing.

So CAFRA, the government's finished reform product, must've been something of a disappointment. Though it got rid of some of the worst inequities in forfeiture law, the personification doctrine remained in place. For that matter, most of Hyde's original good intentions were watered down by Chuck Schumer, Eric Holder and our new AG, Jeff Sessions, and replaced with new, law-enforcement-friendly provisions.

What lessons can those of us who oppose civil asset forfeiture today learn from the battles you fought two decades ago? Are we to take heart from the partial success of those reform efforts? And is there any hope that things will improve in the near future?

A. Thank you for noticing that work—and for appreciating the frustration that those of us who were in those trenches must feel. You’ve captured well the issues and the struggle. Rep. Hyde was a great man, and we were honored to work closely with him to get such reform as we were able to get. But he and we were up against the law enforcement community and, more fundamentally, the endless and mindless war on drugs, which animates our modern civil asset forfeiture law.

So what lessons are to be taken from our previous efforts? You take what you can and live to fight another day. And the fight *does* continue. Our friends at the aforementioned Institute for Justice are today leading it on the ground, with studies and a well-developed litigation strategy, even as we continue to develop the philosophical foundations for that effort that you’ve noted. I take hope, in particular, from the successes of the marijuana reform movement at the state level, which are only growing. And I look forward to the day when we finally learn the lessons of Prohibition and start treating drugs like we treat alcohol and tobacco. But if history is to be our guide, it will be a slow slog because the perverse incentives built into modern forfeiture law are against us, so that is probably what we should direct our attention toward reforming first.

Q. You’ve built CCS into an organization that produces some of the best *amicus* briefs, legal scholarship, and commentary out there. (It’s certainly very successful—the Supreme Court keeps siding with you!) How’d you do it? How do you select the cases for which you submit briefs? What do you do to find scholars and scholarship worth supporting, and what form does that support take?

From the outside looking in, Cato doesn’t seem to impose particularly rigid ideological guidelines, and the think tank as a whole produces commentary on any number of issues. How important is it for you, as director of CCS, to keep the intellectuals and iconoclasts pulling in the same direction?

For that matter, there’s a stereotype, however unfair, that some libertarians don’t play well with people who don’t share their views in every particular. Is Cato’s flexibility and openness the key to its success in shaping public policy? Is that a model other groups could replicate?

A. Yes, I’m proud of what the center has accomplished. I believe it’s fair to say that over our 28 years we’ve played a significant role in changing the debate, especially regarding the fundamental concern that has animated everything else—to encourage judges to be more engaged than many conservatives believed proper, and to locate the authority for that engagement in the Constitution itself, properly understood. It is fair to say, that is, that among conservatives, and even among not a few liberals, the debate today is much different than it was three and four decades ago: it has swung in our direction, not entirely, but noticeably.

How did we and others working with us do it? By doing it together, as just said. But first you have to have a vision of what you stand for and where you're going. And that starts, in this case, with plumbing and understanding the philosophical foundations of the Constitution—as informed by the *Declaration of Independence*. That's precisely where earlier conservatives fell short. Reacting to what they perceived, often rightly, as liberal judicial activism, and informed by books like Alexander Bickel's *The Least Dangerous Branch*, Bork, Scalia, and other conservatives disparaged the Declaration as “philosophizing” for fear that repairing to it would encourage judicial mischief. Yet without that philosophical foundation, judges are adrift when the constitutional text is insufficient, at which point they are encouraged to defer to the political branches, the very thing the Constitution was written to guard against. Ironically, “restraint” becomes thus another form of “activism.”

Thus informed with this vision, we have sought like-minded souls—in the academy, on the bench, in other think tanks and organizations, among litigators, and elsewhere—and we have worked closely with them, commissioning writings, offering them forums in which to speak, and promoting their work. We have worked especially with the ever-growing Federalist Society, which for 35 years has served as a welcoming forum for discussing legal principles and ideas. And when we launched our *amicus* program, we looked for cases that might secure the principles that animated us and, when not written in-house, for lawyers who might best inform the Court in ways the litigants themselves might not.

Your questions regarding how Cato is seen from the outside and how it is governed internally regarding “ideological guidelines” are, shall we say, interesting. Let me say just this: It is true, as you surmise, that there are libertarians who don't play well with people who don't share their views in every particular—or, as I have been heard to say, many libertarians belong to congregations of one. But when you're running an organization like Cato or working there you have to address that problem in a prudent way, which means that only *general* guidelines will do.

We do have our differences within the building, to be sure, and on many issues: On foreign policy, in particular, there are differences among libertarians, as is well known, and on legal issues as well, such as intellectual property and immigration. Libertarians often have trouble with second-best solutions; yet once you come out of a pristine Lockean state of nature you're in a second best world, so you have to deal with the real world or you'll end up talking only to each other, if that!

But we're not anarchists—at least most of us aren't. And we're not the Libertarian Party either. My taste is for a broader, more ecumenical libertarianism; but at the same time we can't water the “brand” down to the point that it stands for little. A related issue is quality, and on that, as director of the center, I'm a stickler. We've worked hard to establish the center's reputation. I don't want to see it compromised either by work we do or by the work of others at Cato making legal arguments that redound to our detriment.

Q. You've been a law prof, senior appointee at the Justice Department, think tank leader, political and legal philosopher, a horse-race gambler, cab driver and a fur trapper. Really, the

only thing still missing is a judgeship. How about it? Aren't you eager to put that lifetime of knowledge to the test and dispense Solomonic justice? Alternatively, what about standing in the well and representing a client? Running for public office? Or are you content to look back over a lifetime of achievement and keep fighting the good fight at Cato? What's in your future?

A. No, no, and no! Goodness, late next November I'll be 75! It's been a great run, and I've been very fortunate, first in having the family I have, and second in having the career I've had. Obviously, I didn't plan it! Rather, to quote Tammany Hall's George Washington Plunkitt, it's simply that "I seen me opportunities, an I took 'em."

The biggest project before me at the moment—and it's a big one—is to finish the book I'm now part way through writing, tentatively titled, *Recovering the American Vision: Rights, Powers, and the Constitution*. As that title may suggest, it's my doctoral dissertation, made accessible for a wider audience, and informed by experience, especially by years in the law. That should be quite enough as I sail into my dotage, but I'm not there yet! Thanks for the opportunity to speak to your audience.