Remember the Common Law

BY JIM HARPER

Good economists are familiar with Frédéric Bastiat’s parable of the broken window, which illustrates that visible economic activity may have unseen costs. When a broken window leads to the purchase of a new window, it’s easy to think that the broken window helped society by increasing production and trade. In fact, breaking a window makes society worse off; wealth has been destroyed, not increased. Bastiat’s essay on this topic was titled “What Is Seen and What Is Not Seen.”

A similar dynamic exists in the legal world. Legislative and regulatory processes are easy to see. Elections routinely draw public attention to legislative and administrative government. Elected and unelected regulators have media operations to tell reporters what they are doing. Common-law rules, on the other hand, are mostly unseen. Legal doctrines such as property and contract emerged quietly from series of court decisions over decades and even centuries, so they often go unconsidered and unspoken. Many people may believe that legislation and regulation do most of the work of ordering society.

Libertarians should remember the common law and generally prefer it. The common-law process for making the rules of a free society has much to commend it. And where it falls down, it is more readily fixable than legislation and government regulation.

American law students learn early that the common law is an important inheritance from England that differs from the civil-law tradition dominant on the European continent. In the common-law tradition, the basic rules that govern our interactions arise from years of experience over generations. Our forebears learned that justice is served and benefits accrue when people avoid violence, stick to their promises, and allocate things in an orderly way. The law of battery, contract law, and property law all emerged as common practice solidified into common law. It’s often called “judge-made” law, but at its best common law is “judge-found” law—that is, judges discover law in common practices that are deeply ingrained in society.

In contrast, the source of rules in civil-

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Libertarianism and the Right to Discriminate

Thanks to the Supreme Court’s recent decision in Obergefell v. Hodges, federal and state legislators can no longer impose marriage limitations based on sexual orientation. Libertarians support that legal structure. But we also argue that private businesses have a constitutional right to boycott same-sex weddings. Can those two positions be harmonized?

Yes. The Constitution is not a code of conduct to which citizens must submit. It has two primary objectives: to secure personal liberty and limit the power of government. The chains of the Constitution bind government, not individual actions.

That’s why it’s consistent for libertarians to advocate both the right to gay marriage and the right to discriminate against same-sex couples. Government may not discriminate in granting marriage licenses. But private parties should be able to consort with whomever they please. The rights at stake are those related to association, property, privacy, and religious exercise. Individuals and business owners should be able to serve, or not serve, anyone they please—guided by the marketplace and constrained by competition. Customers who object can take their business elsewhere. Usually, although not always, that process leads to fair outcomes.

Admittedly, prior to the Civil Rights Act, free markets might have produced segregated public accommodations. It’s hard to be certain. Markets were impeded by Jim Crow, corrupt law enforcement, biased judges, extralegal violence, and even denial of services such as water and electricity to firms that wouldn’t toe the segregationist line. Moreover, free markets are not perfect. But neither is government. The proper comparison is not markets versus an ideal world where social justice is ubiquitous. Rather, the relevant comparison is markets versus government regulation. No reasonable person disputes that government occasionally does good things. But the equation isn’t complete without considering the bad that inevitably accompanies the good. Along with restaurant and hotel integration—which would have happened without government, although more slowly—we now have the inequities associated with such practices as minority set-asides and racial preferences in school admissions, not to mention expanded schemes that might require Jewish bakers to provide cakes at Nazi weddings, and black florists to supply flowers at a Klan funeral.

From a legal perspective, discrimination should be permitted in any society that honors freedom of association. A member of one religious or racial or ethnic group should not be required, against his or her will, to associate with members of other groups. On the other hand, it’s perfectly consistent to argue from an ethical perspective that religious, racial, and ethnic discrimination is sometimes reprehensible. We should condemn people who practice such discrimination, even as we insist on their legal right to do so. Private discrimination that isn’t engineered by government can be censured via non-governmental means—for example, refusal to patronize bigots, social ostracism, and adverse publicity regarding the discriminatory acts. We can denounce immoral conduct—such as lying, infidelity, and even bigotry—without empowering the state to take remedial action.

That’s especially appropriate in the case of same-sex weddings. Forcing private parties to serve gay weddings is a higher order of coercion than forcing private hotels and restaurants to provide rooms and food to black—or gay—travelers. Bakers, florists, photographers, caterers, and so on—when directed to serve a gay wedding—must perform an expressive act that implies support for the institution of same-sex marriage. That goes beyond acceptance of gay people. By contrast, hotel owners were asked only to provide rooms to black travelers, not participate in a ceremony of religious, philosophical, or expressive meaning.

More generally, markets and competition offer built-in incentives against discrimination. Consider the obvious examples of professional football and basketball: NFL and NBA teams consist disproportionately of African American players—not because team owners are benevolent integrationists, but because the players are talented and attract large and profitable audiences. If owners were to discriminate by not hiring black players, they would pay a price for their bigotry. Competitive markets tend to penalize bigots. Government intervention, by contrast, tends to strain the social fabric by compelling unwelcome relationships.

In short, we should condone private—but not government—discrimination, even if the rationale is that a service provider simply doesn’t want to deal with the persons seeking service. That rationale—however offensive it may be in some circumstances—is implicit in our right not to associate, which is the flip side of our constitutional right of association, guaranteed by the First Amendment.

Robert A. Levy
Jason Brennan’s *Political Philosophy: An Introduction* begins with a question: Why should governments be able to do things ordinary people can’t? Imagine: “Virtuous Vani” thinks processed sugar poses a grave danger to society, and holds a 7-11 clerk at gunpoint for selling Big Gulp—who wouldn’t call for her immediate arrest? But if that’s the case, why can Food and Drug Administration bureaucrats do virtually the same thing and receive applause?

This is just one of the many puzzles addressed by Brennan, a professor at Georgetown University. What rights do people have, and are they ever absolute? Is liberty an end in itself? How much freedom should people have? Is utilitarianism a viable theory of justice? Political philosophy addresses questions that at first glance may seem obvious, but soon turn complex—is slavery always wrong? Is voluntary slavery therefore impossible?

Questions like these are necessary, as Brennan explains, if we are to evaluate institutions as just or unjust. Social sciences may be able to inform us of some of the trade-offs and consequences of institutions, but they can’t tell us how to evaluate those trade-offs. “Is it better to be equal but worse off, or is it better to be unequal but better off? To answer that question, we have to think critically about justice,” Brennan writes. “We’ll have to know how to weigh equality against freedom or prosperity.”

Brennan’s work offers a short primer on the basic ideas of political philosophy, outlining the arguments of John Stuart Mill, John Locke, Jean-Jacques Rousseau, John Rawls, Robert Nozick, and many others. He also hosts the second Guide for Cato’s Libertarianism.org, a new series of online courses introducing the principles of libertarian thought. *Political Philosophy* serves as the accompanying text for his lectures, a series of short videos that can be watched online or downloaded for listening on the go.

Brennan’s *Introduction* focuses especially on libertarian philosophers and evaluates the various theories discussed, but does not aim to convince the reader of any particular ideology. Instead, Brennan provides readers with a broad working knowledge of political philosophy and the tools to think critically about these issues on their own.

**VISIT STORE.CATO.ORG/BOOKS TO PURCHASE YOUR COPY OF POLITICAL PHILOSOPHY: AN INTRODUCTION. BRENNAN’S ONLINE SERIES IS AVAILABLE FOR FREE AT LIBERTARIANISM.ORG/GUIDES.**

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**Cato News Notes**

**CLINT BOLICK NAMED TO ARIZONA SUPREME COURT**

Libertarian lawyer Clint Bolick, the author of four Cato books, was appointed to the Arizona Supreme Court in January. “Clint is nationally renowned and respected as a constitutional law scholar and as a champion of liberty,” said Governor Doug Ducey. “He brings extensive experience and expertise, an unwavering regard for the rule of law, and a firm commitment to the state and citizens of Arizona.” Bolick co-founded the Institute for Justice and served for several years as the vice president for litigation at the Goldwater Institute. His Cato Institute publications include *Voucher Wars: Waging the Legal Battle over School Choice; David’s Hammer: The Case for an Activist Judiciary; Grassroots Tyranny: The Limits of Federalism; and The Affirmative Action Fraud: Can We Restore the American Civil Rights Vision?*

**PUTTING OUT FIRES**

The $1.1 trillion omnibus spending bill passed by Congress in December has plenty of things to dismay small government advocates—but there was at least one victory in the negotiations, thanks to Cato senior fellow Randal O’Toole. A proposed amendment would have given the Forest Service a “virtual blank check,” as O’Toole put it, to spend $2.9 billion a year. For context, the most they have ever spent in the past was $1.5 billion. The proposal was defeated, and according to someone familiar with the negotiations, O’Toole’s work critiquing the proposal was “pivotal” to killing the bill and thereby saving taxpayers millions of dollars. “The Forest Service’s fire programs are still very wasteful,” said O’Toole, “but not as wasteful as they would have been if this had passed.”

**FACT-CHECKING THE MEDIA**

In recent months journalists have churned out dozens of dramatic warnings of how the federal government is about to finally enforce the REAL ID Act and require residents of states that have refused to implement a national ID program to use a passport every time they fly. In reality, DHS has failed time and again to enforce these “deadlines.” Cato senior fellow Jim Harper began tweeting out these false alarms with the hashtag #TakenInByDHS. “In reporting uncritically on the Department of Homeland Security’s claimed deadlines for implementing the U.S. national ID law, many journalists are unwittingly helping impose a system that the federal government may one day use to identify, track, and control every American,” he wrote. “The fact is that there is no real cost to state non-compliance with REAL ID.”
At a Cato Policy Forum adjunct scholar ROBERT CORN-REVERE examined the dilemma of confronting the “assassin’s veto”—when people or groups attempt to suppress free speech with intimidation and violence, as in the tragic Charlie Hebdo murders last year.

At a Cato Book Forum, Lawless: The Obama Administration’s Unprecedented Assault on the Constitution and the Rule of Law, DAVID E. BERNSTEIN chronicled the Obama administration’s repeated abuses of constitutional authority.

Students and speakers, including Cato scholars JUAN CARLOS HIDALGO and MARTÍN KRAUSE, at Cato’s Universidad El-Cato in Heredia, Costa Rica, January 21–24. Over the course of three days, students enjoyed lectures on topics such as classical liberalism, liberalism in Latin America, and the morality of capitalism.
What are the rights of the dying? Several states permit physician-assisted suicide, while in others courts and legislators are considering end-of-life care. Libertarians, like much of the public, remain divided on the issue. At a Cato debate, CATHERINE GLENN FOSTER of the Alliance Defending Freedom (right) argued that legalizing assisted suicide amounts to “government interference” in death and endangers the rights of citizens, particularly the disabled. BARBARA MANCINI of Compassion and Choices countered that assisted suicide is a matter of personal liberty and self-ownership, recounting her own experience being arrested after her father took a fatal dose of morphine, and she attempted to honor his wishes not to be brought to the hospital. Cato Unbound editor JASON KUZNICKI moderated the event.

John M. Schuessler discussed his book, Deceit on the Road to War: Presidents, Politics, and American Democracy, at a Cato Forum (page 11).

At a Cato Book Forum, The Economics of Immigration: Market-Based Approaches, Social Science, and Public Policy, editor BENJAMIN POWELL, contributor and Cato policy analyst ALEX NOWRASTEH (left), and NEIL RUIZ of George Washington University discussed the economic evidence on immigration’s beneficial effects.
Part of the genius of the common law is its mix of adaptability and consistency.

w rongs that give victims of privacy invasions the right to sue invaders. In 1960 eminent legal scholar William L. Prosser documented how privacy as a legal concept had come to constitute four distinct torts: intrusion upon seclusion or solitude, or into private affairs; public disclosure of embarrassing private facts; publicity that places a person in a false light in the public eye; and appropriation of name or likeness. The common law of privacy continues to develop and advance. In 1998, the Minnesota Supreme Court recognized invasion of privacy as a tort in that state for the first time. The case was Lake v. Wal-Mart Stores. The defendant’s photo-developing shop failed to deliver two women their vacation photos, but an employee distributed a photo of the two showering together, sparing the court to adopt the “public disclosure” branch of the privacy torts. Like most law, the privacy torts work in the background, through the threat of lawsuits and not actual days in court or big damage awards. The rarity of lawsuits under the privacy torts may show how consistent these baseline privacy rules are with society’s general mores. Some would argue, of course, that they’re not strict enough and that debatable uses of information should produce successful privacy lawsuits more often. Legal evolution will decide who is right.

Privacy law may be in tension with free speech and the First Amendment, so it’s not clear that the privacy torts are a permanent fixture in the common-law pantheon. On the other hand, privacy-law professors and others often use the phrase “privacy harm” in a tacit effort to impress into common language—and ultimately common law—that more offenses against privacy or data security should be recognized as legally actionable harms. It’s all part of a quiet but important debate about our privacy values and what may become our privacy laws.

But people don’t often ask how common law torts, property rights, and contracts protect privacy. They ask: “What will Congress and our state legislatures do?” Legislation and regulation get most of the attention.

The top-down process that established federal privacy regulation of health information illustrates some differences between understated common-law development and cacophonous civil-law-style rule-writing.

In 1996 Congress revamped the rules around health insurance. The Health Insurance Portability and Accountability Act (HIPAA) also addressed health privacy, but it didn’t set new privacy rules. Instead, Congress instructed the secretary of Health and Human Services (HHS) to make recommendations about the privacy of individually identifiable health information. It told HHS to go ahead and write privacy regulations based on those recommendations if Congress did not act.

When HHS reported back to Congress, it downplayed many safeguards for privacy that already existed. These included medical ethics, explicit and implied contract rights, malpractice claims, and state privacy torts—non regulatory privacy protections that got only a few cryptic lines buried deep in the report. In addition to largely ignoring them, HHS advocated eliminating some of them.

Today, with the HIPAA privacy regulations in place, people seeking health care sign a lot of forms and see a lot of notices discussing health privacy—but it’s not at all clear that their privacy is well protected. The HIPAA rules preserved and helped solidify behind-the-scenes information-sharing practices in the health care industry that may or may not serve consumers and society well. Every year, it seems, there is less and less of a free market in health care to test for and discover consumers’ true interests in health privacy and every other dimension of health care. The common law of health privacy is widely ignored.

THE COMMON LAW OF PRIVACY

The field of privacy protection illustrates how common law develops. In 1890 a Harvard Law Review article entitled “The Right to Privacy” made the original argument that law should address privacy. Samuel Warren and Louis D. Brandeis, later to become a U.S. Supreme Court justice, catalogued the legal doctrines that might control certain abuses of private life arising from photography and mass circulation newspapers. They argued that the law should explicitly protect privacy.

Over time, a new branch of common law was born. Courts across the country began to recognize privacy torts—legally recognized
INDUCTIVE COMMON LAW VS. DEDUCTIVE REGULATION

Common law is inductive. Building on experience in case after real-world case, common-law courts accrete knowledge about the rule-set that best serves society. Because rule development occurs with reference to real-life cases, it takes advantage of local knowledge about the precise disputes that occur. This allows better approximation of what the truly just rules will be for most cases.

Hayek emphasized the value of local knowledge in economic decisionmaking. He also emphasized the distinction between common law and top-down legislation in his three-volume work Law, Legislation and Liberty. The Italian lawyer Bruno Leoni is another great thinker in this area. His book Freedom and the Law extolled the virtue of English common law compared to Roman jus civile. The two systems have very different ways of developing rules. Common-law systems hew closer to common justice.

Legislation and regulation more often produce rank re-ordering of rights and liabilities because legislation is deductive. At a single point in time, based on all the knowledge it has drawn together at that moment, a legislature establishes the rule-set that it believes to make the most sense. This is often what it perceives as pleasing the most—or the most important—constituencies. That imperative to please constituencies means that the information legislatures codify often comes from well-organized interests with substantial resources. Special-interest pleading is a hallmark of legislation and regulation.

Judges in common law courts have fewer of the perverse incentives that legislators and regulators do, particularly when judges are appointed for life terms. A tenured judge gets professional acclaim from developing a reputation for fairness, from clearing dockets, and from suffering few reversals in higher courts. Judges generally don’t anticipate growing their courts’ budgets, getting post-service perks, or being re-installed in office due to the outcomes in their cases, as legislators and regulators often do. Legislation and regulation are systematically subject to a kind of intellectual corruption in which self-interest diverges from the public interest.

WRITING THE RIGHT RULES

Rules produced by the deductions of legislators and regulators don’t always fail, of course, and they aren’t always wrong. But it is better to arrive at just rules through a long, society-wide deliberation than through a legislative debate. To illustrate this subtle point, consider the rules that govern the liability of interactive computer services like YouTube, Yelp, craigslist, and Facebook.

In the mid-1990s courts were considering whether interactive online services would be considered publishers of the information people uploaded and posted to them. If they were publishers, websites might be liable for defamation and other causes of action because of the material users contributed to them. Had this rule taken hold, operators of online services would probably have allowed only tightly controlled and monitored interactions among users. The rollicking, interactive Internet we know today would have been sharply curtailed.

In response to this concern, Congress passed legislation saying that interactive computer services are not publishers or speakers of any information others provide using their services. Section 230 of the Communications Decency Act (CDA) is one of the most important protections for online speech in the United States.

But CDA section 230 is often talked about as an “immunity” Congress gave to online service providers, a carve-out from general liability rules, put in place to advance a certain public policy goal. The perception of CDA section 230 as a special-interest favor means that other interests are on relatively strong footing when they come to Congress seeking to overturn it. Today, CDA section 230 is under attack from groups who would like to see it reversed. The rule against liability for online service providers would be stronger if courts had arrived at a rule of “no liability” based in considerations of natural justice.

When the rules that organize our society are temporal products of legislation, they may always be “in play” for a legislative reversal. Online service providers must always remain vigilant in Washington, D.C., for attempts to undercut their special “immunity.” The rules that govern online liability were established quickly, which is good, but they are less settled than they otherwise would be, and there is one more reason for private businesses to maintain a stable of lobbyists and lawyers in Washington.

There is no guarantee, of course, that the common-law rule would be the same right now as what CDA section 230 produced. The common-law process might still be searching for the right rule. Common-law development would probably find, though, that online service providers are not liable for the acts of others.

FAR FROM PERFECT, BUT BETTER IN PRACTICE

This is no argument that common-law courts are perfect. They are not. It takes a very long time for just rules to be found out and settled on through common-law development. Elected judges often have incentives to please powerful constituencies. The class-action mechanism is prone to abuse and often used to reward plaintiffs’ lawyers. Punitive damages are too often a source of windfalls
to lucky plaintiffs. The rules about who pays for litigation may be changed to improve the delivery of justice in the courts.

But these challenges are more correctible than the dynamics in legislation and regulation. Public choice economics teaches that actors in all these rule-making processes will pursue their own self-interest, but the interests of legislators and regulators are likely to diverge from justice more often than the interests of judges.

There is a fair argument that legislation and government regulation create certainty, which may make it worthwhile to accept their many costs. This is particularly acute in the area of high tech, where the application of common law may be unclear.

But regulation produces certainty in theory better than it does in practice. Witness the recent “BitLicense” fiasco in New York State. When Bitcoin, a digital currency, first captured public attention a few years ago, New York superintendent of financial services Ben Lawsky saw it as an opportunity to make his mark in a hot new area. He proposed an ill-defined “BitLicense” that would require registration of Bitcoin businesses in New York. During the rule-making process, his office declined to release “research and analysis” backing the necessity of a BitLicense, in violation of New York’s Freedom of Information Law. The final “BitLicense” was a hodgepodge of regulations like the ones that burden the mainstream financial services sector. They were an ill fit with this emerging technology and a hindrance to innovation because they drove up the cost of starting new businesses. They didn’t acknowledge the technology’s inherent capability to provide consumer protections that surpass existing financial services. Shortly after the “BitLicense” was finalized, Lawsky stepped down from his post to establish a financial regulation consultancy.

Today, it is anyone’s guess whether and how the New York Department of Financial Services will amend or enforce the technology-specific regulation that Lawsky produced. The “BitLicense” did not create certainty about the rules of the road for Bitcoin businesses in New York, and it did not create an upwelling of Bitcoin business activity in New York. America’s financial capital appears to be ceding ground on financial innovation to London, in the birthplace of common law.

Common-law rules foster innovation because they allow anyone with a new idea or process to experiment with it. They were a better fit with this emerging technology and a hindrance to innovation. “Permissionless innovation” does mean some more risk to consumers and society; but our experience with high tech shows just how great the reward is when behavior is controlled with light-touch, simple, fair common-law rules.

The United States and England today live under a dual system. In many areas, they continue to enjoy the benefits of the common law. But legislatures increasingly insert themselves, making temporal judgments that rejigger the rules that people and businesses must live by. In many fields, people look to legislation and regulation first, rather than examining how time-honored rules can be adapted to solve new problems.

Legislatures and regulatory agencies have a lot of smart people working in them. They universally believe they are pursuing the best interests of their jurisdictions. But the system they work in has perverse incentives, and they have little of the knowledge that common-law processes gather and pass down through the ages. “The life of the law has not been logic: it has been experience,” wrote jurist Oliver Wendell Holmes, Jr., in his 1881 book, The Common Law.

The common law is an important part of structuring and ordering a free and prosperous society. It is preferable to legislation and government regulation. Even when we confront new problems, we lovers of liberty should remember the common law.
War and Deceit: Why Obama “Acts like Bush”

Pulitzer Prize–winning journalist Charlie Savage of the New York Times has been covering post-9/11 issues since 2003. His new book Power Wars, based on interviews with more than 150 current and former government officials, tells the inside story of why the Obama administration continued and expanded Bush-era programs related to the war on terrorism. He discussed the book, which Cato vice president Gene Healy described as a “one-man 9/11 commission report,” at a Cato event in January. Michael Glennon, the author of National Security and Double Government, offered his comments as well. Savage’s remarks suggest that the Obama campaign team may have deliberately obscured his position on national security issues. At a Cato book forum several weeks earlier John M. Schuessler of the Air War College and author of Deceit on the Road to War: Presidents, Politics, and American Democracy argued that deception is a feature of democracy.

CHARLIE SAVAGE: In January 2009 when President Obama was inaugurated, there was a moment in which it looked like the war on terror was suddenly, abruptly, over. He had run on a platform of change from George W. Bush’s global war on terrorism, and had been a big critic of how the government had conducted itself in the years after 9/11. In his inaugural address he talked about getting away from the sense that there had to be a trade-off between constitutional ideals and security. Among the first things he did was issue a series of executive orders promising less secrecy, closing CIA black site prisons, banning torture, and ordering Guantanamo closed.

But very quickly it became apparent that the war on terror was not over—that there would be much greater continuity in the counterterrorism policies of the Bush and Obama administrations than the expectations created by then-senator Obama’s campaign rhetoric. Some of his incoming cabinet members, in little-noticed remarks during their confirmation testimony, had affirmed that in fact they thought it was lawful for the government to hold terrorism suspects without trial under the laws of war, that they were going to continue the practice of extraordinary rendition—transferring people to other countries from one intelligence agency to the next based only on diplomatic assurances that there would not be mistreatment—which was exactly Bush’s policy, at least on paper, as well. They temporarily shut down military commissions, but they’d done so in a way that looked like they were keeping the door open to resuming them, which is of course exactly what happened. They were asserting the state secrets privilege in court, to continue blocking lawsuits about torture and surveillance that they had inherited from the Bush administration—and all that was apparent by two or three weeks into the new administration.…

I continued to cover these things, and I became very interested in the targeted killing of the American citizen Anwar al-Awlaki. I brought a lawsuit along with the ACLU—two different lawsuits—to try to make them reveal their legal thinking about the scope and limits of the government’s power to target an American citizen who had not been convicted in a court. Then in the midst of that, Edward Snowden leaks massive amounts of documents about the surveillance state, and it becomes clearer than ever that Obama has not changed, really at all, the NSA apparatus that he inherited, including the bulk collection of domestic phone records. And that’s when I decided that this stuff really needed to be organized in a book. I couldn’t do it justice in newspaper form, there was just too much material, and everything related to everything else.…

A rising from this are some big-picture questions, and the biggest of them all is “How is it that Obama has had so little change from the policies that he inherited from the second-term Bush administration that people keep saying he’s acting like Bush? How did we get here?” I put forward an argument that to “act like Bush” can mean more than one thing. During the Bush years there were two different strands of criticism that were entangled together, but in fact distinct. There was a rule-of-law critique, and there was a civil liberties critique. The civil liberties critique says, “It’s inherently wrong to have a warrantless wire-tapping program, or to torture, or to have a system of military commissions, because the state should not have that power vis-à-vis the individual. This is un-American.” The rule-of-law critique is agnostic about whether these things are a good idea or a bad idea—with the exception of torture, torture is always illegal—but it’s focused on the process. The president doesn’t get to break the law. And so if a federal statute says you must get a warrant to wiretap on domestic soil, even in wartime, the president doesn’t get to say in secret, “I’m the commander-in-chief, I can ignore that.” The president has to go to Congress and persuade lawmakers to remake the law.

One of the big differences between the rule-of-law critique and the civil liberties critique is that the rule of law critique is fixable. If something violates the rule of law, Congress can pass a bill to change the law. And in fact, in the second term of the Bush administration, Congress passed the Military Commissions Act, and passed, with Senator Obama’s vote, the FISA Amendments Act.
We know now, though we didn’t at the time, that the Intelligence Court was issuing secret rulings that took these unilateral programs that were collecting everyone’s phone and email records and rooted them in a somewhat tendentious claim that the Patriot Act authorized them and imposed court oversight. So by the time Obama becomes president, if you think “acting like Bush” means violating the rule of law in the national security sphere, the problem is largely fixed. If you think “acting like Bush” means violating civil liberties, the problem is not fixed.

Barack Obama is a lawyer, obviously, and Joe Biden is a lawyer: this is probably the most lawyerly administration ever. Obama and Biden are clearly the most comfortable when they’re talking to fellow law school graduates who analyze problems the same way, who speak the same lingo. So they fill the upper ranks of their administration with fellow lawyers—an easy example I can give is Eric Holder and I are both criminal lawyers.” Craig was a former prosecutor—they’d done a lot of criminal trials in which police had used pen register trap and trace devices to collect records of who a suspect was calling or receiving calls from and when, not the content, and they knew very well that in 1979 the Supreme Court had ruled that the Fourth Amendment does not cover that kind of data. The reasoning behind it, why the Fourth Amendment doesn’t apply, doesn’t turn on volume—a million times zero is still zero.

It was very important to them that this had been brought under the Court’s oversight and rooted in a claim that a statute authorized it, and it didn’t seem to be a rogue program, there seemed to be legal authority for it, at least on the surface. And so the question then was not whether to keep it or not—the intelligence community wanted it and there was legal authority for it so the task was just to get it within the bounds of what the court had authorized. They added a little internal oversight, and that was it. They didn’t think about it again until Snowden came along.

**Michael Glennon:** The great significance of this book, in my reading of it, lies in the massive documentation of the dominance of the permanent security state, as Charlie refers to it. Its influence is often subtle, and almost always behind the scenes, but it is nonetheless pervasive in the Obama administration, every bit as much as it was in the Bush administration. “The national security bureaucracy is a powerful force,” Charlie writes, “and on many occasions the Obama team bent to its warnings that particular counterterrorism actions were necessary.” The number of holdovers, officials who held the same or similar jobs in both administrations, is quite remarkable. Over and over, key
decisions were made or influenced by ever-present careerists. The law governing their conduct is blurry and malleable, giving them broad power that’s exercised with little accountability. They thrive on secrecy: “The permanent bureaucracy gets nothing from transparency and sees it only in terms of risk,” an administration official tells Charlie.

Page after page of Power Wars provides evidence of its reach. No branch of government is immune to its influence—the president, Congress, and the courts all defer to it. When it comes to national security matters, the president is more presider than decider. Charlie cogently explains why: “For all the focus the media and historians tend to put on presidents as individuals—Bush did this, Obama did that—the world and the government are so complicated that a single person cannot pay attention to all of it. Presidents set the tone and the priorities, and they usually are the ones who make the very biggest decisions. But the overwhelming majority of what an administration does takes place in the trenches of the executive-branch bureaucracy. Dozens or hundreds of officials whose names are unknown to the public and who rarely show up in history books make decisions every day about matters that most likely will never be brought to the president’s personal attention or that may be discussed only briefly in the Oval Office at a ten-thousand-foot level.”

The book is filled with examples of what Charlie is talking about. As time goes on, whistleblower prosecutions go from three before the Obama administration to nine during the administration—or eight, as Charlie points out, depending on how you count. And the increase is driven not by a conscious decision by anyone in the administration—Charlie says he can’t pinpoint any decision by any official to pick up the tempo, but it’s driven instead by improved surveillance technology, which makes it easier to identify leakers. So prosecution is basically on autopilot. “Autopilot”: the term that John Kerry used to explain the continuing surveillance program that intercepted Angela Merkel’s cellphone communications, which Obama of course said that he knew nothing about. The result is a policy of prosecution that has removed one last check on the permanent security state by crippling investigative journalism in this country, a program that has proceeded with no decision to start it, no decision to continue it, and of course, no decision to stop it.

JOHN SCHUESSLER: Academically, there is a long-standing debate about the virtues or lack thereof of democracy in international affairs. The prevailing wisdom is that democracies are simply better than nondemocracies when it comes to the big decisions in foreign affairs: when to go to war, when not to, when to cut losses, and so on. And a lot of this boils down to a more specific set of arguments about institutional constraints, which is kind of a set of terms that makes the eyes glaze over, but it basically comes down to the fact that democratic leaders are accountable in ways that nondemocratic leaders are not. They have to answer to the voters for their decisions, and they have to make arguments in public and persuade people, and those arguments can be vetted and challenged and rebutted if they’re flimsy or deceptive. An important implication of this is that democracies generally pursue more prudent and successful foreign policies than nondemocracies.

I didn’t want to burn the whole house down and say that this is all wrong, but anyone going through that period in the early 2000s where the Iraq War was front and center is going to have some questions about this idealized model of democracy and the democratic process, and whether that accurately captures the way democracies make these big decisions. Others have usefully challenged the veracity of this model—my particular take on it was to look at what I saw as the political use of deception to overcome some of the institutional constraints that were normally discussed: the need to generate public consent, the need to prevail in the marketplace of ideas.

And when I talk about “deception,” I mean something very specific: deliberate attempts on the part of leaders to mislead the public about the thrust of official thinking, in this case the decision to go to war, as well as the reasons to go to war. “Deception” in the way I mean it is a broader concept than “lying”—lying is actually fairly rare, at least in my imprecise measurement, in that it’s actually easy to catch bald-faced lies. They can be fact-checked. But deception is harder to definitely rebut or catch. It involves spinning, it involves concealment, it involves putting together facts in misleading ways as opposed to just flat-out misstating them. Deception, I would argue, is more pervasive than lying, and for that reason I think is more problematic.

Continued on page 17
For years, gay couples across America were denied their right to marriage and equal treatment under the law. Now, in the wake of Obergfell v. Hodges, Christian bakers and florists are being denied their right to run their businesses as they choose. The Cato Institute is the only organization in the country to defend both rights in court—the only organization maintaining that individual and religious rights need not be in conflict.

Libertarians were among the very first champions of gay rights, backing gay marriage long before liberals and Democrats. Cato, accordingly, has long upheld the rights of same-sex couples to individual liberty and equality before the law. “The Fourteenth Amendment’s Equal Protection Clause establishes a broad assurance of equality for all,” the Institute argued in Obergfell. “It guarantees the same rights and same protection under the law for all men and women of any race, whether rich or poor, citizen or alien, gay or straight.”

But unfortunately, after winning victory in Obergfell, the gay rights movement and the libertarian movement began to part ways. Activists began to target Christian business owners who had declined to participate in same-sex weddings—like the Oregon bakers who were fined $130,000 for refusing to bake a wedding cake. As Cato’s vice president for legal affairs Roger Pilon wrote in the Wall Street Journal, “It is one thing to prevent government officials from discriminating against same-sex couples—that is what equal protection is all about—quite another to force private individuals and organizations into associations they find offensive.”

Seventy-one-year-old Barronelle Stutzman, the owner of Arlene’s Flowers in Richland, Washington, has worked as a florist for over 30 years. In 2013 Rob Ingersoll, a longtime customer whom she considered a friend, came in and asked if she would provide custom designs for his same-sex wedding. She declined, citing her Christian beliefs, but recommended several other florists in the area she thought would do a beautiful job. She believed that they parted amicably, but soon found herself facing three lawsuits—one from Washington’s attorney general, and two more from Rob and his partner Curt. A Benton County Superior Court judge ruled that she had indeed violated Washington’s anti-discrimination and consumer protection laws. “I’ve never questioned Rob’s and Curt Freed’s right to live out their beliefs,” she wrote in the Seattle Times. “And I wouldn’t have done anything to keep them from getting married, or even getting flowers.”

The Cato Institute has filed an amicus brief asking Washington’s Supreme Court to reverse the trial court’s decision, arguing that floristry is an artistic expression deserving full First Amendment protection, including protection against compelled speech. “Clients pay a good deal of money for wedding floral arrangements, precisely because of the value of the florists’ expressive selection and decoration decisions,” the brief reads. “[T]he justices have said repeatedly that what the First Amendment protects is a ‘freedom of the individual mind,’ which the government violates whenever it tells a person what she must or must not say,” Cato senior fellow Ilya Shapiro wrote in a blog post. “Forcing a florist to create a unique piece of art violates that freedom of mind.”

In December, Cato executive vice president David Boaz participated in The Atlantic’s LGBT Summit, where he warned the audience that bringing the coercion of government down upon Christian bakers and florists only risks creating a political backlash to the victory of gay rights. “I think it is an illiberal attitude to say to a person with strong religious views, ‘You have to participate in a ceremony, like a gay wedding, that offends your religious sensibilities.’ Go to a different wedding planner. Go to a different florist,” he said. “We’re not talking about the only doctor in town—we’re talking about businesses. There are millions of businesses, and almost all of them want our business.”
Last summer the Export-Import Bank shut down for the first time in its 81-year history. Congress departed for its summer recess without reauthorizing the bank, leaving its authority to expire at midnight on June 30. Just a few years earlier, the idea of upending Ex-Im like this would have been unthinkable—it's regular reauthorizations had coasted through Congress after Congress for decades unchallenged. What changed? According to those most familiar with the battle, it all began with a paper from Cato's Sallie James.

In 2011 James published her first in-depth critique of the bank, “Time to X Out the Ex-Im Bank.” She called out the bank for picking winners and losers in the U.S. economy and redistributing resources to the chosen few. If the private sector is unwilling to finance a transaction, she wrote, “it is a signal that taxpayers should not be exposed to the risk, either.”

In 2012 she published another paper calling for the end of Ex-Im. By now interest was picking up—the Washington Post's George Will wrote a column about James' work, critiquing the bank for its virtually unconstrained interventions into the market. “As Sallie James says,” he wrote, “public choice theory teaches that government favors flow to the politically connected. Favor-dispensing institutions such as the Export-Import Bank are dispensing incentives for private interests to develop lucrative political connections.”

Veronique de Rugy, a Cato adjunct scholar whose work has been at the forefront of the Ex-Im debate, recalled James’s “remarkable paper” in 2011 as one of the first shots fired in the Ex-Im fight, counting it “essential to explaining why so many people have come out against the Ex-Im Bank today.” Andy Roth, vice president of government affairs at the Club for Growth, cited James’ paper as the original inspiration for his group's campaign against Ex-Im. “I really wanted us to pick a fight on the issue because the arguments made by Sallie were so simple and easy to understand,” he said. A Washington Post article detailed the Club for Growth's reaction when they first began to delve into the details of Ex-Im after reading James’ paper. “I’m sitting in my office, and I hear Barney [Keller, then communications director] screaming, ‘This is unbelievable,’” Chris Chocola, the former president of the Club for Growth, told the Post. As Keller researched deeper and deeper into the bank’s transactions, he would periodically exclaim when he found yet another instance of the bank propping up special interests.

Numerous Cato scholars, including James, de Rugy, Dan Ikenson, Ian Vasquez, Aaron Lukas, Steve Slivinski, Chris Edwards, and Doug Bandow, unleashed a volley of criticism that captured Americans’ attention. By December 2012, Bloomberg was describing panicked Ex-Im supporters as “caught off guard” by the sudden groundswell of opposition. Up until now, they wrote, the bank’s reauthorization had been “a matter of routine.” Business groups were stunned when they finally faced a real challenge. “That there was a fight at all amazed the bank’s backers,” wrote Bloomberg. Government cronies had grown all too accustomed to getting their way.

Unfortunately the cozy bond between K Street and the government is a difficult one to break—in December of 2015 Congress revived Ex-Im, funding it through 2019. But opposition to the bank is certainly not dead, now that Americans have seen Ex-Im for what it really is: corporate welfare.
Andrew Coulson, senior fellow in Cato’s Center for Educational Freedom, passed away on February 7 at the age of 48. He had been fighting brain cancer for more than a year. His wife Kay Krewson was at his side throughout the entire challenging journey. Andrew never gave up, and he retained his good humor, his wit, his commitment to his work, and his determination to do things his way right up until the end, as friends could see in his emails and his Facebook posts.

Andrew joined Cato 10 years ago as director of the Center for Educational Freedom, after becoming well known to educational freedom advocates for his 1999 book *Market Education: The Unknown History*. He turned the directorship over to Neal McCluskey last year so he could concentrate on his magnum opus, his multi-part documentary series tentatively titled *School, Inc.* Andrew wasn’t just the author of that series, he was the producer, director, writer, on-camera narrator, and travel arranger. He had just about finished the series before his health got the better of him. The bittersweet news is that Bob Chitester and Free to Choose Media have taken over the final stages of the project, and we expect it to be on public television this fall—an accomplishment that many of us never really believed could happen, though Andrew always did.

People in the education world have had high praise for Coulson’s work. Milton Friedman wrote of *Market Education*, “In this unusually well written and thoroughly researched book, Andrew J. Coulson ranges from ancient Greece and Rome to modern America and Japan to document his conclusion that parental choice in a private educational market is a far more effective system for educating children than government-run schools. Encyclopedic in its coverage of the arguments for and against alternative modes of organizing schooling, readers will find this excellent book instructive whether they agree or disagree with his conclusion.” The book also drew praise from scholars at Harvard, Stanford, and Oxford, and from columnist William Raspberry of the *Washington Post*.

Upon his passing, Lisa Snell, director of education policy at the Reason Foundation, wrote, “*Market Education: The Unknown History* is the book I tell everyone interested in education to start with.” Adam Schaeffer, who worked with Coulson at Cato after being persuaded by his arguments, wrote at Cato’s blog, “There is no one else beside Andrew Coulson that you must read to discover what reforms we need in education and why they will work. That is not hyperbole. There are many very sharp people who have contributed important thoughts on education reform, but you will get everything essential that you need from reading through Andrew’s collective works.” Schaeffer’s blog post included a bibliography of Coulson’s most important writings.

Coulson’s long advocacy for education tax credits can be seen not just in those writings, but in *ACS TO v. Winn*, a 2011 case in which the Supreme Court upheld Arizona’s K-12 scholarship tax credit program and for which Coulson worked closely on Cato’s amicus brief.

Andrew Coulson grew up in Canada and got a degree in mathematics and computer science from McGill University, after which he became a software engineer at Microsoft. As we said in announcing his joining Cato as director of the Center for Educational Freedom, “while Bill Gates quit school to form Microsoft, Andrew Coulson quit Microsoft to reform schools.” Through his books and studies and his documentary series, Andrew’s significant contributions to that goal will continue for a long time.
DECEMBER 1: Policing in America

DECEMBER 2: Cato Institute Policy Perspectives 2015 (Chicago, IL)


DECEMBER 8: Deceit on the Road to War: Presidents, Politics, and American Democracy

DECEMBER 9: Cato Club Naples 2015

DECEMBER 9: The ITC and Digital Trade: The ClearCorrect Decision

DECEMBER 11: REAL ID: Fear, Federalism, and the U.S. National ID Program

JANUARY 5: Power Wars: Inside Obama’s Post-9/11 Presidency

JANUARY 6: The Economics of Immigration: Market-Based Approaches, Social Science, and Public Policy

JANUARY 7: The Assassin’s Veto

JANUARY 13: Blood Oil: Tyrants, Violence, and the Rules that Run the World

JANUARY 20: GMOs and the Future of the Global Food Supply and Medical Innovations

JANUARY 26: The Past and Future of Buckley v. Valeo

JANUARY 26: Cato Club Naples 2016

JANUARY 27: Cato Institute Policy Perspectives 2016 (Naples, FL)

JANUARY 27: What Are the Rights of the Dying?

JANUARY 29: The Libertarian State of the Union

For more information, visit www.cato.org/friedman-prize.

Cato Calendar

Cato Institute Policy Perspectives
PALO ALTO • FOUR SEASONS
APRIL 8, 2016

FUTURES UNBOUND: THE CATO SUMMIT ON FINANCIAL REGULATION
CHICAGO • THE DRAKE
JUNE 6, 2016

PROTECTING RELIGIOUS FREEDOM
WASHINGTON • CATO INSTITUTE
JUNE 14, 2016

CATO UNIVERSITY
WASHINGTON • CATO INSTITUTE
JULY 24-29, 2016
Speakers include Tom G. Palmer, Jeffrey Miron, Randy Barnett, Robert McDonald, and David Boaz.

CONSTITUTION DAY CONFERENCE
WASHINGTON • CATO INSTITUTE
SEPTEMBER 15, 2016
Speakers include Clint Bolick.

CATO CLUB 200 RETREAT
PARK CITY, UT • MONTAGE DEER VALLEY
OCTOBER 13 –16, 2016
CENTRAL BANKS AND FINANCIAL TURMOIL
34TH ANNUAL MONETARY CONFERENCE
WASHINGTON • CATO INSTITUTE
NOVEMBER 17, 2016
Speakers include Thomas J. Sargent, James Grant, Steve H. Hanke, and Phil Gramm.

29TH ANNUAL BENEFAC TOR SUMMIT
NAPLES, FL • RITZ-CARLTON GOLF RESORT
MARCH 2–5, 2017
CATO CLUB 200 RETREAT
LAGUNA BEACH, CA • MONTAGE LAGUNA BEACH
OCTOBER 5–8, 2017
30TH ANNUAL BENEFAC TOR SUMMIT
RANCHO MIRAGE, CA • RITZ-CARLTON
FEBRUARY 22–25, 2018
CATO CLUB 200 RETREAT
MIDDLETOWN, VA • SALAMANDER RESORT & SPA
SEPTEMBER 27–30, 2018
Conference debates reforms to the justice system
Policing in America

The past several years have been fraught with concern over American policing tactics, whether prompted by the killings of Tamir Rice and Freddie Gray, the wasteful and invasive War on Drugs, or the rampant abuses of civil forfeiture. At a Cato conference, law enforcement experts gathered to debate whether the justice system is in need of reform. Participants included scholars and policy experts as well as members of law enforcement, such as Ronald L. Davis, the Justice Department’s director of community oriented policing services.

Cato public opinion analyst Emily Ekins presented the results of a Cato/YouGov poll, which found that requiring police body cameras remains one of the most overwhelmingly popular reform proposals—92 percent of Americans support the policy, across ideologies and party lines. Policy analyst Matt Feeney, who recently published a detailed analysis of the costs and benefits of body cameras along with recommendations for implementation, led a panel discussion on emerging police technologies. Alex Rosenblat of the Data and Society Research Institute argued that technology alone cannot create accountability, and warned against “unrealistic” expectations of what body cameras can accomplish.

Cato’s poll also found stark differences among racial groups on the topic of police favorability. Seventy-three percent of Caucasians view the police favorably, versus 43 percent of African Americans and 57 percent of Hispanics. Vicki Gaubeca of the New Mexico American Civil Liberties Union detailed the intimidating tactics used by Border Patrol agents at the Mexican border, including unjust detentions and racial profiling. “Border communities generally feel that border enforcement agents who commit abuse are getting away with it,” she said.

Clark Neily of the Institute for Justice called the practice of civil forfeiture, by which police can seize and keep the property of citizens without ever proving them guilty of a crime, “one of the greatest threats to public perception of police legitimacy.”

Grover Norquist, the president of Americans for Tax Reform, urged conservatives to take up the cause of justice reform, lamenting that “they’ve turned the police, in a lot of cities, into tax collectors.” Jerry Ratcliffe of Temple University highlighted the fact that, contrary to most people’s beliefs, police spend only a minuscule amount of time on violent crimes. He explained that the public remains “heavily focused, almost fixated, on violent crime and serious predatory violence” when thinking about policing, despite the fact that statistically violent crime is down and police spend the majority of their time on minor disturbances like noise complaints. Other speakers throughout the day included Lynn Overmann from the White House, Nathan Freed Wessler of the ACLU, David Klinger of the University of Missouri–St. Louis, and Samuel Walker of the University of Nebraska–Omaha.

“We have a lot of work to do to make the case for a criminal justice system that protects rather than infringes on our constitutional rights; that allows people regardless of color or creed to view police officers as guardians rather than occupying soldiers or financial predators; that allows police officers to do the types of noble things they signed up for, and swore an oath to do,” Cato policy analyst Adam Bates said in his closing remarks. “Regardless of your political philosophy, these are issues of life and death that strike at the very heart of our constitutional republic and our community.”

PRESENTATIONS FROM THIS CONFERENCE CAN BE VIEWED ONLINE AT CATO.ORG/EVENTS/ARCHIVES.
Money, politics, and the First Amendment

Buckley v. Valeo, Forty Years Later

When it comes to the role of money in politics, according to Cato senior fellow Jeffrey Milyo, people aren’t just uninformed—they’re misinformed. As he recounted at Cato’s conference, “The Past and Future of Buckley v. Valeo,” when asked what percentage of political spending comes from Super PACs, the median response is 67 percent. Only 2 percent of people select the right answer—25 percent or less. The exact number is actually closer to 10 percent. The conventional wisdom is that money plays an outsized role in politics, but, he argued, the data doesn’t bear this out. “Politicians do nothing good with their time,” Milyo quipped. “If they spend a lot of time raising money, we’re all safer.”

Nevertheless, campaign spending remains a deeply controversial issue. To commemorate the 40th anniversary of the Supreme Court’s landmark ruling on campaign finance, Buckley v. Valeo, the Cato Institute and the Center for Competitive Politics held a conference to discuss the legacy and future of the ruling, which struck down campaign spending restrictions but upheld restrictions on contributions. Vice President John Samples recalled Cato founder and president emeritus Ed Crane’s personal involvement in Buckley as a plaintiff, and his subsequent years battling for First Amendment rights in politics.

The conference opened with a discussion between Bradley Smith of the Center for Competitive Politics, a former chair of the Federal Election Commission, and Floyd Abrams, one of the nation’s leading First Amendment lawyers. Smith vigorously defended the right to spend money on political speech, arguing that if you can’t spend money to advance your political opinions, that limits your speech, just as an inability to pay to print Bibles would limit your freedom of religion.

Abrams recalled the very day of the decision, at which he was present 40 years ago. He dubbed the ruling a “tolerable compromise,” but added, “There’s no doubt in my mind that it has led to a sort of crazy quilt system of enforcement.” Smith proposed that the system should be simplified—a point also made by Milyo, who noted that the rules governing campaign spending are impossible for lay people to understand, posing great challenges to grassroots lobbyists who may easily violate the rules without even realizing they exist. This, he argued, is an area where people from all sides might be able to band together to change the rules.

Despite some disruption from Washington’s “Snowzilla,” which shut down the federal government that day, the conference went on and was broadcast that evening by C-SPAN.

PRESENTATIONS FROM THIS CONFERENCE CAN BE VIEWED ONLINE AT C-SPAN.ORG.

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The argument I make in the book is essentially not just that deception is something leaders occasionally do that poses a problem for these big arguments about democracy and war, but that it’s actually a natural outgrowth of the democratic process. That the very institutional constraints that the scholarly wisdom has emphasized encourage leaders to mislead the public on these big decisions. And this is basically because elected leaders have good reasons to maximize domestic support for war. War is a costly, high-stakes endeavor, it can redound to the disadvantage of leaders who get the country into losing or misguided wars, and so leaders want to go into a war with as much domestic support as possible. This is all actually highlighted by the prevailing scholarly wisdom. Where I think the wisdom goes wrong is in missing the tools that leaders have at their disposal to rig the process.

EACH OF THESE PRESENTATIONS CAN BE VIEWED IN FULL ONLINE AT CATO.ORG/EVENTS/ARCHIVES.
Fiscal Imbalance, Explained

Some of the most pressing questions about global economies—whether governments are spending beyond their means, for example, and if so by how much—concern what economists call “fiscal imbalance.” Although this is a concept familiar to economists, it can often be difficult for non-economists to decipher. In “Fiscal Imbalance: A Primer” (White Paper), Director of Economic Policy Studies Jeffrey Miron provides a clear introduction to the concept of fiscal imbalance. Fiscal imbalance essentially concerns whether a government can continue forever to make the expenditures necessitated by its existing policies, given the expected revenues under those policies and the government’s debt. This includes its ability to borrow money in the future—which is not infinite. This imbalance, as Miron writes in “U.S. Fiscal Imbalance over Time: This Time Is Different” (White Paper), is growing. He projects fiscal imbalance for every year between 1965 and 2014, revealing that the United States has seen a rising fiscal imbalance since the early 1970s. “As of 2014, the fiscal imbalance stands at $17.9 trillion, with few signs of future improvement even if GDP growth accelerates or tax revenues increase relative to historic norms,” he warns. “Thus the only viable way to restore fiscal balance is to scale back mandatory spending policies, particularly on large health care programs such as Medicare, Medicaid, and the Affordable Care Act (ACA).”

THE COSTS OF GUN CONTROL

Gun control advocates persistently call for measures like universal background checks, a ban on high-capacity magazines, or a ban on so-called “assault weapons.” But, as associate policy analyst David B. Kopel argues in “The Costs and Consequences of Gun Control” (Policy Analysis no. 784), “Such proposals are not likely to stop a deranged person bent on murder.” Kopel examines the actual costs and benefits of these popular gun-control measures, demonstrating that they would prove largely ineffective. “Before adding new gun regulations to the legal code, policymakers should remember that several mass murders in the U.S. were prevented because citizens used firearms against the culprit before the police arrived on the scene,” he warns.
MURDER AS A THREAT TO FREE SPEECH

The brutal Charlie Hebdo killings last year were a shocking act of violence, but unfortunately, not the first violent reactions to speech perceived as blasphemy. As Robert Corn-Revere, a partner at Davis Wright Tremaine LLP, writes in “To Confront the Assassin’s Veto, or to Ratify It?” (Working Paper no. 36), “This was yet another grim marker in the cross-cultural conflict illustrated by events such as the Ayatollah Khomeini’s 1989 fatwa against Salman Rushdie for writing The Satanic Verses, the 2004 murder of filmmaker Theo van Gogh on the streets of Amsterdam for perceived insults to Islam, and the violent reaction to the cartoons of Mohammad published in the Danish newspaper Jyllands-Posten in 2005.” Corn-Revere’s paper confronts the question of how the law should deal with these sinister attempts to chill speech.

ESAS: EMPOWERING STUDENTS AND FAMILIES

“Every child deserves the chance at a great education and the American dream,” Cato policy analyst Jason Bedrick, Goldwater Institute education director Jonathan Butcher, and former Goldwater Institute vice president for litigation Clint Bolick—who has since been appointed to the Arizona Supreme Court—write in “Taking Credit for Education: How to Fund Education Savings Accounts through Tax Credits” (Policy Analysis no. 785). In an effort to improve education, several states have passed laws allowing students to receive an Education Savings Account (ESA) which parents can put toward alternative education services. In this analysis, the authors show how legislators can design ESAs that will work in the 40 states with constitutional provisions that prohibit the use of public funds at religious schools. “Tax-credit-funded ESAs would empower families with more educational options while enhancing accountability and refraining from coercing anyone into financially supporting ideas they oppose,” they write.

CHINA AT A CROSSROADS

China, as Cato vice president James Dorn puts it, is “at a crossroads.” It has made tremendous progress in recent years by expanding the market and strengthening property rights. But at the same time, its powerful one-party state maintains a strong grip on citizens’ private and commercial dealings. “The damage China’s illiberal state has inflicted on the nation is becoming evident as the economy slows, debts mount, and state-owned enterprises (SOEs) draw capital away from the more productive private sector,” writes Dorn in “China’s Challenge: Expanding the Market, Limiting the State” (Working Paper no. 34). He highlights the importance of renewing interest in China’s ancient culture and writings on topics like freedom and limited government—a legacy which its authoritarian leaders have obscured.

THE LUKEWARMING WORLD

In “Climate Models and Climate Reality: A Closer Look at a Lukewarming World” (Working Paper no. 39), Center for the Study of Science director Pat Michaels and assistant director Chip Knappenberger further the case for the “lukewarmers”—those who believe that the evidence for some human-caused climate change is persuasive, but that, contrary to the alarmists, this warming occurs in accordance with the lower end of expectations from mainstream science. They contend that the rate of warming over the past several decades has been so slow it was “completely unexpected” by any of the climate models—a worrying indication that the current state-of-the-art climate models are not up to the task of simulating the actual behavior of the earth’s climate.” This consequently throws efforts to implement climate policy based on these models into serious doubt.

THE EVOLUTION OF WEAPONRY

Technological advances in recent years have led to a bevy of increasingly small, cheap, and sophisticated weapons. “This new diffusion of power has major implications for the conduct of warfare and national strategy,” U.S. National Defense University distinguished research fellow T.X. Hammes argues in “Technologies Converge and Power Diffuses: The Evolution of Small, Smart, and Cheap Weapons” (Policy Analysis no. 786). Hammes delves into the particular challenges posed by various types of emerging technology, like drones, artificial intelligence, and nanoenergetics, or explosives. With such abundant and affordable technology available, the United States may be exposed to much more danger when waging military campaigns in the future. “Increasingly,” he writes, “we will have to ask the question ‘Is the strategic benefit of an intervention worth the cost when the enemy can strike back in and out of theater?’”
SIMON AND GARFUNKEL KNEW
Sitting on a sofa on a Sunday afternoon
Going to the candidates’ debate
Laugh about it, shout about it
When you’ve got to choose
Every way you look at it you lose
— “MRS. ROBINSON,” 1968

JUST SAY NO TO SOCIALISM, HILLARY
Chris Matthews: What’s the difference between a socialist and a Democrat?
Hillary Clinton: Well, I can tell you what I am. I am a progressive Democrat.
Matthews: How’s that different than a socialist?
Clinton: I’m a progressive Democrat who likes to get things done and who believes that we are better off in this country when we’re trying to solve problems together.
— CHRIS MATTHEWS ON HARDBALL, MSNBC, 01/05/16

JUDGING CONGRESS LIKE A FACTORY
The 112th Congress, you might remember, was the least productive in modern times. The 113th, the one that concluded in 2014, did more, but only slightly . . .

After the first year of this 114th Congress, more bills have been enacted than in the 112th or 113th, according to data compiled by GovTrack.us. So far, the 114th is tracking more closely with the more-productive 110th and 111th.
— WASHINGTON POST, 12/24/15

BERNIE SANDERS: HONEST ENOUGH TO ADMIT THAT HIS SPENDING PLANS WILL REQUIRE RAISING TAXES ON THE MIDDLE CLASS. HILLARY CLINTON: NOT.
Front-runner Hillary Clinton often sounded like an underdog, as she attacked the Vermont senator for flip-flopping on guns, proposing an unrealistic health-care plan and admitting that he would raise taxes on the middle class.
— WASHINGTON POST, 01/18/16

THE ESTABLISHMENT WEEPS
There’s only so much revenue a country can wring out of an income tax system.
— CATHERINE RAMPPELL IN THE WASHINGTON POST, 11/12/15

WISDOM OF THE ELDERS, 1925
For years I’ve watched governments take control of our lives, and their argument is always the same—fewer costs, greater efficiency. But the result is the same, too. Less control by the people, more control by the state until the individual’s own wishes count for nothing. That is what I consider my duty to resist . . .

The point of a so-called great family is to protect our freedoms. That is why the barons made King John sign Magna Carta . . .

Your great-grandchildren won’t thank you when the state is all-powerful because we didn’t fight.
— THE DOWAGER COUNTESS OF GRANTHAM ON DOWNTON ABBEY, PBS, 01/24/16

GET THE LAWYERS OUT OF POLITICS, AND LOOK WHAT YOU GET INSTEAD
While lawyers are still a huge part of American politics today, their influence has faded somewhat. By the 1960s, lawyers held fewer than 60 percent of Congressional seats. In 2015, fewer than 40 percent of Congressional members were lawyers . . .

The reason for the change, Robinson says, is partly the rise of a professionalized political class after World War II. After the war, a permanent political class began to form in Washington—people who work as political aides or in civil society organizations, many with the intention of making a career in politics.
— WASHINGTON POST, 01/19/16

IT HELPS TO KNOW SOMEONE
Last April, a kilo of GBL, an illegal chemical akin to “date rape drug” GHB, made its way from China to the District. And it brought two investigators—one from the Metropolitan Police Department and one from the Department of Homeland Security—to the home of U.S. Senate staffer Fred Pagan.

“We know who you are and who you work for,” Homeland Security special agent Mark Waugh told Pagan, 49. “That’s the reason we didn’t break down your door.”
— WASHINGTON CITY PAPER, 01/14/16

KNOW YOUR CUSTOMERS
The Dag Hammarskjöld Library at the United Nations—named after the secretary general who died in 1961—doesn’t make the news very often. Meant to be used by the professional Secretariat staff of the UN and by national delegations, it stores documents and publications from the UN and related organizations, as well as a raft of other books and materials on international relations, law, economics, and other UN-relevant topics. So, you know, a library.

But even the UN’s library has a social media presence now, and recently it tweeted the 2015 publication that got checked out the most frequently . . .

To be clear: The UN is full of delegates representing awful dictatorships, and the 2015 book that it says got checked out the most from the UN library was about . . . how to be immune from war crimes prosecution.
— VOX, 01/07/16