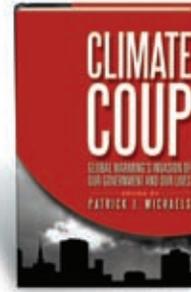




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Cato Policy Report

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The Right to Property in Global Human Rights Law

BY JACOB MCHANGAMA

“**E**veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.” So declares article 17 of the 1948 Universal Declaration of Human Rights. However, the right to property was seen as extremely controversial by several of the states that drafted the UDHR. The controversy reflected the ideological divide of the Cold War, between democratic and capitalist countries on one side, and non-democratic socialist states, as well as certain developing states, on the other.

Unfortunately, suspicions about private property as a fundamental human right survive to this day, to the detriment of the coherence of human rights as a guiding political concept, and of fundamental freedoms and prosperity.

The first draft of the UDHR, prepared by the Canadian lawyer (and socialist) John Humphrey, prioritized collective ownership over individual property rights and only referred to the right to “own personal property.” According to Humphrey’s draft, ownership of industrial, commercial, or other profit-making enterprises was to be governed by national law—and the state could

regulate the acquisition and use of private property. This wording was inspired and supported by communist and Latin American countries whose constitutions only protected personal property and left the state free to regulate the means of production. Later drafts—and the final version—accommodated Western objections. But whereas

Western states succeeded in obtaining a protection of private property in the legally non-binding UDHR, they failed in this endeavor when the General Assembly adopted the legally binding International Covenant on Civil and Political Rights in 1966.

A number of subsequent “core” interna-
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JACOB MCHANGAMA is the director of legal affairs at the Danish Center for Political Studies and external lecturer on international human-rights law at the University of Copenhagen.

More than 600 Cato Sponsors and friends turned out in Naples, Florida, in April to hear Florida governor **RICK SCOTT** summarize his plans for reforming government, reducing spending, and boosting the economy.



BY EDWARD H. CRANE

“The slogan of the totalitarians running the dystopia depicted in the dark, futuristic movie *Brazil*, was ‘We’re all in this together.’”

President’s Message Actually, We Are Not All in This Together

Having attended UC-Berkeley in the sixties, I have a certain nostalgia for the wacko hippie leftist crowd. I agreed with them on the Vietnam War back then, and not much else. So I’m always curious as to what today’s equivalent, MoveOn.org, is up to. A recent fundraising letter they sent to their members (trust me, I’m not one) included this statement: “As progressives, we share a core belief that we’re all in this together.”

It is a small victory, I suppose, that leftists feel compelled to refer to themselves as progressives these days. But MoveOn is certainly correct that the collectivist notion of “all in this together” is central to the leftist worldview. One is reminded that the slogan of the totalitarians running the dystopia depicted in the dark, futuristic movie *Brazil*, was “We’re all in this together.” Here is Robert Reich, noted progressive and professor of public policy at my old alma mater, advising President Obama on how he should respond to Republican Rep. Paul Ryan’s budget plan: “Obama must show America that the basic choice is between two fundamental views of this nation. Either we’re all in this together, or we’re a bunch of individuals who happen to live within these borders and are mainly on their own.”

Set aside the false dichotomy. The choice is hardly between in-this-together sheep and atomistic individuals. Tocqueville was astounded at the many ways Americans loved to work together. Granges, churches, business associations, volunteer fire departments—the list was pretty much endless. That said, these associations were voluntary and the government had nothing to do with them. If there is one thing that identifies American exceptionalism, it is a fierce individualism. Americans don’t like to be told what to do—especially by bureaucrats.

But that is what the left is all about. Hillary Clinton lamented to MSNBC during her failed presidential bid, “You know, when I ask people, ‘What do you think the goals of America are today?’ people don’t have any idea. We don’t know what we’re trying to achieve. And I think that in a life or in a country you’ve got to have some goals.” After all, “winning the future” is the Obama administration’s theme these days, and without

national “goals,” how can we tell if we’ve won or not? Indeed, President Obama took Prof. Reich’s advice during his speech on the deficit, citing “a belief that we are all connected; and that there are some things [many, as it turned out] we can only do together, as a nation.”

It has been duly noted by scholars that the two great totalitarian philosophies of the 20th century, communism and fascism, had similar methodologies and similar goals, so to speak. Certainly, denigrating the importance of the individual and subsuming his or her personal interests to the greater goals of the national movement were integral to both those horrific philosophies. Yet this underlying anti-individualist, collectivist theme continues—not just on the left—in today’s political environment.

Neoconservative superstar David Brooks wrote in the *New York Times* just this past March, “Citizenship, after all, is built on an awareness that we are not all that special but are, instead, enmeshed in a common enterprise. Our lives are given meaning by the service we supply to the nation. I wonder if Americans are unwilling to support the sacrifices that will be required to avert fiscal catastrophe in part because they are less conscious of themselves as components of a national project.”

And I wonder if it has ever dawned on Mr. Brooks that the “fiscal catastrophe” we Americans face is a direct result of national projects called Social Security, Medicare, and Medicaid. Oh yes, and the national project to make every American a homeowner. Not to put too fine a point on it, but there would be no \$20 trillion unfunded liability in Social Security had we allowed *individual* accounts. There would be huge surpluses. And limiting house purchases to *individuals who could afford them* would have avoided the multi-trillion-dollar disaster that national project created.

It’s enough to make you want to go out and see *Atlas Shrugged*. Again.

Collapse of the high-speed rail bubble

Randal O'Toole and Gridlock Save Taxpayers Billions

Cato senior fellow Randal O'Toole may have saved taxpayers billions of dollars.

O'Toole has long been recognized as a major voice in the debate surrounding American mobility. An opponent of top-down planning and publicly funded transit projects, he advocates market-based solutions to transportation that let Americans get around how they want, when they want.

In Tampa, whose transit agency was seeking voter approval for a light-rail project, O'Toole and transit expert Wendell Cox spoke to a Tea Party group in September. Local activists credit this meeting with firing up a campaign against the light-rail ballot measure that voters turned down in November. The momentum behind that campaign helped persuade Florida's new governor, Rick Scott, to kill Florida's high-speed rail plan in 2011.

Published reports credit Cato, the Reason Foundation, and the Heritage Foundation with doing the work that persuaded the governor to return \$2.5 billion of high-speed rail funds to the federal government. Since Florida was a linchpin of President Obama's \$500 billion high-speed rail plan, that action may save U.S. taxpayers hundreds of billions of dollars.

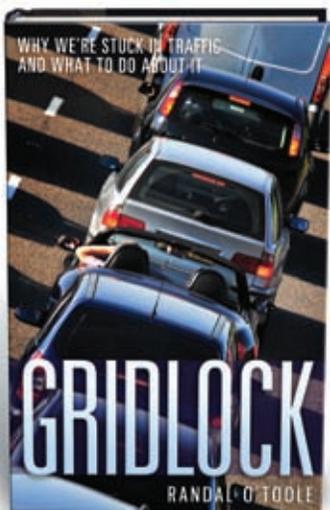
"Randal O'Toole is a very convincing fellow," the *Austin Chronicle* recently commented. "Spend about half an hour listening to him—as a packed dining room of Austin's movers and shakers did recently at the Headliners Club—and you may come away convinced that rail-based mass transit is about as desirable for a city as an earthquake, and possibly more expensive."

O'Toole also gave speeches in Madison and Milwaukee, and published a report on Ohio's rail project for the Buckeye Institute. Those efforts may have played a role in the decision by new governors Scott Walker and John Kasich to cancel expensive rail projects in their states.

When Cato published O'Toole's book, *Gridlock: Why We're Stuck in Traffic and What to Do about It*, O'Toole embarked on a 30-city tour of the country to promote the book and the ideas in it.

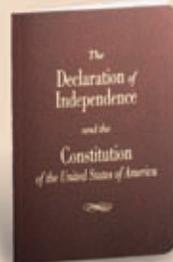
Speaking in cities that recently started or are considering commuter-rail service, including Albuquerque, Atlanta, Austin, Dallas, Denver, Madison, Milwaukee, Minneapolis, Nashville, Portland, and Raleigh, O'Toole pointed out that the capital cost of many of these commuter trains was more than \$1 million per daily round-trip rider. "It would be less

expensive, and better for the environment, to give every rider a brand-new Toyota Prius every year for the rest of their lives," he pointed out. His presentations provided ammunition to transportation activists in cities where they are working to stop new rail projects. ■



Cato News Notes

THE CONSTITUTION FINDS NEW AUDIENCES



The Cato Institute's Pocket Constitution will soon be available to a huge new audience. In a deal with CVS, the drug-store chain is stocking the Constitution by its cash registers in almost 700 stores, from Virginia to New York.

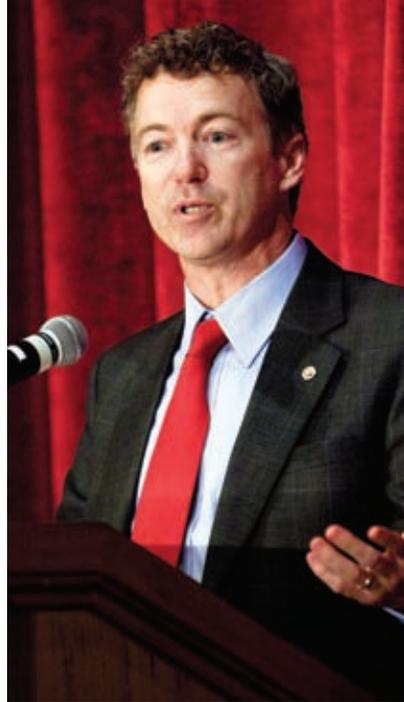
And reaching readers a little farther than New York, the Pocket Constitution, in Arabic translation, made it into the hands of judges from Iraq, Jordan, Saudi Arabia, and the West Bank when they were handed out by Josh Blackman during a talk at the State Department.

THERE'S STILL A CASE FOR GOLD

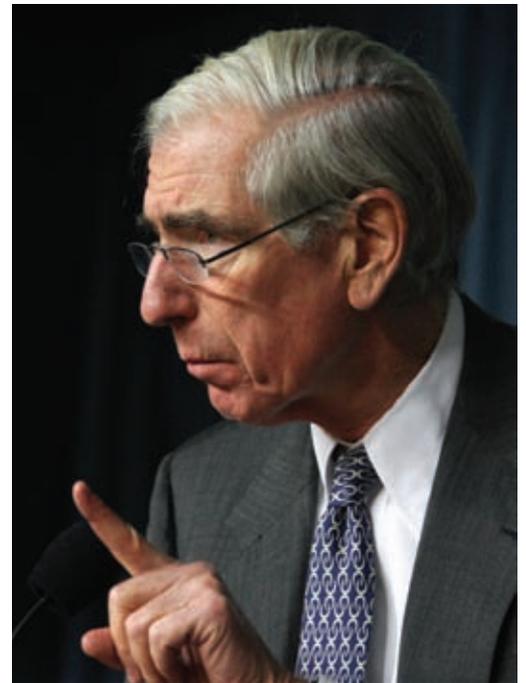
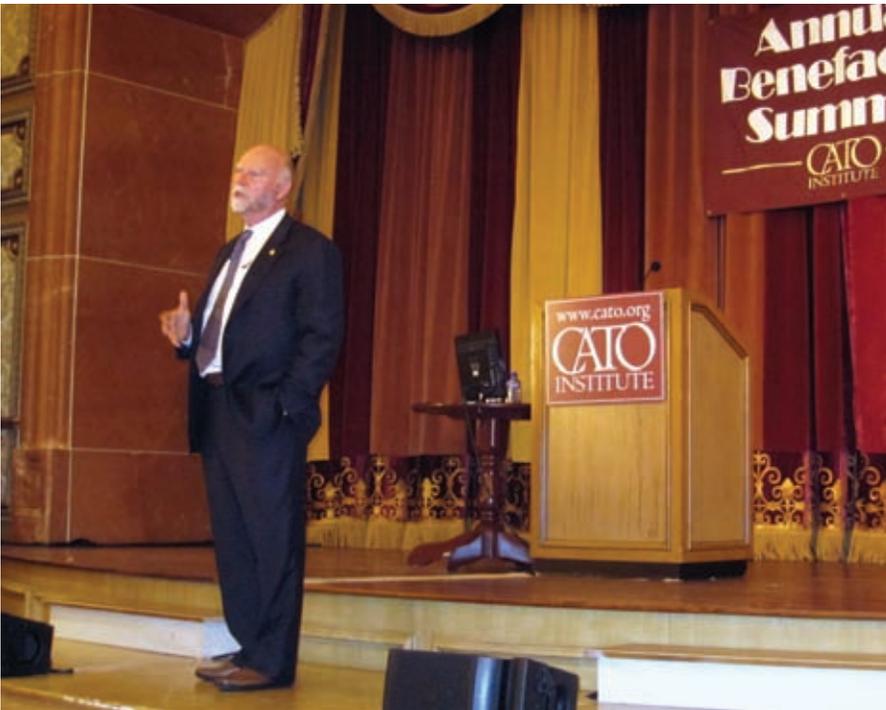
Rep. Ron Paul and Lewis Lehrman's classic, *The Case for Gold*, first published in 1982, is widely available again as a free e-book from the Cato Institute. Paul and Lehrman served on the U.S. Gold Commission in 1982, commissioned by Congress to evaluate the role of gold in the monetary system. They produced a landmark minority report. Published in book form by the Cato Institute that year, the report covers the history of gold in the United States, explains how the breakdown in its use as a financial standard was caused by government, and details the critical need for sound money—where prices reflect market realities, government stays in check, and people retain their freedom. Download *The Case for Gold* at www.cato.org/case-for-gold.

COPS WATCHING "COPS ON CAMERA"

New Haven, Connecticut, announced an important new police policy in March—and the Cato Institute played a featured role. With General Order 311, the city declared that citizens should no longer be arrested for using their cameras to record police actions in public. To train officers in this change, assistant chief Tobin Hensgen played "Cops on Camera." That video, a project of the Cato Institute, released in September 2010, already has over 100,000 views on YouTube. "If a citizen wants to exercise his First Amendment rights and photograph you while you're in a squad car and uniform or on detail while you're performing your duties, as long as they're legal, you have no expectation of privacy," Hensgen said. We couldn't have said it better ourselves.



Judge DOUGLAS H. GINSBURG of the United States Court of Appeals for the District of Columbia Circuit highlighted troubling trends in legal scholarship at a book forum in March. The event was held to discuss *Schools for Misrule: Legal Academia and an Overlawyered America*, with Judge Ginsburg's remarks following a talk by author and Cato Institute senior fellow Walter Olson.



In February, the Cato Institute hosted its 23rd Annual Benefactor Summit in beautiful Del Mar, California, with over 150 guests attending. JOHN AGLIALORO (above left), a Cato Club 200 member and producer of the new film *Atlas Shrugged*, introduced a sneak preview of the movie. Sen. RAND PAUL (R-KY) (above right) discussed the need to cut spending—and how difficult accomplishing that can be in the culture of Washington. Biologist CRAIG VENTER (above), who beat the National Institutes of Health in the race to sequence the human genome and created the first cell with a synthetic genome, talked about his research and biotech entrepreneurship.

Former White House counsel C. BOYDEN GRAY addressed the constitutionality of the Dodd-Frank financial regulation law at a Cato Policy Forum in February. Gray criticized the law for its “incredible vagueness and lack of oversight,” which “undermines or destroys separation of powers,” and predicted that the Supreme Court will eventually strike it down.

Former World Chess champion turned Russian reformer GARRY KASPAROV (left) chats with senior fellow ANDREI ILLARIONOV (middle) and IAN VÁSQUEZ, director of Cato's Center for Global Liberty and Prosperity, during a visit to the Cato Institute. Kasparov founded the Russian organization United Civil Front and ran for president in 2007.



More than 600 people filled the Ritz-Carlton in Naples, Florida, for a Cato city seminar, hearing talks from Florida governor Rick Scott and talk radio host Neal Boortz. The event proved so popular that the Cato Institute launched Cato Club Naples, an ongoing series of seminars, beginning in March. A second Cato Club Naples was held in April, and they will resume in November—and run through the winter months.

Continued from page 1

tional human rights conventions include clauses that prohibit discrimination on the basis of property or in relation to property based on a person's sex, race, religion, or similar categories. But none of these conventions include a free-standing right to private property.

Even the European Convention on Human Rights, adopted by Western liberal democracies in 1950, added the right to property (defined rather weakly as the peaceful enjoyment of possessions) only as an additional protocol. The ECHR affords some protection against expropriation, but it allows states a very wide "margin of appreciation." Both the American Convention on Human Rights and the African Charter on Human and Peoples' Rights protect private property, but as is the case with the ECHR, their protections against expropriation and regulatory takings are weak.

THE INTERPRETATION OF COURTS AND ACADEMICS

Despite the end of the Cold War and the collapse of socialism, much of mainstream human rights thinking is still skeptical of—if not outright hostile to—the notion of private property as a human right in its classical sense of protecting against expropriation and intrusive regulation. In fact, leading human rights scholars have reinterpreted the right to property to encompass an entitlement to be provided property by government through redistribution. The following quote is from the widely cited *Economic, Social and Cultural Rights: A Textbook*:

In order for the right to property to be fulfilled and for everyone to really enjoy the right to property, every individual should enjoy a certain minimum of property needed for living a life in dignity, including social security and social assistance.

The so-called positive obligation to fulfill the right to property was reiterated in a 2010 "Legal Opinion on the Right to Property from a Human Rights Perspective," authored by the Geneva Academy of International Humanitarian Law and Human Rights and

“Much of mainstream human rights thinking is still skeptical of—if not outright hostile to—the notion of private property as a human right.”

cited in a report from the UN Special Rapporteur on the Right to Food, as noted below. This line of argument is not limited to academics, but has also been internalized by human rights officials, organizations, and courts.

In a report from October 2010, the UN Special Rapporteur on the Right to Food asserted that the unequal distribution of land threatens the right to food. As a remedy, the Special Rapporteur proposed that states should encourage "communal ownership systems" rather than focus on "strengthening the rights of landowners" through a "Western concept of property rights." And according to the Special Rapporteur, realizing the right to food may also entail an obligation on the state to secure access to land "through redistributive programmes that may in turn result in restrictions on others' right to property."

The UN Committee on Economic, Social, and Cultural Rights has already criticized several states for privatizing land, housing, health care, and water—suggesting that such steps may lead to violations of the International Covenant on Economic, Social, and Cultural Rights, which, among others, seeks to protect the right to work, social security, and an adequate standard of living.

In a case from 2009, the European Court of Human Rights interpreted the right to property as including pre-retirement benefits (the Inter-American Court of Human Rights has adopted a comparable interpretation of the right to property in the American Convention). This prompted a scathing comment from the president of the Belgian Constitutional Court to the effect that the

judges in Strasbourg had achieved something that not even Karl Marx had been able to do. The European Court of Human Rights determined that full compensation based on market value would normally be required for expropriations to comply with the ECHR. However, compensations of less than the full market value may be sufficient if the taking of property pursues "measures of economic reform" or "social justice." These categories are obviously very broad and lack any meaningful definition, conferring a worrying degree of discretion on governments while diluting the protection of property owners from arbitrary, ideologically justified seizures.

THE FUNDAMENTAL IMPORTANCE OF THE RIGHT TO PROPERTY

This development is a stark indicator of how far the concept of human rights has traveled since the United States became the first country to be founded on the idea that all men possess inalienable rights.

The Virginia Declaration of Rights from 1776 (which inspired the U.S. Bill of Rights) declared property an inherent right of all men, and the right to property is protected by the Fifth Amendment to the U.S. Constitution. That the right to property was considered a precondition for individual rights is clear from James Madison's essay on property from 1792, in which he wrote:

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.

But the emphasis on property as an inalienable human right was not particular to the American Founders at the time. The (first) French Declaration of the Rights of Man from 1789 states that "property is an inviolable and sacred right." Most constitutions of European liberal democracies include bills of rights—often inspired by the American and French ones—that protect the right to private property.

“The Special Rapporteur on Food’s proposal to undermine private property rights for communal ownership is thus a recipe for both poverty and disaster.”

The American Founders and the early European proponents of liberal democracy understood that the legal protection of private property against arbitrary interference creates a sphere of inviolability that is necessary for the enjoyments of other freedoms—such as privacy and the freedoms of expression, association, and religion. Were all housing, media outlets, organizations, and religious institutions state-owned, the government would be able to control most parts of its citizens’ lives, direct their productive capacities, and quell dissent.

This classical understanding of the right to property primarily entails a “negative” obligation that protects against arbitrary expropriation and regulation of private property. To the extent that the classical understanding of the right to property includes a positive obligation, it is limited to adopting the appropriate legal framework and protecting against the transgressions of third parties. The right to property provides opportunities and agency, but it does not guarantee results. It does not include a positive obligation to “fulfill” the right to property through the compulsory transfer of property from one individual to another. Such a human-rights obligation would make the protective sphere of the right to property largely illusory and would undermine, rather than strengthen, human dignity. Moreover, a positive duty to fulfill the right to property would make the application of this right wholly arbitrary and incompatible with the requirements of legal clarity and foreseeability on which respect for the rule of law depends.

THE POSITIVE EFFECTS OF PRIVATE PROPERTY ARE WELL DOCUMENTED

The hostile approach to private property among human-rights defenders is a major hindrance toward securing respect for the fundamental rights and freedoms set out in the UDHR and the ICCPR, as well as for ameliorating poverty. The intimate relationship between the right to property and freedom and prosperity is well supported by various studies. All but one of the countries ranked in the top 10 of the 2010 International Property Rights Index also rank as

“free” (with the best possible score) in Freedom House’s 2010 “Freedom of the World” survey of civil and political freedom. Conversely, of the countries ranked in the bottom 10 of the IPRI, none rank as “free.” Seven are ranked as “partly free” (including countries with widespread human-rights violations such as Venezuela, Bolivia, and Bangladesh). And three are ranked as “not free” (Zimbabwe, Chad, and Cote D’Ivoire). All the countries in the top 10 of the IPRI are developed countries with a high GDP per capita. On average, countries in the top quintile of the IPRI enjoy a per capita income eight times higher than the countries in the bottom quintile of the IPRI. The link between poverty and the absence or insufficient protection of property rights is also made clear in the World Bank’s 2009 Country Performance and Institutional Assessments. Of the more than 70 developing countries surveyed in 2009, only five had property rights and rule-based governance scores of 4, and none scored higher (where 1 equals the lowest score and 6 equals the highest score).

History provides many stark lessons on the importance of respecting private property and the potential disasters that follow from the systematic violation of this right. In apartheid South Africa, the right to property of millions of blacks was systematically violated through forced relocations intended to ensure white rule. The forced collectivization of land in the Soviet Union in the 1930s and in China during the Great Leap Forward of 1958–61 resulted in famines claiming millions of lives.

UNDERMINING THE RIGHT TO PRIVATE PROPERTY AS A RECIPE FOR DISASTER

The Special Rapporteur on Food’s proposal to undermine private property rights for communal ownership is thus a recipe for both poverty and disaster. When the government becomes responsible for producing and distributing food, the result is not only less efficient production and distribution, but also a potentially lethal concentration of power over the lives of the many in the hands of the few. The government’s monopoly on food may thus become a weapon that can be deployed against recalcitrant parts of the population—as has been the case in Bashir’s Sudan, in Mugabe’s Zimbabwe, and in North Korea during the famine in the 1990s (which may have caused millions of deaths). Dictators and their cronies rarely starve.

In market economies with well-defined property rights, very few depend on the government for satisfying their basic needs, such as nutrition. Food is provided by private actors operating in the market who offer choice, quality, and affordability that would have been unimaginable in the old socialist countries where citizens had to queue in order to get the most basic foods.

The conflict between economic, social, and cultural rights (ESC rights) and respect for private property can also be demonstrated with more recent examples. In 1999, Venezuela adopted a new constitution committed to “social justice,” which includes a wide range of (justiciable) ESC rights that require government interference with property rights. Under Venezuela’s constitution, the widespread and arbitrary nationalization of supermarket chains, telecommunications, electricity, oil companies, and land ownership carried out by the Chávez administration is thus in conformity with the underlying principles of ESC rights, rather than a violation of property rights. Moreover, the continuous concentration of power in the executive, including the right to rule by decree, has eroded the freedom of Venezuelans, including the freedom of expression: media are required to air pro-government speeches and those critical of the gov-

ernment risk losing their licenses.

The situation in Venezuela is approaching the eerie scenario envisaged by an expert working group of UNESCO when debating how to realize the ESC rights proclaimed in the UDHR:

If the new declaration of the rights of man is to include provision for social services, for maintenance in childhood, in old age, in incapacity or in unemployment, it becomes clear that *no society can guarantee the enjoyment of such rights unless it in turn has the right to call upon and direct the productive capacities of the individuals enjoying them.*

The danger of letting the state be solely responsible for achieving ESC rights was not lost on a majority of the Commission on Human Rights when they drafted what would become the ICESCR. In 1951, a minority proposed that the responsibility for achieving the rights in the ICESCR should rest solely with the state. This was rejected by a majority of the Commission, which “fully recognized the importance of private as well as governmental action for the achievement of these rights.” Unfortunately, the recognition of the importance of the private sector, and thus for private property, seems lost on current mainstream human-rights thinkers.

STRENGTHENING THE HUMAN RIGHT TO PRIVATE PROPERTY

While human-rights experts and organs of the UN are often hostile to private property in its classical sense, the fundamental importance of this right has been recognized by other authorities. In 2008, the Commission on the Legal Empowerment of the Poor, a working group under the UNDP co-chaired by former U.S. Secretary of State Madeleine Albright and Peruvian economist Hernando De Soto, a winner of the Milton Friedman Prize for Advancing Liberty, published a report entitled “Making the Law Work for Everyone.” The report concludes that the right to property must be understood as a “fundamental human right” essential for the integrity of the individual. The report adopts a classical understanding

“Those who believe that human rights are essential for freedom and prosperity should urgently focus their efforts on strengthening the protection of the right to property under international human rights law.”

of the right to property as intrinsically linked to individual freedom, stating that “the body and mind are the first and most immediate property of persons.” In addition, the report stresses the importance of property rights for economic development:

In the absence of generalized and equitable property rights systems much of economic activity does not develop its full potential even for powerful actors; there is a high likelihood of social unrest; there may be under-accumulation of human capital resulting in a low-quality labor force, and little demand for credit resulting in underdeveloped financial institutions and ultimately hindered growth. There is also less foreign investment or flight of capital when property rights are not guaranteed.

The report also points to the lack of property rights as a factor in civil armed conflict around the world. Importantly, the report shows that limiting state ownership of land and resources is essential in order to effectively promote and implement property rights, since a government’s large-scale ownership of land provides it with the ability to arbitrarily impose planning restrictions and expropriate—without compensation—to the detriment of tenure security. The Commission’s thorough report maps out an entirely

different understanding of property rights and their importance than the above-mentioned report by the Special Rapporteur for Food and the CESCR, which effectively recommends weakening property rights.

Based on empirical evidence showing the strong link between property rights, freedom, and prosperity, there can be little doubt that strengthening classical private-property rights should be an urgent priority of the human-rights movement, as well as a cornerstone of human-rights policies of developed states, including the United States.

For instance, developed countries and development nongovernmental organizations should help developing countries implement the legal and administrative framework necessary for making property rights effective, rather than focusing on the redistributive element of ESC rights, which undermines the right to property. Such a development strategy has recently been initiated by the Danish government. The new strategy, “Freedom from Poverty—Freedom to Change,” emphasizes the role of “economic growth based on free markets and private property benefiting the poor” as well as “respect for human rights.”

It is indisputable that there are obvious and systemic shortcomings in the UN’s human-rights protection system—particularly in those organs that are dominated by member states such as the Human Rights Council and the General Assembly. Despite these shortcomings, it should be made a priority to remedy the fatal flaw of the ICCPR by adopting an optional protocol with a robust protection of the right to property against arbitrary expropriation and regulatory takings. For countries with strong protection of property rights, such as the United States, and most Western countries, the proposed optional protocol would most likely not require substantial changes of national legislation (even if the United States, has not incorporated the ICCPR into national law and does not recognize individual complaints to the Human Rights Committee). However, an optional protocol could be a useful tool in promoting the right to property as a human right, par-

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The New Health Care Law: What a Difference a Year Makes

When President Obama signed the Patient Protection and Affordable Care Act into law on March 23, 2010, few would have predicted what happened in the following year. Opposition to the law has led to Republican gains in Congress, a House vote to repeal it, and two federal courts striking down part or all of the law as unconstitutional. At a half-day Cato Institute conference, held one year after the House of Representatives passed the law, Kavita Patel, M.D., managing director of delivery-system reform at the Engelberg Center for Health Care Reform at the Brookings Institution; Michael F. Cannon, director of health policy studies at the Cato Institute; Ron Pollack, executive director of Families USA; and Douglas Holtz-Eakin, former director of the Congressional Budget Office, debated how the law has already affected America's health care sector, labor markets, and the federal budget, and what impact it will have in the future.

KAVITA PATEL: My background is in primary care as an internal medicine physician, and that's where we often talk about quality, delivery-system reforms, and some of the actual transformations in the Affordable Care Act. We're seeing some of those changes right now—in medical homes, patient care coordination, transitions in care—by virtue of the fact that one of the things we tried to do in the ACA was show that those are the promising areas for the next decades.

A lot of us working on the health care law knew that there were mechanisms—bureaucratic, statutory, and otherwise—preventing the Centers for Medicare and Medicaid Services from rewarding places doing “innovative” things. Out of that was born the Centers for Medicare and Medicaid Innovation, with \$10 billion for projects, research, and evaluation. One of the first things out the gate from that \$10 billion—over 10 years—was the promotion of primary care and medical homes at the state level. This is a population for which innovation is desperately needed.

In terms of quality, we've known now for the last seven or eight years that the quality of care in our country has been, at most—on average—“good” about half the time. If you're in Las Vegas, that may be decent odds. If you're dealing with health care, that's unacceptable. So, in an effort to make sure that we understand the gap—but also so that we can do something about it—we really need to understand what works. That means not just putting money into data on websites, but actually investing in effectiveness, in comparing research that looks at treatments and processes of care—as well as establishing guidelines on how our evidence is used by clinicians.

Streamlining and coordinating what the government does was something that all of us thought were broken and dysfunctional. One year later we've already seen agencies coordinating and making their data accessible—agencies that had not spoken to each other before and historically had not necessarily even traded data or had their data accessible to the public.

Looking forward, the key changes are not spelled out in much minutiae in the law, offering an opportunity for not only interpretation, but also for action and decision-making on behalf of health care providers. Those changes impact accountable-care organizations, medical homes, value-based purchasing, a lot of the insurance design benefits that we're hoping that we will see in Medicare, as well as some of the state-based Medicaid contracts. That's exactly where the promise of not only cost containment and bending the cost curve will come from, but also the true promise of delivering the right care, at the right time, in the right place.

MICHAEL CANNON: ObamaCare is no more going to improve the quality of health care than its consumer protections are going to protect patients. Most of the provisions that are supposed to improve the way we deliver health care were not specified in the law. Basically what happened, we created a Center for Medicare and Medicaid Innovation to run pilot programs and experiment with different ways of setting prices and different financial incentives—different terms of exchange—to see if providers will deliver care that is more coordinated.

The problem with these pilot programs—and this approach for reforming health care—is that we have tried it and it has never worked. Medicare has been trying pilot programs for its entire existence, and either those pilot programs fail or, if they succeed in either improving the quality of care or reducing the cost of care, are blocked by the corners of the health care industry whose income streams those innovations threaten: the low-quality providers or high-cost providers who will see Medicare revenues delivered someplace else. Under lobbying pressure, these pilot programs are eliminated. There's an article in the most recent issue in the journal *Health Affairs* that polled physicians in Switzerland and asked them, “What would it take for you to provide more coor-

minated care than what you're providing right now?"—to join into the sort of accountable-care organizations that are discussed in this law? The Swiss doctors said they would want a 40 percent raise before they took these steps to improve the quality of care. That's the sort of resistance that you're going to see to these pilot programs.

This law will not improve the cost of medical care or health insurance, either. The individual mandate, portions of which began taking effect on September 23, 2010, is already increasing the cost of health insurance for millions of Americans. One insurance company reported those provisions were forcing it to increase premiums on some customers by up to 30 percent.

Another reason for the backlash is that many believe the law is overkill. If you look at the preexisting-condition insurance plans that the law has set up in each state, they've attracted just 12,000 enrollees at last count, or three percent of the 375,000 projected to enroll. Since the primary motivation of the law was to protect people with preexisting conditions, that suggests that it wasn't necessary to conscript 200 million Americans into a compulsory health insurance scheme to solve that problem. The projections that ObamaCare will permanently eliminate 800,000 jobs—not to mention any temporary job losses—is striking fear in those battered by the recession.

Finally, many Americans are taking this law personally. The president promised to put an end to the game playing, but then made backroom deals with the drug lobby and Walmart, while Senate Democrats who drafted this law used tax dollars to buy votes in support for it. Americans watched Kathleen Sebelius repeatedly censor insurers who disagreed with her. They saw their tax dollars buy ads where Andy Griffith used "weasel words"—those aren't my words, those are from FactCheck.org—to mislead seniors about how this law will affect their coverage. They hear the president continue to say things that they know are untrue, that his own advisers in some cases—and nonpartisan observers in others—have discredited: for instance, ObamaCare will allow Americans to keep their coverage, reduce costs, and reduce the deficit. We heard that

the individual mandate was a tax. Then the president told us that it was not a tax. Then his Justice Department went into court to argue that, in fact, it is a tax. At a certain point, people start to feel insulted.

Newt Gingrich predicted that this law would be repealed by April 2013. I don't know if anyone can know if that's true, but I'm struck by two things. The first is that if Congress doesn't repeal this law, we'll be



Kavita Patel

“One year later we've already seen agencies coordinating and making their data accessible—agencies that had not spoken to each other before.”

back here on the second anniversary of ObamaCare, the fifth anniversary of ObamaCare, the 10th anniversary of ObamaCare—having conferences like this one, in rooms like this one, in Washington, D.C., and elsewhere in the country. We'll be asking why health care spending is still rising out of control, why we still don't have coordinated care, accountable-care organizations, comparative-effectiveness research that helps us to improve the quality of care, and health information technologies; and we'll be questioning why insurers are being rewarded by ObamaCare's price controls for

avoiding or mistreating the sick. The second thing that I'm struck by is just how plausible Gingrich's prediction is. It's certainly far more plausible than anyone thought one year ago today.

RON POLLACK: We have already seen significant and helpful changes due to the Affordable Care Act. So far, much of the conversation about the Act has focused on matters that go into effect in 2014. But there are a number of things that have already gone into effect, and they are very significant and helpful. Let me pick out the more salient ones. In no particular order they include:

Young adults—who turn out to be the age most likely to be uninsured—now can continue to stay on their parents' policy until their 26th birthday. I don't know how many young adults have already availed themselves of such coverage, but they can now get coverage through their parents. (There's a moral here: Be good to your parents.)

Second, with respect to seniors, some have already seen the benefit of this legislation in two different respects. One of them is helpful to those who currently fall into the huge prescription drug gap in coverage, the so-called “doughnut hole,”—where, after seniors and people with disabilities in Medicare have spent a certain amount of money, they fall into a no-coverage zone. In today's dollars, once a senior has spent \$2,840 in drugs during the year, the gap in coverage begins, and it doesn't end until they've spent \$6,484—a gap of \$3,644 dollars. With each passing year that gap is supposed to get larger. Last year, people who fell in the doughnut hole received a modest \$250 check. This year, anyone falling into the doughnut hole can purchase brand-name drugs with a 50 percent discount. In other words, somebody who falls into the doughnut hole can receive a \$1,822 benefit to help them afford their drugs. Seniors also receive the benefit of free preventive care, so that Medicare becomes more of a preventive and primary care system, not just a sickness care system.

A third group aided is small business owners. They can receive a tax credit of up to 35 percent of the costs of covering their

workers if they have fewer than 25 workers. I don't yet know how many have availed themselves of this tax-credit benefit, but there are over 4 million who qualify for it.

Children are another group already helped. They are the first to receive the benefit of insurance-related protections such that they cannot be denied coverage due to a pre-existing condition. An insurance company can't deny coverage just because a child has asthma or diabetes. This important protection is extended to adults in 2014.

The Affordable Care Act is also providing reinsurance for early retirees between the ages of 55 and 64, and this enables more and more companies to continue providing coverage for their early retirees.

Already in effect is a prohibition on lifetime limits on insurance benefits. As a result, somebody with a catastrophic illness (such as cancer) or who gets into a bad accident will no longer be bankrupted because he or she has to spend money totally out of pocket once reaching a lifetime cap.

Under the Affordable Care Act, insurance companies can no longer take away your coverage once you get sick if you have paid your premiums all along. In the past, there have been a number of insurance companies that rescinded policies when people got sick. That no longer is lawful, and that is providing new, important protections.

In the longer run, the Affordable Care Act makes huge progress in expanding health coverage for people who are uninsured. It does so by providing direct help to people with incomes below 400 percent of the poverty level (which will help a family of three with approximately \$75,000 in income or less). Additionally, the Act expands the safety-net Medicaid program to cover people and families with incomes below 133 percent of the federal poverty level. As a result largely of these two improvements, the Congressional Budget Office tells us about 34 million people who don't have coverage today will receive it. It is possible that even more than 34 million people will gain coverage, depending on how well enrollment and retention systems are established through regulations and state implementation. This coverage expansion is worthy of strong support.

DOUGLAS HOLTZ-EAKIN: One of the things that has been forgotten, in the course of the debate and the enactment, and now the anniversary, is that there was a time several years ago, beginning in 2009, when there was a bipartisan consensus that America needed sensible health care reforms that would control the growth of spending, improve the delivery system, and expand coverage. What actually happened was a highly partisan



“If Congress doesn't repeal this law, we'll be back here on the 10th anniversary asking why health care spending is still rising out of control.”

activity that has given me just one more piece of evidence that all partisan laws end up being bad policy. It is unwise in a democracy to push through large legislation on one party's votes. Those laws are never infused with the best ideas of both sides, and as a result they are not as good, and they immediately become objects for overturning. It doesn't serve our country—which needs a durable and functional health care system—to undertake this kind of activity, and so I expect us to be back again in the future, discussing either the demise of the Affordable Care Act or alternatives that build upon its shaky foundation.

What are the problems with that foundation? Michael Cannon asked me to talk about the ACA from the perspective of budget, labor market, and economic policy, and there I think it is indeed a dramatically dangerous piece of legislation at the wrong point in our history. I hope it is now well understood that the federal government's budget is on the road to hell. There is no polite way to describe why the world's largest economy has placed itself on a trajectory that looks like a third-world debt crisis. It is for that reason mystifying to me when the very prosperity and freedom that has built our economy is put at a risk by taking a decisive step in the wrong direction, at a time when we already have deep problems.

There is no way you can pretend that the Affordable Care Act will improve the government's fiscal or budgetary condition. It sets up two new entitlement spending programs: insurance subsidies for those in the exchanges, and the so-called “Class Act,” a long-term care insurance program—both of which the CBO estimates will grow at an average of eight percent per year annually as far as the eye can see. Tax revenues will not grow at eight percent a year annually as far as the eye can see; the economy will not grow at a rate eight percent a year annually as far as the eye can see; there will be no way either of those things will be able to keep up with those spending demands, and the budget will deteriorate, not improve. You can paper that over with a variety of budgetary gimmicks, as has been done with this legislation. You can count on savings that will never appear in the Medicare program, because we haven't reformed the Medicare program. Its business law remains the same, its costs will be the same, its providers will need the same money, or we just won't cover the beneficiaries. And I think when Congress is faced with that choice, it will cover the beneficiaries. You can't just simply pretend that the Class Act will collect money inside the budget window and not pay out benefits past the budget window. You cannot leave out the annual appropriations that are necessary to set up and run the program. You cannot do all the things that they did, and somehow trick people into believing this is a good step from a budgetary

Continued on page 19

Malou Innocent

Malou Innocent is a Foreign Policy Analyst at the Cato Institute researching Middle East and Persian Gulf security issues and U.S. foreign policy toward Pakistan, Afghanistan, and China. She is a member of the International Institute for Strategic Studies, and has appeared as a guest analyst on CNN, BBC News, Fox News Channel, Al Jazeera, Voice of America, CNBC Asia, and Reuters.

Innocent has published reviews and articles on national security and international affairs in journals such as *Congressional Quarterly*, *Foreign Policy*, *Wall Street Journal Asia*, *Christian Science Monitor*, *Armed Forces Journal*, the *Guardian*, *Huffington Post*, and the *Washington Times*. She earned dual B.A. degrees in Mass Communications and Political Science from the University of California at Berkeley, and an M.A. degree in International Relations from the University of Chicago.

In 2008, Innocent traveled to Pakistan for an on-the-ground perspective. In 2010, she returned to the region, this time to neighboring Afghanistan to study the impact of American policies. We asked her to talk about some of her experiences.

The terrorist attack of September 11, 2001, which happened my freshman year of college, was the defining moment of my generation. However, far from instilling in me a “rally ’round the flag” effect, the attacks severely eroded my trust in government. To me, 9/11 reflected the folly of our own statecraft: our Department of “Defense” was better designed for launching pre-emptive invasions against foreign countries, rather than serving the primary constitutional function of protecting our own country. Perhaps even worse, ever since 9/11, politicians continue to implement counterproductive policies that drain us economically, spread our resources thin, and drag us into endless wars—all of which plays directly into al Qaeda’s hands and does little to increase my faith in government.

My trip to Afghanistan in May 2010 exposed the discrepancy between the impact of our policies abroad and how those policies are portrayed to Americans back at home. For example, the Obama administration has been selling the fantasy that by paving roads and building schools we can win Afghan hearts and minds. Nothing could be further from the truth. In fact, in many instances the belief that outside government planners can promote stability and growth robs Afghans of the opportunity to

do things better for themselves. Moreover, in many poor subsistence areas, insurgents collect taxes, provide policing and a rudimentary court system, and are often better liked than the Afghan officials we support. If anything, the prolonged Western troop presence has given rise to a sort of “neo”-Taliban, that tend to be far more hardened than the generation of jihadists left over from the Soviet occupation.

As for my trip to Pakistan in August 2008, it was my first exposure to a conservative, Muslim society. Certainly, my travels there

made me appreciate the freedoms I have in the West. A few of the men I interviewed refused to shake my hand and another had to be persuaded to be in the same room with me. That being said, I find it stunningly naïve for political activists in America to assume it is our responsibility to redress these gender inequalities. They focus too narrowly on changing a single variable of social life and overlook the highly interconnected interplay of broader societal forces that keep many Muslim women subjugated. One can strongly dislike cultural prohibitions that discriminate against women and simultaneously reject calls for these women’s so-called “liberation” by U.S. forces.

Having been born and raised in the liberal bastion of the San Francisco Bay Area, I saw quite clearly—and often up close—the intrusiveness of the nanny state and the failure of big government policies. To me, Cato’s core principles reflect my own beliefs about the proper role of government and its relation to individuals within society. ■



MALOU INNOCENT (third from right) is joined by **JOSEF STORM** (far left), senior fellow **DOUG BANDOW** (far right), and Afghan police officers at a site several miles outside of Kabul.

Highlighting our Sponsors' generosity

Newly Named Facilities in the Cato Expansion

It has been a little over a year since Cato's Board of Directors voted to approve a \$50 million capital campaign to fund a doubling in the size and facilities at the Institute's 1000 Massachusetts Avenue headquarters, allowing for a significant increase in policy staff and public attendance at events. We decided to call the campaign Liberating the Future, and it is off to a remarkable start. As of April, Cato Sponsors had generously contributed more than \$38 million toward our \$50 million goal. A major source of that funding has come from named new facilities that are part of the expansion. While some naming opportunities remain (lucky you—it's not too late!) here is a summary of the named facilities and programs to date:

THE HERBERT A. STIEFEL CENTER FOR TRADE POLICY STUDIES

Named for the long-time libertarian and entrepreneur who turned Stiefel Laboratories into one of the world's largest independent pharmaceutical firms. Contributor anonymous.

BILL & REBECCA DUNN BOARD ROOM

This renovated facility which features meetings and lectures each week is next to the Wintergarden where Bill and Rebecca, who were already Cato Sponsors, first met.

KEN & FRAYDA LEVY LIBERTY GARDEN

The Cato expansion includes a new 7th floor that will feature a roof garden for receptions and for staff to enjoy at lunch or after work. Ken and Frayda also met through their participation in the Cato Sponsor program.

(Maybe we should start an online dating service.)

GEORGE M. YEAGER CONFERENCE CENTER

This beautiful high-ceilinged facility will host sit-down luncheons and dinners for 200 people. It will hold as many as 500 people auditorium style and divides into three separate meeting rooms for smaller events. It will feature state-of-the-art A/V equipment. Donated by longtime Cato Club 200 member George Yeager.

RICHARD & SUE ANN MASSON POLICY CENTER

The Policy Center will accommodate 60–70 attendees for lectures and meetings. The Cato intern program will utilize this facility extensively, and our new Cato e-Briefings will originate from it. Richard and Sue Ann are Cato Club 200 members.

ASNESS LECTURE HALL One of the meeting rooms in the Yeager Center will be named after Cato Club 200 member Cliff Asness, the outspoken defender of free markets in the investment business. (If not there, where?) Cliff and his wife Laurel are relatively new additions to the Cato family.

BOB & RUTH REINGOLD STUDENT CENTER

The new Student Center will house some 45 interns, an increase of 20 over those housed in our current facilities. The Reingolds are longtime Cato Club 200 members, although they met before Cato existed (the Institute, not the Roman). They are accomplished tennis hustlers.

JAMES M. KILTS CAFETERIA

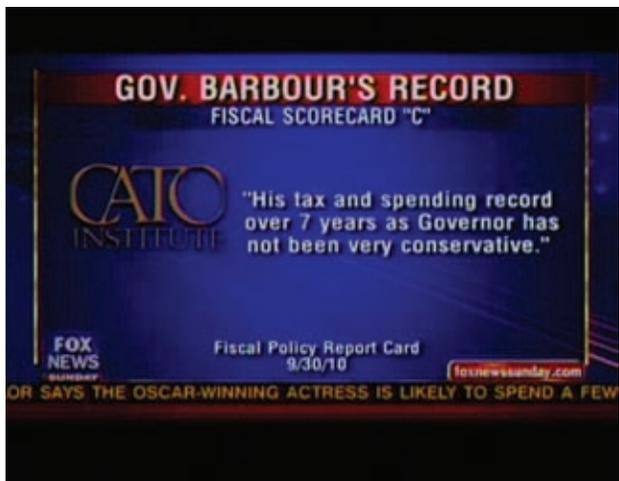
The expanded employee luncheon room will overlook the Yeager Conference Center a floor below. The glass paneling looking down on the conference center becomes opaque at the flip of a switch. This beautiful dining facility will feature a flat screen television that will show on-going events at the Institute. Jim Kilts, former CEO of the Gillette Co., is a Cato Club 200 member.

ROSE WILDER LANE HALL This reception area, leading to the Hayek Auditorium, will feature many receptions and will exhibit Cato historical information, along with television monitors tuned to both news programs and lectures in the different venues in the building. Lane, a mentor to Ayn Rand, was the author of the great libertarian book, *The Discovery of Freedom*. Donated by Cato Board member Ethelmae Humphreys.





Cato scholars routinely travel to Capitol Hill, hosting briefings, attending meetings with lawmakers, and testifying before Congress on important policy issues. **1.** CHRIS EDWARDS (left), director of tax policy studies, spoke at a Cato breakfast for new members of Congress. He was joined by (from left to right), BOB GIBBS (R-OH), ROBERT DOLD (R-IL), and MICK MULVANEY (R-SC). **2.** ANDREW J. COULSON (right), director of the Center for Educational Freedom, discussed the negative impact of federal involvement in America's classrooms before the House Committee on Education and the Workforce in February. **3.** MARK CALABRIA (right), director of financial regulation studies, speaks with his former boss, Sen. RICHARD SHELBY, former chairman and now ranking member of the Committee on Banking, Housing, and Urban Affairs. **4.** Research fellow JULIAN SANCHEZ argued against a hasty reauthorization of the PATRIOT Act when he testified before a Senate committee in March. **5.** ROGER PILON (left), vice president for legal affairs and director of the Center for Constitutional Studies at the Cato Institute, urged Congress to return to its constitutional limits at a Hill event in February—a message echoed by Rep. SCOTT GARRETT (R-NJ), founder and chairman of the Congressional Constitution Caucus.



On “Fox News Sunday,” Chris Wallace confronted Mississippi governor Haley Barbour with his “C” performance on Cato’s “Fiscal Policy Report Card on America’s Governors.” The report, put out biennially by director of tax policy studies Chris Edwards, uses statistical data to grade the governors on their taxing and spending records.

FEBRUARY 8: *Inflated: How Money and Debt Built the American Dream*

FEBRUARY 9: Cato Institute Policy Perspectives 2011 (Naples, Florida)

FEBRUARY 10: Restoring Limited Constitutional Government Starts with Congress

FEBRUARY 11: Private lunch with Governor Mitch Daniels

FEBRUARY 15: Is Dodd-Frank Constitutional?

FEBRUARY 24–27: 23rd Annual Benefactor Summit

MARCH 2: *Reforming America’s Health Care System: The Flawed Vision of Obamacare*

MARCH 3: *Schools for Misrule: Legal Academia and an Overlawyered America*

MARCH 8: *Robust Political Economy: Classical Liberalism and the Future of Public Policy*

MARCH 10: Cato Club Naples: How to Tame the Federal Budget

MARCH 16: *Neoconservatism: An Obituary for an Idea*

MARCH 21: The New Health Care Law: What a Difference a Year Makes

MARCH 22: A Government Thumb on the Election Scale?

MARCH 24: Beyond Exports: A Better Case for Free Trade

Audio and video for all Cato events dating back to 1999, and many events before that, can be found on the Cato Institute website at www.cato.org/events. You can also find write-ups of Cato events in Ed Crane’s bimonthly memo for Cato Sponsors.



Cato launched the 2011 edition of its “Economic Freedom of the States of India” report, copublished with Indicus Analytics and the Friedrich Naumann Foundation, at an event in New Delhi in March. Coauthor and Cato research fellow SWAMINATHAN S. ANKLESARIA AIYAR (left), along with coauthor BIBEK DEBROY (right) and MONTEK SINGH AHLUWALIA, one of India’s leading reformers, presented the report.

Cato Calendar

CATO UNIVERSITY SUMMER SEMINAR
Annapolis, Md. • Loews Hotel
July 24–29, 2011
Speakers include Rob McDonald, Don Boudreaux, Robert Levy, Edward H. Crane, David Boaz, Tom G. Palmer, and Lynne Kiesling.

CONSTITUTION DAY
Washington • Cato Institute
September 15, 2011
Speakers include Alex Kozinski.

CATO CLUB 200 RETREAT
Newberg, Ore. • Allison Inn and Spa
September 22–25, 2011

MONETARY REFORM IN THE WAKE OF CRISIS
29th Annual Monetary Conference
Washington • National Housing Center
November 16, 2011
Speakers include James Grant, Judy Shelton, Richard H. Timberlake, George Selgin, Roger Garrison, and Allan H. Meltzer.

24TH ANNUAL BENEFACTOR SUMMIT
Palm Beach • The Breakers
February 23–26, 2012

Climate-change hysteria in law, defense, health, trade, and development

Exposing Global-Warming Alarmism's Grasp

Reasonable minds differ on the science of global warming. Even if they didn't—even if the science were settled—anyone familiar with the federal government's track record on large-scale regulation ought to harbor serious doubts about Washington's anti-climate-change efforts. And while climate hysteria dominates the environmental argument within the spheres of politics and science, few realize just how far its influence extends.

In *Climate Coup: Global Warming's Invasion of Our Government and Our Lives*, Patrick J. Michaels edits a collection of essays offering shocking insights into the impact of global-warming alarmism on the law, the scientific peer-review process, global security, trade, international economic development, and public education.

Michaels, senior fellow at the Cato Institute and author of *Climate of Extremes: Global Warming Science They Don't Want You to Know*, introduces the book's eight chapters, in which academics and policy experts sketch the landscape of global-warming alarmism's reach. Roger Pilon and Evan Turgeon show how, while James Madison, the father of the Constitution, thought that “the powers of the new government would be ‘few and defined,’” the modern executive branch, “in the name of addressing global warming, is able to regulate virtually every human activity in this nation.”

Ross McKittrick offers a cautionary tale of bias within the peer-review process that acts as the gatekeeper to the scientific literature. He recounts the two years he spent “trying to publish a paper refuting an important claim

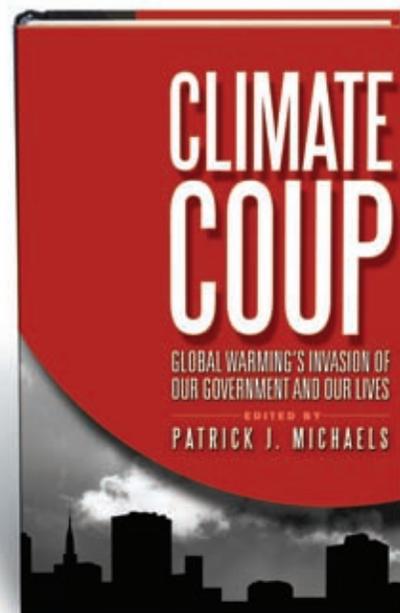
in the IPCC's Fourth Assessment Report,” a claim that “was not just wrong but was based on fabricated evidence.” He writes, “I did not expect a smooth ride, but the process eventually became surreal.”

Ivan Eland looks at the way the Department of Defense has used global warming as a justification for its own expansion under the umbrella of national security. Sallie James shows how politicians, in an effort to appear active on the climate-change issue while not offending special-interest groups, have proposed “trade-related measures [that] put the United States at risk of retaliation, litigation, or both from its global trading partners.”

Indur M. Goklany argues that developing nations will have little difficulty adapting to rising global temperatures, while Robert E. Davis debunks many of the most pervasive myths about global warming and public health. “The litany of human health impacts from global warming goes on and on,” he writes. “It's safe to say that these (and other) health impacts either will not happen or will not be nearly as severe as the predictions.”

Neal McCluskey ends *Climate Coup* with a look at global-warming alarmism in public education and its pernicious effects. “When what we will need are rational, well-informed adults, what we will get is either people who know little or nothing about climate change or people who are scared to death about it,” he writes.

In his introduction, Michaels offers a striking observation by way of a parade of horrors: “When students are threatened with death from global warming, when our



military raises the threat of war from global warming, when the state has the apparatus to run our lives because of global warming without any additional legislation, when our Congress legislates tariffs that could provoke trade wars because of global warming, when the threats of global warming to the developing world are egregiously exaggerated, when the biomedical community hypes unfounded health and mortality fears, and when the scientific peer-review process becomes skewed against anything moderate, we have witnessed a coup.”

Climate Coup exposes the sordid details of this process. ■

Visit www.cato.org/store or call 800-767-1241 to get your copy of *Climate Coup* today; \$24.95 hardback.

Price Gouging, Soft Drinks, and Alfred Kahn

Anti-price gouging laws are intended to prevent taking advantage of another's pain for one's own gain. In the new issue of *Regulation*, Michael Giberson argues that we would be better off without them. Also in this issue, Jonathan Klick and Eric A. Helland show that there's little evidence that soda taxes would shrink American waistlines, and Susan E. Dudley remembers Alfred Kahn, the father of airline deregulation.

Richard A. Epstein says that the Durbin Amendment's regulation of debit interchange represents a radical effort to extend price. Jerry W. Markham examines the politics of executive pay and finds that calls for restraint in compensation are often driven not by sound policy but by ideological dreams of wealth redistribution. In addition, the Spring 2011 issue features articles on the impact of “administrative procedures” regulatory reform in New Jersey, government-run power authority in Pennsylvania, and the lack of consumer benefits from licensure laws, as well as reviews of books on antitrust law, tenacious economic ideas, and climate change.

Regulation is available by subscription or online at www.cato.org/regulation.



Cato's constitutional trilogy challenges conventional wisdom

Lochner: A Notorious Case Reconsidered

Two recent Cato Institute books touched on the major 1905 Supreme Court decision, *Lochner v. New York*, which held that a law setting maximum working hours for bakers violated the constitutional right to liberty of contract. In *The Right to Earn a Living*, Timothy Sandefur charted the history of that fundamental human right, and showed how it was eroded by Progressive Era judges. In *Liberty of Contract*, David Mayer identified the foundations and nature of the Court's *Lochner*-era legal theories and decisions and shattered the myths that scholars have created about both this era and subject.

Now, in a book co-published by the Cato Institute and the University of Chicago Press, David E. Bernstein adds a third part to this series, presenting a new way of thinking about the Constitution and the federal government's delegated, enumerated, and thus limited powers.

Rehabilitating Lochner: Defending Individual Rights against Progressive Reform offers an exacting study of that notorious case and its impact on American law. Bernstein digs into the history of *Lochner* and the often surprising forces that lined up on the two sides of the case. In rehabilitating this much-maligned case, Bernstein overturns "the mythical morality tale invented during the Progressive Era for overtly ideological reasons."

Through a careful reconstruction of the events leading up to the case, an examination of the opinion—including its famous dissents, and analysis of the reaction among legal intellectuals, Bernstein has written, as he describes it, "the first comprehensive modern analysis of *Lochner* and its progeny, free from the baggage of the tendentious accounts of Progressives, New Dealers, and their successors on the left and, surprisingly, the right."

Bernstein then traces *Lochner's* impact on Progressive sociological jurisprudence, the popular ideological position at that time that "masked a political agenda that favored a significant increase in government involvement in American economic and social life." This movement, launched

by Roscoe Pound in a series of attacks on the Supreme Court's liberty of contract jurisprudence, held that "law's purpose is to achieve social aims" and that "legal rules, including constitutional rights, cannot be deduced from first principles." The Progressives' anger at the *Lochner* majority was not thus exclusively about its reasoning, but also to a great degree about its unwillingness to overlook constitutional controls that would limit the creation of a "union-led social democracy in place of a regime of general contractual freedom."

It was this desire to see *Lochner* as an unprincipled attack on Progressive utopian social engineering—engineering with the veneer of science—that led to the *Lochner* myth. The Court was not protecting the right of workers to contract freely for their wages and labor. Instead, it was, as Justice Holmes memorably wrote in his dissent, trying to force *laissez faire* upon the downtrodden to the benefit of big-business capitalists.

But, as Bernstein shows, as despised as it was, "Lochnerian protection of liberty of contract was invoked to justify some of the most significant early decisions expanding constitutional protections for the rights of African Americans and women and for civil liberties, often over the strong opposition of Justice Holmes and his Progressive allies."

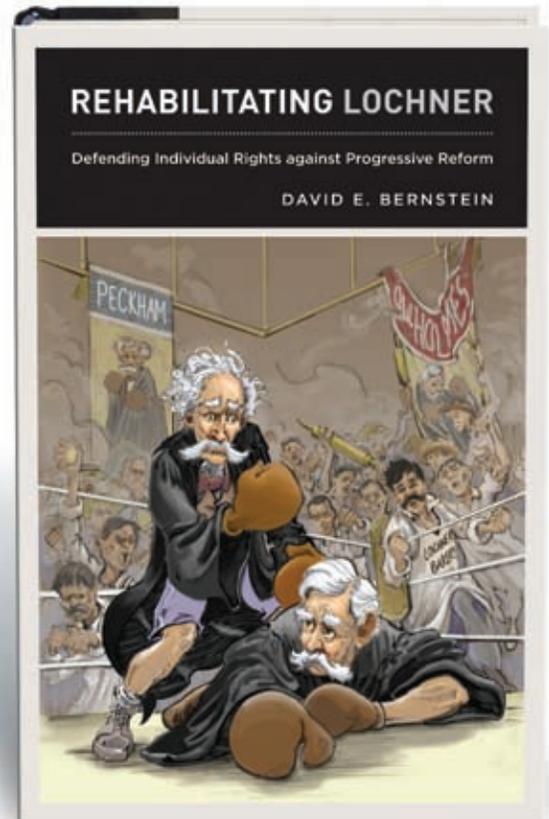
In chapters on sex discrimination and segregation laws, Bernstein maps this opposition. He shows how Progressive feminists sought to use laws like the one overturned in *Lochner* to keep women out of the workforce, so as to protect their perceived delicate sensibilities and motherly roles from the harm of freely chosen employment. And he traces the way unions and their Progressive intellectual allies used police power and the worker-protection laws to safeguard the

jobs of white men from the competitive threat of black workers.

The *Lochner* era is a good deal more complex than most legal scholarship suggests. "An accurate and nuanced view of the Supreme Court's pre-World War II due-process jurisprudence," Bernstein writes, "does not allow for blithe categorization of justices who lived in a very different era, replete with ideological and political disputes and assumptions that are foreign and often barely comprehensible to modern scholars, into prescient heroes and narrow-minded villains."

Bernstein concludes the book by arguing that, "when scholars distort history to serve an agreeable governing ideology or to rally opposition to existing precedents that they dislike, their work richly deserves correction." *Rehabilitating Lochner* offers just that. ■

Visit www.cato.org/store or call 800-767-1241 to get your copy of *Rehabilitating Lochner* today; \$26.95 hardback.



It's the Spending, Stupid: A Looming Fiscal Train Wreck

In “**Bankrupt: Entitlements and the Federal Budget**” (Policy Analysis no. 673), Cato Institute senior fellow Michael Tanner paints a grim picture of America’s fiscal future, but notes that “no one should be shocked to learn that government spending is out of control.”



Under Presidents Bush and Obama, federal spending has nearly doubled over the last decade, with budget deficits at unprecedented levels. While there has been talk in Congress of cutting discretionary spending, the real problem is entitlement programs—particularly Social Security, Medicare, and Medicaid: “In fact, by 2050, these three programs will alone expand to consume every penny that the federal government raises in taxes.” This “looming fiscal train wreck has been amply abetted by both political parties,” Tanner writes, but adds that “the 2010 midterm

elections demonstrated that voters see the debt as a major issue.” Tanner presents the full scope of the deficit and debt and then turns to their common cause: “The reason we have a deficit is pretty simple: government spends too much,” he writes. Tanner closely examines Social Security, Medicare, and Medicaid, mapping their ballooning spending and unfunded liabilities—and shows how the Patient Protection and Affordable Care Act, passed one year ago, will only make the situation more dire. It is not too late to stave off bankruptcy, but it means taking action immediately. “Congress now has an opportunity to change its ways,” Tanner writes. “The coming months will show whether it will.”

Nukes and the Far East

With the New Strategic Arms Reduction Treaty (New START) and the release of the U.S. Nuclear Posture Review (NPR), the Obama administration has elevated nuclear disarmament to the center of its nuclear agenda. But this leaves open the question of “how far should the United

States move beyond symbolism in ‘getting to zero?’” writes Lavina Lee, lecturer at Macquarie University in Sydney, Australia, and author of *U.S. Hegemony and Legitimacy: Norms, Power and Followership in the Wars on Iraq* (Routledge, 2010), in “**Beyond Symbolism? The U.S. Nuclear Disarmament Agenda and Its Implications for Chinese and Indian Nuclear Policy**” (Foreign Policy Briefing no. 91).



Before making this move, Lee argues, the United States should ensure that it “will in fact receive concrete, reciprocal concessions from China and India,” the prospects for which are doubtful. Regarding China, Lee writes, “Given President Obama’s own admission that global zero is unlikely to be achieved in his lifetime, the Chinese have cause to question whether the United States and Russia will voluntarily relinquish their nuclear superi-

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ority any time soon.” And with India worried about the threat of its nuclear neighbors, China and Pakistan, “any commitments India is likely to make on nuclear force reductions will be linked to both of these states doing the same.” Before the United States places disarmament at the center of its nuclear diplomacy, it needs to also be aware of the move’s opportunity costs, for there is “the risk that the United States will offer much with respect to nuclear disarmament and get little in return.”

Fannie and Freddie’s Subprime Disaster

“By most accounts, the subprime mort-

gage market played a key role in the recent financial crisis. Yet there remains considerable debate over what drove that market,” writes Mark Calabria, director of financial regulation studies at the Cato Institute, in **“Fannie, Freddie, and the Subprime Mortgage Market”** (Briefing Paper no. 120). But after carefully examining and presenting the evidence, he finds a clear culprit: “Fannie Mae and Freddie Mac were not only the largest players in the subprime mortgage market, they were drivers of that market.” Nearly one-third of Fannie and Freddie’s direct purchases were subprime, while during the height of the housing bubble, almost 40 percent of

newly issued private-label subprime securities were purchased by Fannie Mae and Freddie Mac. Calabria argues that the failure of Fannie and Freddie and their precipitation of the housing crisis offer a strong rebuke to government attempts to engineer the housing market. “Ultimately taxpayers and the broader economy will only be protected from future bailouts by a full withdrawal of the federal government from housing policy,” he writes. Calabria concludes, “Our financial system would become considerably more stable were Washington to abandon its attempts to direct capital to politically favored segments of the economy.” ■

Continued from page 8

ticularly in poor developing countries with questionable human-rights records.

An optional protocol on the right to property would also counterbalance the recently adopted optional protocol to the ICESCR, which allows individuals to complain that their ESC rights have been violated. That protocol is likely to result in decisions that further undermine property rights by reason of the so-called duty to fulfill, which, as discussed above, involves compulsory redistribution of property.

This development has potentially grave consequences for the right to private property around the world as NGOs, international organizations, governments, and courts are influenced by contemporary human-rights standards. Even in the United States, where the reference to international human-rights conventions is very limited at the federal

court level, some courts in states such as New Hampshire, West Virginia, and California have referred to international human rights standards—including the ICESCR and the UDHR—when deciding claims related to adoption, education, and general relief.

An optional protocol affording private property human rights protection would create a line of defense against expropriations based on human-rights claims under the ICESCR. Moreover, the obligations arising out of the ICESCR are much less well defined than those under the ICCPR. The rights in the ICESCR have to be achieved progressively over time, and complaints generally have to show a “clear disadvantage” in order to be admissible. States have a wide margin of discretion in their implementation based on a standard of “reasonableness,” taking into account a “range of possible policy measures.” When it comes to the ICCPR, on the

other hand, states are under an immediate obligation to “respect and to ensure” the rights therein, as well as provide an effective remedy for their violation. Taking into account the clear and immediate nature of the obligations under the ICCPR, it would be possible to argue that from the outset the right to property under ICCPR trumps claims involving the infringements of private property arising out of the ICESCR.

Mainstream human-rights thinking is increasingly hostile to the protection of private property and receptive to the ideas of ESC rights that often conflict with the right to property. Accordingly, those who believe that human rights are essential for freedom and prosperity and that the right to property is an essential human right should urgently focus their efforts on strengthening the protection of the right to property under international human rights law. ■

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point of view.

Another big risk is that we’ll end up with more people in the exchanges—because employers can do arithmetic. They understand that there is so much taxpayer money on the table in those exchanges that it is entirely possible for them to drop their coverage, particularly for anyone under 300 percent of the federal poverty line. It is a no-brainer to drop the coverage, pay the penalty,

give the worker a raise, and allow the worker to take the post-tax wage plus the subsidies and buy insurance at the exchanges that is just as good or better. If you take the population that’s eligible for that kind of bargain, and assume that not even all of them do it, you can double the \$1 trillion cost easily over the first 10 years, or triple it.

I would have loved to have stood here on the first anniversary of a bipartisan health care bill that took care of the costs problems

and enhanced the prospect for coverage in the United States. Instead, we’re celebrating the anniversary of something which represents another missed opportunity in health care reform in the United States, a dangerous step from an economic and budgetary policy point of view, and something that really cannot survive. And regardless of what we call it—repeal, replace, or simply throw up our hands and pray—it will not be this way in the future. ■

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IMPLICITLY LEGAL

More than 70 pieces of Metro equipment, including a 32-inch computer monitor, camera equipment, and a portable generator, were found in the home of a Metro supervisor, according to the agency's inspector general. But the employee was able to retire and won't face any criminal charges because it was an “implicitly tolerated practice” at the agency, according to Inspector General Helen Lew's summary of the case. Her report said it appears other employees also took Metro gear.

The former supervisor in the track maintenance division took some items directly from the agency's Carmen Turner facility in Hyattsville, the report said, but also took some equipment through purchases using a Metro credit card. . . .

The inspector general, investigators, and transit police found the tools and various equipment in a search of the man's home. The department's management was not aware that some of the equipment even existed, as much of it didn't have bar codes. . . .

The report said the State Attorney's Office for Prince George's County declined to prosecute because it wrote in a letter that Metro “may have served to create an atmosphere where such behavior, although not explicitly condoned or excused, was part of an implicitly tolerated practice.”

—*Washington Examiner*, February 14, 2011

AIG RECEIVED \$182 BILLION FROM THE TAXPAYERS

American International Group Inc.'s mortgage insurer does more business in

Republican-leaning states because it signs up more reliable customers than those in “more liberal” areas, Chief Executive Officer Robert Benmosche said.

“All of the states where we're a leader, where we're the No. 1 insurer, are red states, all of the states where we're at the bottom are blue states,” Benmosche, 66, said yesterday at a conference in Washington. “Part of what we found out is that our model is about culture and it's about the attitude in the public. And what we find is where there's more of a tendency for people to be more liberal, more that the government is responsible for what happens to me.”

—*Bloomberg*, February 2, 2011

PRODUCER PROTECTIONISM AND THE DANGER OF LAISSEZ-FAIRE CAT GROOMING

Cat groomers, tattoo artists, tree trimmers and about a dozen other specialists across the country. . . are clamoring for more rules governing small businesses.

They're asking to become state-licensed professionals, which would mean anyone wanting to be, say, a music therapist or a locksmith, would have to pay fees, apply for a license, and in some cases, take classes and pass exams. . . .

The most recent study, from 2008, found 23% of U.S. workers were required to obtain state licenses, up from just 5% in 1950.

—*Wall Street Journal*, February 7, 2011

GETTING SUCKED INTO THE PARASITE ECONOMY

In an interview with *Politico*, a Google spokesman argued that a cabal of antitrust lawyers, lobbyists, and public relations firms is conspiring against the Internet search giant. The mastermind?

Google says it's Microsoft.

Maybe it's irony, or maybe it's payback.

In the 1990s, Microsoft was the tech industry wunderkind that got too big for its britches—and Google CEO Eric Schmidt, then an executive at Sun Microsystems and later at Novell, helped knock the software titan down a peg by providing evidence in the government's antitrust case against it. . . .

But there are also increasing calls from some Silicon Valley competitors and Washington-based public-interest groups for the Justice Department to launch a sweeping antitrust probe of Google. The European Union and the state of Texas have reviews underway.

Google says its rivals are fueling the attacks.

—*Politico*, February 9, 2011

GET WHILE THE GETTIN' IS GOOD

Departing members of the House of Representatives awarded millions of dollars in extra pay to aides as they closed down their offices, according to lawmakers' spending records.

The 96 lawmakers paid their employees \$6.7 million, or 31%, more in the fourth quarter of 2010 than they did, on average, in the first three quarters of the year. . . .

Because most of the departing members were Democrats, fourth-quarter salary increases in 2010 for Democratic staffers were the largest in the decade that LegiStorm has been gathering such data.

Republican staffers enjoyed a similar boost when many of their employers left office at the end of 2006.

—*Wall Street Journal*, March 7, 2011