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Cato Policy Report

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U.S. v. Jones: Fourth Amendment Law at a Crossroads

BY JIM HARPER

In 2004, Antoine Jones, the owner of a northeast Washington, D.C., nightspot called Levels, came under suspicion of narcotics trafficking. A joint FBI/Metropolitan Police Department task force obtained a warrant authorizing the use of a GPS tracking device on his Jeep Grand Cherokee. The warrant permitted them to attach the device in the District of Columbia within 10 days of its issuance. But they installed the device on the 11th day, in Maryland.

Outside the terms of the warrant, they used the device to track Jones's vehicle and his whereabouts for 28 days, gathering 2,000 pages of data. They used that data to further investigate, to charge, and ultimately to convict Jones of possession and conspiracy to distribute cocaine.

When Jones appealed his conviction and the use of the GPS evidence, the government argued that it did not need a warrant to track the movements of his car, as these movements were almost entirely in public. In the landmark case of *Katz v. United States* (1967), the Supreme Court had said, sensibly for the time, "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." Justice John Marshall Harlan, concurring in that case, mused about Fourth Amendment protection stemming from an "expectation of privacy" that society finds reasonable. In the hard cases ever since, courts and commentators have tried to use the "reasonable expectation of privacy" test to divine the meaning of the Fourth Amendment.

It is a stretch for people to expect privacy in things they expose to the public. So perhaps the Fourth Amendment allows government agents free rein to track people's movements, even by secretly attaching GPS devices to their cars.

But the *Jones* Court declined to let advancing technology and the "reasonable expectation" test overrun the Fourth Amendment's privacy protections. Instead, it relied on property rights to determine when government agents have invaded the right against unreasonable searches and seizures. *Jones* opens the door to improvements in Fourth Amendment protection—improve-

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JIM HARPER is director of information policy studies at the Cato Institute and author of *Identity Crisis: How Identification Is Overused and Misunderstood.*

On June 28, the Supreme Court upheld the individual mandate of the Patient Protection and Affordable Care Act, justifying it under Congress's taxing power. Outside the Supreme Court that day, Cato senior fellow MICHAEL TANNER was interviewed by Rita Cosby on the implications of this momentous decision.

BY ROBERT A. LEVY

> "The Cato Institute will continue as a non-aligned, non-partisan source of libertarian views on public policy."

Chairman's Message

Cato Is History; Long Live Cato

October 1, 2012, marks a new chapter in Cato's history, but also the end of an era. For 36 incredible years, Ed Crane has been Cato's chief executive officer and guiding light. But on October 1, Ed will be stepping down. He'll be succeeded by John Allison, the former CEO of BB&T—a celebrated businessman, committed libertarian, and recognized authority on management and public policy. That change arises from a compromise between the Institute's directors on one hand and Charles and David Koch on the other. Central to the compromise is a new structure we believe will guarantee that the Institute will continue as a non-aligned, non-partisan source of libertarian views on public policy.

As you might guess, this protracted dispute diverted focus from Cato's mission during a time when Cato's vigorous advocacy is more critical than ever. Both sides—represented by a divided board—recognized that we had to find a resolution, and do so as quickly as possible. Like all compromises, no side got everything that it wanted. But we believe that we reached the best deal possible under the circumstances.

A key component of the settlement was a change in Cato's structure. Cato will hereafter be governed by members; no longer will there be shareholders. The members will be the directors of the Institute and they will elect their own successors. Initially, the board will have 16 directors. Our 12 original pre-dispute directors, including David Koch, will continue to serve. They will be joined by John Allison and three others nominated by the Kochs.

Another key component of the settlement was a change in Cato's leadership. For a number of years, Ed has said that he was planning on stepping down from his post as president. As part of the settlement, the timing of that transition and the selection of his successor were decided. For the rest of this year, Ed will be working closely with John Allison on transition and related issues. Thereafter, Ed will be a consultant to Cato on fundraising and other matters, as determined by John and Ed.

On Wednesday, the board voted to approve the settlement. Everyone at the board meeting voted for the settlement. Everyone involved in the compromise is committed to Cato, its vision and its mission, and believes the settlement will help ensure that Cato can continue fulfilling its mission into the future.

That's it, in a nutshell. A small group of people made this happen. But the two persons who were absolutely essential to the process were Ed Crane and John Allison.

Of course, Ed is the person most responsible for our enormous success over three and a half decades. Under Ed's leadership, Cato has become a preeminent public policy research organization. His role in co-founding, managing, and growing the Institute has been, quite literally, indispensable. Ed is an icon in the libertarian community. He richly deserves that label.

John Allison started at BB&T in 1971; he was elected president in 1987 and CEO in 1989. Under his management, BB&T became one of the nation's top financial holding companies. Its assets grew from under $5 billion to $152 billion. In 2009, after retiring as CEO, John joined the faculty at Wake Forest, where he's Distinguished Professor of Practice in the School of Business. He holds six honorary doctorates, has been inducted in the North Carolina Business Hall of Fame, and was named one of the 100 most successful CEOs worldwide by the *Harvard Business Review*. John also serves on boards of five university-affiliated organizations. Most important for our purposes, John has earned the admiration and respect of Charles and David Koch and the entire Cato board of directors.

If Cato had sought the foremost exemplars of individual liberty and limited government as successive CEOs, we could not have found two people better qualified than Ed Crane and John Allison. Both are superstars; and that is why Cato's past is prologue. We are proud of our achievements and confident that the Cato Institute will flourish over the coming years.

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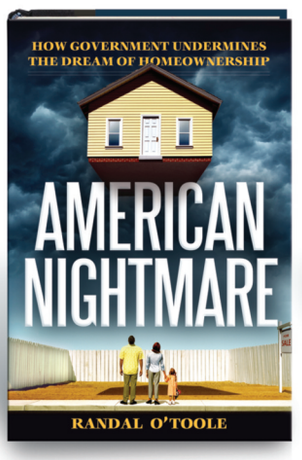
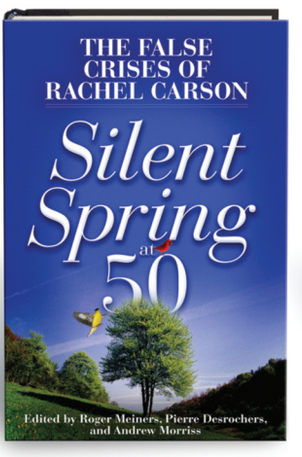
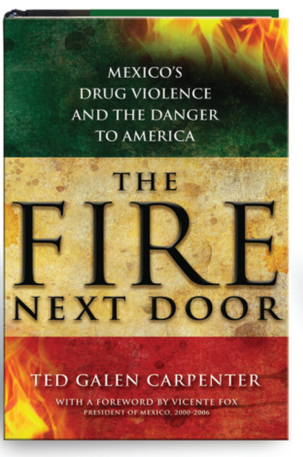
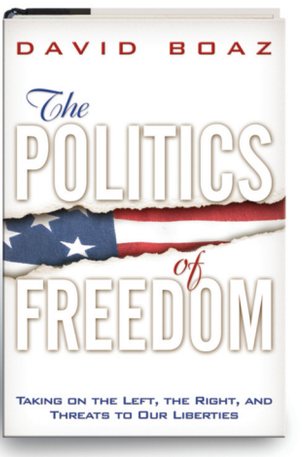








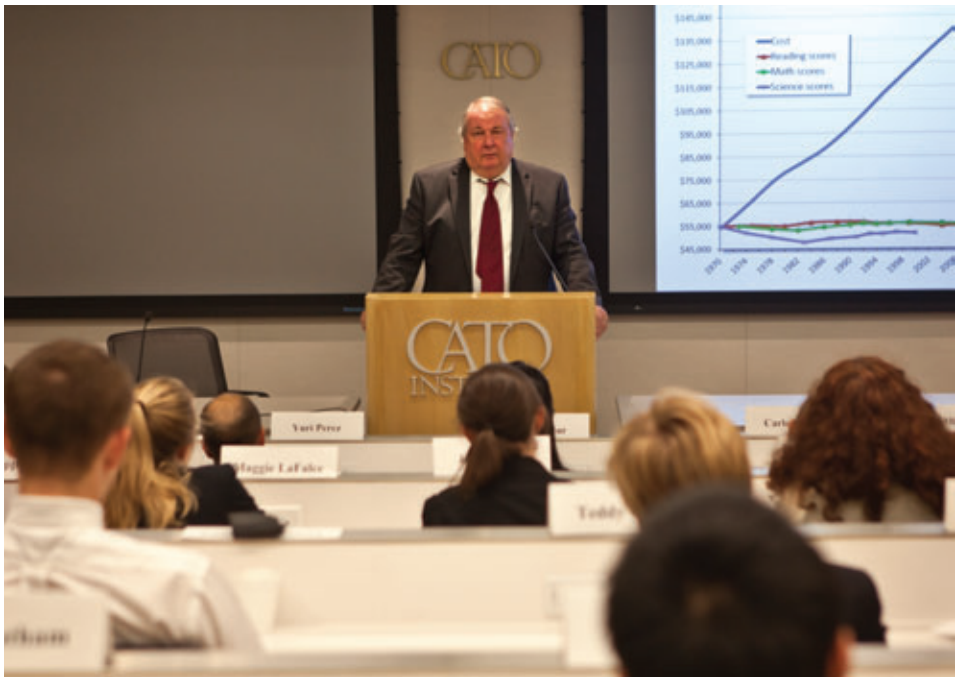
For Cato clothing, books, and gifts, visit Cato.org/store, or call 800-767-1241.

Many critics continue to decry money in American politics, arguing that rules for disclosure would help eliminate disproportionate influence in elections. On the heels of proposals for a revised DISCLOSE Act, JOHN SAMPLES, director of Cato's Center for Representative Government, discussed the problems with the proposals in front of a packed room at a Capitol Hill Briefing in June. "The problem with disclosure is that it 'chills' speech," he said. "Once it's disclosed that certain people are supporting controversial candidates, those people may be threatened or even attacked."

BENJAMIN H. FRIEDMAN, research fellow in defense and homeland security studies at Cato, answered questions from reporters after a policy forum at the Institute. The event, "Libya: One Year Later," surveyed the country's troubling developments since the Obama administration's decision to intervene last year.

In June, CHRISTOPHER PREBLE, vice president of defense and foreign studies at the Cato Institute, joined MICHAEL O'HANLON, director of research and senior fellow at the Brookings Institution, on a panel at a Bloomberg conference on defense issues. The two discussed the strategic and military challenges facing the United States today.

Sen. Ron Wyden (D-OR) discussed his efforts to block the extension of the FISA Amendments Act, focusing in particular on a loophole that would "allow the government to effectively conduct warrantless searches for Americans' communications."



As part of our ongoing efforts to connect with a new generation of libertarian leaders, the Cato Institute's summer intern class is immersed in a series of in-depth seminars on politics, economics, law, philosophy, and various policy issues. At one session, Cato president Edward H. Crane discussed the history of the Institute and the circumstances that led him to establish a think tank.

At the Second Annual Cato Papers on Public Policy Conference, Cato senior fellow Jeffrey A. Miron (standing, left) discussed the Great Depression with Eric Rasmussen (standing, right) of Indiana University. Charles Calomiris of Columbia University and James Hamilton of the University of California–San Diego offered comments on the presentation.

"It's time for socially tolerant Republicans to come out of the closet," Cato publications director David Lampo (left) said at a forum for his new book, *A Fundamental Freedom: Why Republicans, Conservatives, and Libertarians Should Support Gay Rights*. Michael Barone, coauthor of the *Almanac of American Politics*, praised the book.

Continued from page 1

ments that could come about in a drug-sniffing dog case being argued this fall.

"We hold that the Government's installation of a GPS device on a target vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" Justice Antonin Scalia wrote for a five-justice majority of the *Jones* Court, consistent with a Cato Institute amicus brief in the case. The government "occupied private property for the purpose of obtaining information."

The Court's decision was unanimous, but four justices disagreed with Justice Scalia's rationale. Justice Samuel Alito led this group, arguing strongly against the use of property analysis, or, as he put it, "18th-century tort law." Alito would have used the *Katz* test, finding that one has a reasonable expectation of privacy in the sum total of one's public movements. *Katz* doctrine, he granted, was "not without its own difficulties."

Justice Sonia Sotomayor concurred separately in a very interesting and sure to be influential opinion. She joined the majority opinion, but took pains also to express agreement with Justice Alito's concurrence. Importantly, she mused about the weakness of the third-party doctrine—the "premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." She wrote:

> This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

The Court was unanimous in denying government agents authority to track people using high-tech devices without a warrant, but it was almost perfectly split in its reasoning. That opens Fourth Amendment law to reform.

> "The *Jones* Court relied on property rights to determine when government agents have invaded the right against unreasonable searches and seizures."

PROTECTING PRIVACY—BUT HOW?

A point of agreement between Justices Scalia and Alito was the goal of preserving "that degree of privacy against government that existed when the Fourth Amendment was adopted." But neither justice was clear about what he meant in saying that. Preserving some past state of affairs with relation to privacy cannot be a clear goal without a command of what the thing is.

In 1967, the year that the Supreme Court decided *Katz*, scholar Alan Westin characterized privacy in his seminal book *Privacy and Freedom* as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." This is the strongest sense of the word "privacy": the exercise of power to control personal information. When people can control information about themselves, they will define and protect their privacy as they see fit.

If the Court wants to give individuals the same level of control over personal information as they had in the past, it should examine how people controlled information in the past and see that their ability to do so is maintained in the present. In the late 18th century, people controlled information about themselves by how they arranged the things in the world. Retreating into one's home and drawing the blinds, for example, caused what happened inside to be private. Lowering one's voice to a level others could not hear made a conversation private. Draping the body with clothing made the details of its shapes, textures, and colors private.

These actions, in the abstract, prevent others from perceiving things. At base, people protect their privacy by denying others access to the photons, sound waves, particulate remnants, and physical surfaces that reveal themselves and the things around them.

It is not enough, though, for people to withdraw into their homes, lower their voices, or wrap their bodies in clothes. They also rely on law. When people enter their homes, they rely on property rights to prevent others from accessing what goes on within. When people put on clothing, they rely on the law of battery, which bars wrongful physical contact that might strip the body of its wrappings.

Courts have had an easy time with "real world" privacy protection in Fourth Amendment cases. In *Terry v. Ohio* (1968), for example, a plain-clothes police detective observed three men acting strangely and became suspicious that they were casing a store for a stick-up. When Officer McFadden grabbed Terry, spun him around, and patted down the outside of his clothing, the Court easily recognized this as a seizure, followed by a search. The seizure and search were reasonable and therefore constitutional.

Consider how physics and law worked in the *Terry* case. Standing in a place he was legally entitled to be, Officer McFadden had used his eyes to capture the photons bouncing off his suspects and the things around them. Terry and his fellows had not concealed their movements on the street. Visual observation and inference combined to give McFadden an idea that they might be armed.

Because he had reasonable suspicion, Officer McFadden was allowed to touch Terry in a way that would otherwise be a battery. After he seized Terry and turned him, Officer McFadden placed his hands on Terry's outer garments. He used touch to seek out information that was otherwise concealed from view. The hard resistance and weight of the gun were different from the soft resistance of the human body, of

clothing, papers, and such, and the gun was found. Only a year after the *Katz* decision, the Supreme Court did not resort to the fuzzy "reasonable expectations" analysis. It wrote with confidence and clarity about the seizure of Terry, the search it facilitated, and their legal import.

THE PHYSICS OF PRIVACY PROTECTION

The Supreme Court has struggled when applying the physics of privacy to information technologies. In *Olmstead v. United States*, the 1928 wiretapping case that the Court famously got wrong, Olmstead and his colleagues in bootlegging had used the telephone to communicate. A microphone in the handset produced a modulated electrical current that varied its frequency and amplitude in response to the sound waves arriving at its diaphragm. The resulting current was transmitted inaudibly and invisibly along the telephone line to the local exchange, then on to the phone at the other end of the circuit.

Importantly, the signal passing along the electric wire was invisible and inaudible to any human. It could not be perceived and was thus private. Chief Justice William Howard Taft described the means by which the government tapped the defendants' phones: "Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office" of the conspiracy. These wires carried the signal to a coil and diaphragm controlled by the government, which reproduced the sound of the voices otherwise unheard all along the wire. Government agents transcribed the conversations to use as evidence.

But later in his opinion, Chief Justice Taft denied these facts. Justifying his legal conclusions, he wrote: "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only." He flatly denied the physical realities of wiretapping while withholding Fourth Amendment protection from telephone conversations.

The Court returned to the issue nearly four decades later in 1967's *Katz v. United States*. Katz was an alleged bookie, convicted because FBI agents had bugged the public telephone booth from which he placed his calls. As in *Olmstead*, the bug converted sound waves to electrical signals. Crucially, the listening device was configured to be invisible to Katz. Unable to see the device, and seeing nobody near the phone booth in which he spoke, Katz believed his conversations were private. And they were—but for the FBI agents using high-tech gadgetry to hear what they otherwise could not have heard.

> "If the Court wants to give individuals the same level of control over personal information as they had in the past, it should examine how people controlled information in the past and see that their ability to do so is maintained in the present."

Justice Stewart's majority opinion reversing Katz's conviction rested on the physical protection that Katz had given to his oral communications by going into a phone booth. Against the argument that Katz was in public for all to see, he wrote: "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." The Court gave Katz's privacy-protective actions Fourth Amendment backing.

The "reasonable expectation of privacy" language Justice Harlan used in his solo concurrence has certainly enjoyed repetition, but it was not the holding in the case. He mused about "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

This language would change the factual question the majority opinion turned on—Was the information physically and legally available to others?—into a murky two-part analysis with a quasi-subjective part and a quasi-objective part. Judicial administration of the Fourth Amendment has suffered ever since.

THE WEAKNESS OF THE *KATZ* TEST

Subsequent Courts have not faithfully applied the *Katz* test, instead presuming what parties' expectations are and then analyzing their reasonableness. The *Katz* test has reversed the focus of the Fourth Amendment, turning away from the reasonableness of government action to examine the reasonableness of privacy expectations.

Reasonable expectation doctrine biases Fourth Amendment law against privacy in another way. Courts examine concealment of personal information under the reasonable expectation test, but they do not apply any such analysis when information is left exposed. The plain view doctrine is a simple constitutional rule: if a thing is visible (or otherwise perceivable) by authorities acting within the law, a person cannot make a Fourth Amendment claim against their observing it and acting on the knowledge of it. Plain view is a simple factual question, but plain concealment and privacy get further consideration. It should be that information one conceals from the general public one also conceals from the government.

The actual holding in *Katz* was based on physical protection given to a telephone conversation. Katz had excluded "the uninvited ear" when he went into a phone booth, including the ears of government agents. When one has arranged one's affairs using physics and law to conceal information, it is generally unreasonable for government agents to defeat those arrangements. Thus it is reasonable to expect privacy. But reasoning backward from expectations to protection of information, as Justice Harlan did, has utterly confounded courts trying to apply Fourth Amendment doctrine. The challenge will only grow if courts try to square "reasonable expectations" with continuing advances in information technology.

FLORIDA V. JARDINES—THE DOG-SNIFF CASE

It may not be a high-tech case, but a drug-sniffing dog case, in which the Court might revise Fourth Amendment doctrine.

In *Florida v. Jardines*, a case before the Court this fall, law enforcement received an uncorroborated tip that Joelis Jardines was growing marijuana in her home. Two officers went to the front door of her home with a dog trained to detect narcotics. The dog alerted on the front door, which prompted the officers to seek a warrant, ultimately finding the marijuana plants inside. The question in the case is whether having a dog sniff at the front door of a suspected marijuana grow house is a Fourth Amendment search that requires probable cause.

In *Illinois v. Caballes* (2005), the Court said that a drug-sniffing dog search is no search at all because it only reveals the existence of illegal drugs, something in which nobody can have a "reasonable expectation of privacy." That is a logical extension of *Katz*, but it is deeply concerning because it would hold any activity of government agents constitutional if it is sufficiently tailored to discovering only crime.

The Department of Homeland Security (DHS) has various technologies under development that could fit within the *Caballes* rule even though they are highly invasive. One, called Future Attribute Screening Technology, would examine Americans' biologic cues—cardiovascular signals, pheromones, electrodermal activity, respiration, and so on—to detect intent to cause harm. This would not invade "reasonable expectation of privacy" under current doctrine because it would indicate only the existence of a criminally guilty mind.

> "The *Katz* test has reversed the focus of the Fourth Amendment, turning away from the reasonableness of government action to examine the reasonableness of privacy expectations."

Another DHS program is called the Remote Vapor Inspection System. The RVIS generates laser beams at various frequencies to be aimed at a target vapor. The beams reflected and scattered back to the sensor head reveal spectral signatures that can be matched to the signatures of sought-after gasses and particulates. Using RVIS, government agents might remotely examine the molecular content of the air in houses and cars, quietly and routinely explore the gasses exiting houses through chimneys and air ducts, and perhaps even silently inspect any person's exhaled breath. If RVIS technology is programmed to indicate only on substances produced by wrongdoing, the *Caballes* rule means that even pervasive, frequent, and secret use would be considered no search.

CONCLUSION

The Court should abandon *Caballes* and no longer use its parent, the "reasonable expectation of privacy" test, in Fourth Amendment cases. Instead it should use the plain meanings of terms like "search" and "seizure" and the actual holding of *Katz v. United States*, which turned on physical protection of information—not "expectations"—to administer the Fourth Amendment.

In *Jones*, the Court opened the door to reforming Fourth Amendment doctrine this way. It should not be courts' broad pronouncements about expectations of privacy that govern constitutional protection. The way people arrange the things in the world—what they do with their property—controls whether information is private and protected. A person's car is not the government's to use for its surveillance purposes. If government agents want to learn a suspect's whereabouts, they will have to do it another way, or get a warrant.

Joelis Jardines closed and locked the doors to her home, denying all comers the ability to perceive what goes on within, including through the smells produced inside. The Cato Institute argued to the Court as an amicus in *Jardines*, "It is a search when government agents bring a drug-sniffing dog to the front door of a person's home to examine the home for the presence of drugs. The dog makes perceptible what otherwise was not perceptible."

It is reasonable to expect that one's privacy will be maintained when one has placed sufficient physical and legal barriers around personal information. But in an important sense, privacy is beside the point. The Fourth Amendment, after all, is not a privacy management tool. The Fourth Amendment describes the right of individuals, retaining sovereignty not given to the state, to be free of unreasonable searches and seizures no matter what material or social consequences wrongful government action might have. ■

The Obamacare Ruling: What Does It All Mean?

On June 28, the Supreme Court ruled that the individual mandate component of the Patient Protection and Affordable Care Act is constitutional under Congress's taxing power. What is left of the idea that the Constitution creates a government of limited and enumerated powers? What does this case of the century mean, for not only our health care system, but also our constitutional republic? And what are the next steps for Congress? At a Cato Policy Forum held days after the ruling was handed down, several prominent scholars joined together to answer these important questions. Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at Georgetown University, a senior fellow at the Cato Institute, and the "intellectual godfather" of the case against Obamacare, offered his examination of the decision. Michael F. Cannon, Cato's director of health policy studies, highlighted optimistic signs on the future path toward repeal.

RANDY BARNETT: As you all know, last week's decision did not go the way we hoped it would. This was a real crushing blow to liberty and to myself. But just because it was a bad loss does not mean it could not have been worse. It could have been—and to deny what we accomplished under these circumstances is to give the other side a bigger victory than they in fact won. I want to suggest that the reason this case was so historic is that there was not one, but two huge issues on the table.

The first was on whether the government in this country would control our medical care. If this particular bill remains as law, I believe that it will fundamentally alter the relationship between individuals and their government. It will essentially change our political system to one more closely approximating that of Western Europe. Now I don't have anything against Western Europe—they have nice buildings and the food is good—but I don't necessarily want to live under their social-democratic political system. Unfortunately, given the provisions of this bill, I believe that will be the inevitable outcome.

The second huge issue on the table with this law was the Constitution of the United States. Our constitutional republic, which says that the federal government is one of limited and enumerated powers, has been the single most important principle that this country has stood for from its founding. It's a principle that the Supreme Court has never denied and often affirmed, even throughout the New Deal, the Warren Court, and the Great Society.

But if the core of this bill—the individual mandate—was upheld under the Commerce Clause, then the theories underpinning that decision would eliminate the existence of enumerated powers. If the decision to purchase health insurance could be regulated under the commerce power, then anything could be justifiably regulated. Essentially, what we would have at the end of this legal battle is a "national problems" clause—a provision in the Constitution which gives Congress the power to address any national problem at its own discretion.

So what did the Supreme Court decide? Let me first say that nearly everyone, myself included, believed that these two issues were a package deal. In other words, if we lost our challenge to Obamacare, then we would also lose our effort to preserve the enumerated powers of the Constitution. But that's not what happened.

Last week, there were five votes in the Supreme Court for the proposition that the Constitution contains limited and enumerated powers, that the individual insurance mandate as drafted exceeds Congress's powers, that in fact the Commerce Clause is restricted to regulating economic activity that has a substantial effect on interstate commerce, and finally, that it does not reach inactivity. It does not give Congress the power to mandate economic activity in order to then regulate it. That's what the Court decided, in a position that 99.9 percent of law professors said was based on frivolous arguments. Their position—that Congress had an unlimited discretionary power to address national problems—commanded at best four votes.

I have always argued in favor of an interpretation of the Constitution based on its original meaning. But even those who believe in a living Constitution—a dynamic document that derives its meaning from the Supreme Court—now have to accept two propositions. First, we have a government of limited and enumerated powers. Second, the individual insurance mandate exceeds those restrictions.

This represents a major victory because the alternative would have been so much worse. To put it another way: if you were in a war and you lost a major battle, but still managed to gain some terrain during the course of that battle, would you surrender that terrain when all is said and done? Of course not. Well, that is exactly the situation we find ourselves in. We've actually moved constitutional law in a positive direction. The position that has now been affirmed by five justices was not previously on the books in such an explicit form. And what was previously an unreasonable position among the vast majority of constitutional law professors is now the law of the land. It's important to recognize that.

Where do we go from here? Imagine that we're actually in 1935 and the Supreme Court has just struck down a minimum wage law by a five-to-four vote. Well, as history tells us, what's coming next is 1937—

when, as a result of public pressure and a Democratic administration, the New Deal is reauthorized. It's upheld by a five-to-four vote based on another switch by a different Justice Roberts, the so-called "switch in time that saved nine."

I believe that we are at a similar point in time now, only our position is the one that could conceivably emerge later. For the first time in my life, a broad swath of the American people has been engaged in a lawsuit of this nature. They've followed every step along the way, and a majority have thought the Affordable Care Act was unconstitutional from the beginning. They were riveted by the decision last week, and deeply disappointed with the results.

I don't believe that the meaning of the Constitution changes. The substance of constitutional law, however, changes with the different composition of the Supreme Court. That's why, given the choice between fighting to defeat Obamacare or preserve the Constitution—if you taxed me in order to make me choose—I would have undoubtedly picked the latter. In November, voters can still fight Obamacare. No single election could have saved the Constitution, but now that it's safe, we can rely on voters to achieve what we didn't in court.

This is not going to be easy—there are no guarantees—but it's something that can be done. The timing of this was actually quite good because we have an election teed up to do just that. This election is not only going to be about Obamacare, but also about electing a president who commits himself to judicial nominees who believe in both the written Constitution and the enumerated powers contained therein. It will be about nominees who have judicial character as well as judicial commitment.

And if that happens, then we could be standing at the threshold of what Bruce Ackerman of Yale Law School has called "a constitutional moment." It could mark a moment from which justices will now be selected according to their commitment to the original meaning of the Constitution—not just their favorite parts—and their ability to resist pressure to the contrary. If that happens, we will look back upon this decision as a historic turning point in constitutional law.

Now, am I predicting that this will happen? No, I'm not—and in that sense I'm not entirely optimistic. I didn't predict the way this case was going to be decided, and I'm not predicting which way the election will swing. All I'm saying is that an election is a prerequisite to a constitutional moment. The seeds of that moment have been sown by both our legal challenge and the ruling in this case. There is a reason for hope. Those who value our republican system of limited federal powers should put their disappointment with the decision aside and breathe a sigh of relief over the legal precedent that was set. Now is the time to ensure that we realize the potential of this moment—that this is, in fact, our 1935, and what's coming is going to be our 1937.


Randy Barnett

> "There were five votes in the Supreme Court for the proposition that the individual insurance mandate as drafted exceeds Congress's powers."

MICHAEL F. CANNON: On the day of the Supreme Court's ruling in *NFIB v. Sebelius*, I did a radio program opposite a former health policy adviser to President Obama. The host of the radio program asked her if she could think of anyone who would be harmed by the Supreme Court's decision, and she said that she could not. Now think about that. This is a law that is spending two trillion dollars over the next 10 years from the federal budget—it compels states, employers, and individuals to spend trillions more—and this Obama adviser couldn't think of a single person who would be hurt by the associated taxes and regulations.

There wasn't enough air time for me to talk about all the ways that this law is going to hurt Americans, and is in fact hurting them right now. But here are a few. The mandates that this law imposes on businesses are already discouraging employers from hiring. The medical device tax in particular will eliminate jobs in that industry. There are a million or more people that this law has already thrown out of their health plans. In fact, the Robert Wood Johnson Foundation recently estimated that this law will cause 150,000 Americans with high-cost conditions—very sick Americans—to lose their health insurance.

The law has caused some premiums to rise by 20 to 30 percent—and that was almost immediately after it took effect. Supporters of the law acknowledge that it will cause some peoples' premiums to double, even after accounting for all of the tax credits and subsidies involved. The law will impose implicit marginal tax rates in excess of 100 percent on low- and middle-income Americans. It is undermining civil liberties, like when the Secretary of Health and Human Services effectively threatened insurance carriers with bankruptcy for the crime of telling their subscribers how much this law was increasing their premiums. Of course, it also threatens religious liberty by forcing people to pay for things that they consider immoral. And finally, the law's health insurance price controls create a race to the bottom by literally forcing insurance companies to provide lousy coverage to the sick and deny them care.

Supporters of the law like to say that this is a matter of life and death. I don't think they have any idea how right they are. But it isn't just the Obama administration that's oblivious. After the ruling, I spoke to a

reporter who has followed the health care debate for decades. I told him that repealing Obamacare is health care reform, because that law is hurting so many people. The supposedly popular dependent coverage mandate, for instance—which requires employers to offer coverage for dependents up to the age of 26—threw 6,000 spouses and children of members of an SEIU local in New York out of their health insurance coverage, leaving them with nothing. The supposedly popular preexisting condition provision that took effect six months after the law was signed has caused carriers in 39 states to flee the market for child-only health insurance and has caused those markets to collapse in 17 states. The reporter said he had never heard of either example.

We clearly have a lot of education to do, and yet it's worth mentioning that the polling has been consistent on this law for two years. The public has opposed this law ever since it was first introduced in Congress. A recent New York Times poll found that 65 percent of the public—and more than 70 percent of independents—wanted the Supreme Court to strike down all or part of this law. Yet we keep hearing over and over again that the reason the American people don't like this law is because they don't understand it. It seems to me that the people who don't understand this law tend to be geographically concentrated in Washington, D.C.

Nevertheless, after this decision, the Obama health care law is weaker—and the path to repeal is clearer—than it was one week ago. It's now becoming clear how severely the Supreme Court's ruling hobbled this law. The law already gave states the ability to block about half of its new entitlement spending simply by refusing to create health insurance exchanges. The Court's ruling has now given states the power to block the rest of the law's new entitlement spending. State officials now have it within their power to collectively reduce the federal deficit over the next 10 years by $1.6 trillion. *All they have to do is sit on their hands*. Let me explain.

The law relies on states to implement two of its essential components: the health insurance exchanges and the expansion of the Medicaid program. The exchanges will channel about $800 billion to private insurance companies. The Medicaid expansion will spend about $900 billion over the next 10 years, much of that also going to private insurance companies. Contrary to popular belief, states are under no obligation to do either of these things. And they should refuse in both cases.


Michael F. Cannon

> "Repealing Obamacare is health care reform, because that law is hurting so many people."

Many state officials believe that if states create a health insurance exchange, they'll have more control over how the law is implemented in their state. While it is true that the law directs the federal government to create an exchange in a state that does not create one itself, the law appropriates no funds for them to do so. The Republicans in Congress are unlikely to provide that money. But the law also requires state-run exchanges to be approved by the Secretary of Health and Human Services and empowers her to force a state-run exchange to do everything that she would have done through a federal exchange. And for the privilege of having the Secretary dictate how they run their own exchanges, states would have to pay $10 to $100 million per year in operating costs.

Due to the interlocking nature of the law's many features, states that create exchanges will be needlessly exposing companies to the employer mandate, which taxes employers up to $2,000 per worker if they fail to offer required coverage. Why is that? That tax is only enforceable in a state that creates its own health insurance exchange, because what triggers that tax is when one of the employer's workers goes into an exchange and receives a tax credit or a subsidy to purchase health insurance. Those tax credits and those subsidies are available only through state-run exchanges, not those created by the federal government. The law is very clear about this—it laboriously and explicitly restricts those tax credits and subsidies to state-run exchanges. States that refuse to create an exchange can therefore block those subsidies, exempt their employers from that tax, and lure jobs away from other states that do impose that tax.

The Supreme Court also handed Obamacare a serious defeat by striking its Medicaid mandate. As of now, federal Medicaid grants comprise an average of 12 percent of state revenues. The law commanded states to dramatically expand their Medicaid programs even further on pain of losing all federal Medicaid grants. Twenty-six states, led by Florida, challenged that mandate as unconstitutionally coercive, and they won. The Court ruled that the federal government can't withhold existing Medicaid grants from the states that fail to expand their programs, and so now states can refuse to expand their programs without fear of reprisal, which they should do.

So far, about 73 members of Congress have sent letters to the National Governors Association urging them not to create a health insurance exchange, a move that is essential to repealing this law. Several governors have already expressed their refusal to do so, which is not surprising. If 26 of them sued the federal government because the cost of that expansion was unduly burdensome, then you can bet that at least some, if not all, of them are going to refuse to expand their Medicaid programs.

But you don't need a governor to do this

Continued on page 19

World leaders catch up to Cato

Opposition to Drug Prohibition Gains Steam

Last November, the Cato Institute hosted a conference, "Ending the Global War on Drugs," where international leaders and prominent scholars came together to review the widespread impact of drug prohibition. In his closing address that day, Fernando Henrique Cardoso, former president of Brazil, suggested a "paradigm shift" in the current battle, offering a way forward "from just repression to a more humane and comprehensive approach."

This spring, the *Wall Street Journal* noted that a transformation may already be underway. At a regional conference intended to tout U.S. trade policies in Colombia, the administration met with unexpected resistance against its global efforts to stem the use of narcotics. "The uprising on drug policy is led by some of Washington's closest and best-funded allies in Latin America"—statesmen who, according to the *Journal*, "say the current approach isn't working, after hundreds of millions of dollars and tens of thousands of drug-related murders."

The revolt is just the latest acknowledgment that the mounting costs of the war on drugs are becoming intolerable. Last year, the Global Commission on Drug Policy—a 19-member panel which included former U.N. secretary general Kofi Annan, former secretary of state George Shultz, and former Fed chairman Paul Volcker—released a groundbreaking report. "The global war on drugs has failed," they concluded, "with devastating consequences."

Across the world, leaders are beginning to search for alternatives to this endless battle. In a 2009 Cato study, best-selling author Glenn Greenwald described one such option: Portugal's 2001 decision to decriminalize all drugs, including cocaine and heroine. He concluded that none of the nightmare scenarios predicted by critics—from rampant increases in usage among the young to the transformation of Lisbon into a haven for "drug tourists"—had occurred in the seven years since the policy shift. To the contrary, usage rates remained roughly the same, while drug-related pathologies—from sexually transmitted diseases to deaths after overdose—decreased dramatically.

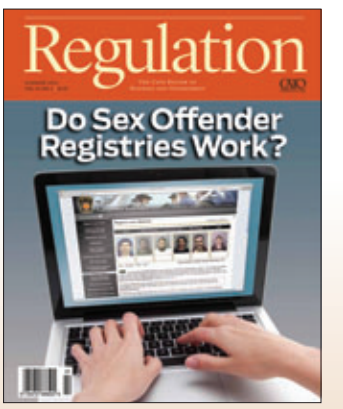
The study quickly made international waves. Earlier this year, Portugal's top drug official himself acknowledged its impact. "Greenwald's report has been the starting point of the enormous visibility of the Portuguese policies," João Goulão wrote in a February e-mail. Although prohibition has manifestly failed to stem illicit drug use, it has generated enormous costs with perverse outcomes. Throughout the world, leaders are beginning to acknowledge this fact and demand change.

As Moises Naim, former editor of *Foreign Policy*, told the *Journal*, "I think 2012 will go down in history as the year when the pillars of Washington's drug policy began to erode." ■

At a Cato Institute Conference last November, leaders from around the world gathered to criticize the manifest failure of the global battle against narcotics. The day closed with an address by former Brazilian president FERNANDO HENRIQUE CARDOSO, who called for "a more humane approach" to the war.

Sex Offenders, Gas Tank Leaks, and Politicized Policymaking

Since the mid-1990s, sex offenders have become subject to some of the most novel crime laws in U.S. history. In the new issue of *Regulation* magazine, University of Michigan law professor J. J. Prescott asks whether sex offender registries in particular make us more or less safe. The author examines data from the experiences of 15 states over almost 10 years and finds that laws purporting to protect the public may actually be increasing sex offender recidivism rates. "Indeed, the idea that notification regimes may make registered offenders more dangerous is consistent with the fact that notification causes these individuals significant financial, social, and psychological harm," Prescott writes.



Elsewhere in the issue, Michael L. Marlow and Sherzod Abdukadirov ask whether behavioral economics can combat obesity, while Henry G. Manne considers whether the SEC's new embrace of cost-benefit analysis is a watershed moment for the agency.

Henry I. Miller offers a cautionary tale by examining the regulation of biotechnology in "The Use and Abuse of Science in Policymaking." Haitao Yin, Howard Kunreuther, and Matthew W. White explore the prevention of underground gas tank leaks and ask, "Does Private Insurance Reduce Environmental Accidents?"

The Summer 2012 issue features reviews of books on the U.S. health care system, government involvement in financial markets, the politics of oil, the fruits of global capitalism, and the life of a famous physicist—as well as Peter Van Doren's roundup of recent academic papers.

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

A collection of critical analyses on the mother of environmentalism

The True Legacy of Rachel Carson's *Silent Spring*

In September 1962, Houghton Mifflin released a book that captivated the public, shaping our intellectual, political, and ecological histories to this day. Widely credited with launching the modern environmental movement, Rachel Carson's *Silent Spring* immediately became a work of iconic status.

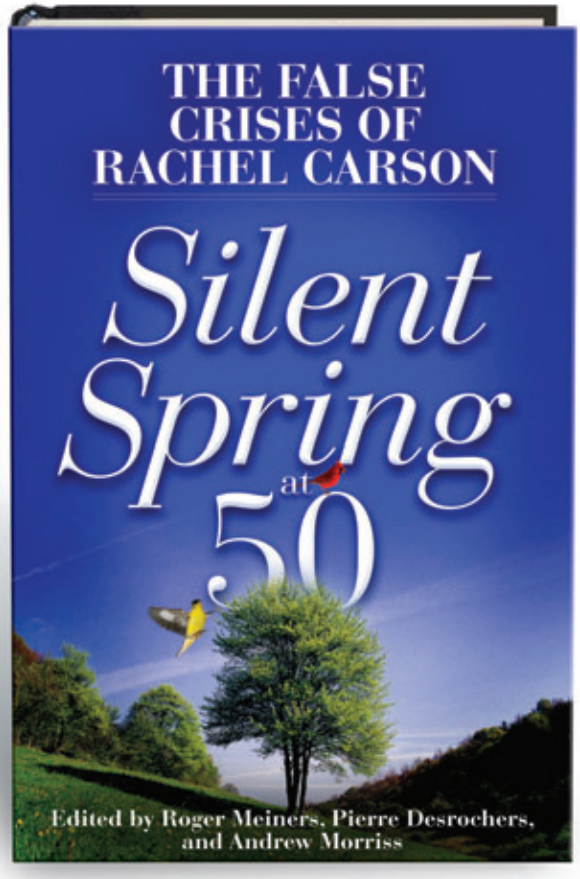
The book sparked controversy at the outset. But regardless of whether it is now venerated as sacred writ or dismissed as pseudoscience, the enduring impact of this runaway bestseller is undeniable.

In *Silent Spring at 50: The False Crises of Rachel Carson*, Roger Meiners, Pierre Desrochers, and Andrew Morriss edit a collection of essays that seek to reassess the book's legacy with the hindsight of five decades. Its purpose, the editors write in introducing the volume's distinguished academics, is to put *Silent Spring* in the context of its era, evaluate how the science it was built upon has withstood the test of time, and examine the policy consequences of its core ideas.

Wallace Kaufman begins the volume by relating Carson's book to the larger intellectual story of her life, as well as the role she played within the environmental movement itself. "She was not its founder or its lifeblood, but first an inspiration, then, with *Silent Spring*, a catalyst," he writes.

Pierre Desrochers and Hiroko Shimizu place Carson into the context of a broader network of activists concerned with environmental threats, showing that the book was "not the work of an isolated and pioneering mind that alone swam against an overwhelming intellectual current." It was, rather, the latest installment in an already popular genre. Robert Nelson situates *Silent Spring* in the struggle between environmentalism and economics as America's "civic religion." While the book is gravely flawed from a scientific perspective, "judged by the standards of theology," he writes, "it may fare better."

Desrochers and Shimizu illustrate how the book's central metaphor—a town where "no birds sang"—actually betrays Carson's "blatant disregard" for certain data and her "selective silence" on the benefits of synthetic pesticides. Meiners then catalogs some of Carson's more egregious sins of omission, focusing in particular on her "unbalanced speculation" when it came to rising cancer rates and her failure to adjust for factors such as tobacco use. "At the time she was writing *Silent Spring*, the causes of cancer and the relative role of various potential causes were widely debated," he writes. "Yet Carson was silent on that debate."



Nathan Gregory compares Carson's concerns about maintaining the balance of nature to today's more complex view of the resilience of ecological processes. Donald Roberts and Richard Tren, who have devoted decades to malaria control, review Carson's "poetic vilification of DDT." As they demonstrate, her fears surrounding the chemical—and the subsequent lack of investment in new insecticides—led to a devastating amount of human suffering. "The ultimate irony is that DDT remains a valuable and necessary tool in our malaria control arsenal precisely because no legitimate replacement has been found," the authors write.

Meiners and Morriss examine how the book's concern over agricultural pesticide use dovetailed with the larger political struggle in the 1950s to regulate U.S. food production, while Jonathan Adler explains how Carson's arguments spurred a broader political push for the federalization of pesticide regulation in particular and environmental issues in general.

Larry Katzenstein illustrates the book's role in popularizing what would later be termed the "precautionary principle"—a concept that calls for the elimination of risk without considering the foregone benefits, costs of compliance, or risk-risk trade-offs involved. Gary Marchant expands on this by examining "the legal legacy of the zero-risk approach" and its enduring—though unfortunate—influence on policymaking today. "The world and the risks inherent in it pose a much more complex and difficult challenge than the simple solutions of Carson's era imply," he writes.

Carson undoubtedly influenced American views of the environment in beneficial ways. Yet, up until this point, the mixed legacy of her work has been concealed by a dearth of critical assessments. "We have to look clearly at *Silent Spring* as part of our national conversation about the environment," the editors write in the volume's introduction, "rather than treat it as a holy text by a secular saint."

Silent Spring at 50 provides that needed clarity. ■

Visit www.cato.org/store or call 800-767-1241 to get your copy of *Silent Spring at 50* today; $25.95 hardback.

At an American Enterprise Institute forum, "Cybersecurity and American Power," JIM HARPER (speaking) joined ADAM SEGAL of the Council on Foreign Relations (center) and JEFF SNYDER of the Raytheon Company on a panel following a speech by the National Security Agency's director, General Keith B. Alexander (not pictured). Harper answered General Alexander's call for cybersecurity legislation by criticizing the apocalyptic rhetoric that has driven the cybersecurity debate. As a substantial purchaser of technology systems, the government can improve standards in the marketplace, Harper said, but the responsibility for protecting most "cyber" infrastructure should remain with the private sector.

Soon after the Supreme Court upheld the individual-mandate component of Obamacare, three experts from the Cato Institute traveled to Capitol Hill to analyze the decision. MICHAEL CANNON (speaking), Cato's director of health policy studies, was joined by senior fellows MICHAEL TANNER (left) and ILYA SHAPIRO. Cannon noted the decision severely hampered the law's Medicare expansion, giving states the ability to refuse to expand those programs. "Coupled with the fact that the statute already enables states to block the other half-trillion dollars of new entitlement spending," Cannon said, "the law is in a very precarious position."

Schools typically have fall and spring semesters. But at the Cato Institute, summer is the time for education. In June, the Institute held an Intern Forum, led by Senior Fellow Tom G. Palmer, called "10 Reasons You're Probably a Libertarian"—which was widely attended by students (left) from around the Beltway. **RIGHT:** In July, two Cato summer interns—Matt Cavedon of Emory University (seated) and Jack Solowey of the University of Pennsylvania (standing, right)—debated libertarianism and conservatism with Heritage Foundation interns Maura Cremin of the University of Oklahoma and Keith Neely of Vanderbilt University.

At Cato University in Peru, Nobel laureate Mario Vargas Llosa (left) signed books after speaking to students. And back in the states, Sen. Rand Paul (R-KY) (right) posed with Cato University students after his keynote address on Capitol Hill in July, where he offered reasons to be optimistic about the country's future.

CATO INSTITUTE 30TH ANNUAL MONETARY CONFERENCE

Money, Markets, and Government: The Next 30 Years

THURSDAY, NOVEMBER 15 • WASHINGTON, D.C.

Cato's 30th Annual Monetary Conference will address the links between sound money, free markets, and limited government, and how those links might evolve in the future. The choice of monetary and fiscal policy regimes will determine whether economic and social harmony will spontaneously emerge or whether government power will continue to grow.

FEATURED SPEAKERS

VERNON L. SMITH - *Nobel Laureate in Economics*

THOMAS HOENIG - *Vice Chairman, Federal Deposit Insurance Corporation*

JOHN B. TAYLOR - *Professor of Economics, Stanford University*

GEORGE S. TAVLAS - *Director, Bank of Greece*

JÜRGEN STARK - *Former Chief Economist, European Central Bank*

CHARLES PLOSSER - *President, Federal Reserve Bank of Philadelphia*

JOIN LEADING EXPERTS AS THEY DISCUSS

- How the choice of monetary and fiscal policy regimes affects economic freedom and prosperity
- Policy steps needed to avoid future financial crises
- Lessons from the Eurozone debt crisis
- The limits of monetary policy
- The case for rules vs. discretion
- China's path toward capital freedom

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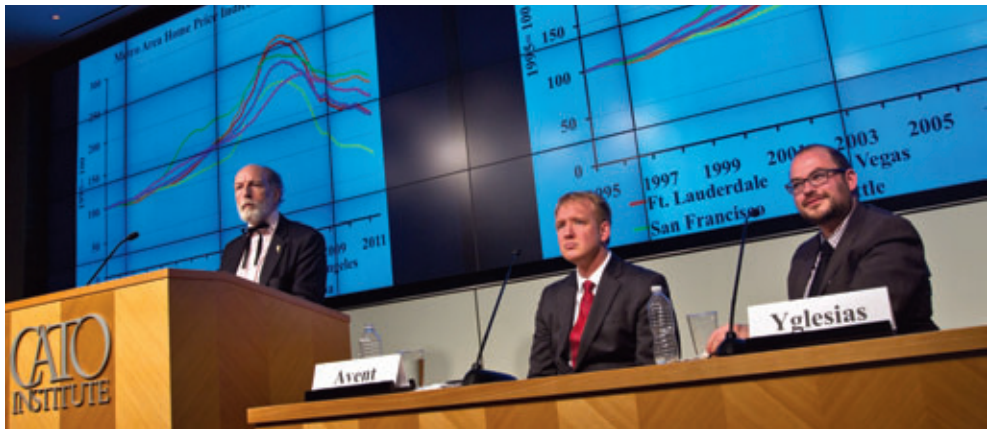

For several decades, U.S. policymakers have grappled with how to make housing more affordable for more people. In June, the Cato Institute and *Next American City* jointly hosted a panel discussion about housing and development policy in American cities. Cato senior fellow RANDAL O'TOOLE (at podium), author of the new book *American Nightmare: How Government Undermines The Dream of Homeownership*, argued that various government tools, such as zoning and subsidies, have limited people's access to housing. RYAN AVENT (center), economics correspondent for *The Economist*, largely agreed, while MATTHEW YGLESIAS, a columnist for *Slate*, argued that markets alone will not create sustainable communities.

JUNE 7–8: Cato Papers on Public Policy Conference

JUNE 8: The DISCLOSE Act and the Future of Campaign Finance

JUNE 13: The Death and Life of Affordable Housing

JUNE 14: Saving Urban Transit from the Federal Government

JUNE 20: 40 Years of Title IX: Blessing, Curse, or Something in Between?

JUNE 27: Libya, One Year Later

JUNE 27: *The Locavore's Dilemma: In Praise of the 10,000-Mile Diet*

JUNE 29: 10 Reasons You're Probably a Libertarian

JULY 2: The Supreme Court's Obamacare Ruling: What Does It All Mean?

JULY 10: The Supreme Court's Obamacare Ruling: What Happens Next?

JULY 18: *A Fundamental Freedom:Why Republicans, Conservatives, and Libertarians Should Support Gay Rights*

JULY 18: Libertarianism vs. Conservatism: A Debate

JULY 19: Airport Body-Scanning: Will TSA Follow the Law?

JULY 25: The Surveillance Iceberg: The FISA Amendments Act and Mass Spying without Accountability

JULY 26: Bringing Private Capital Back into Our Mortgage Market

JULY 27: The Hidden Surveillance State

JULY 29–AUGUST 3: Cato University

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 Calendar

CATO CLUB 200 RETREAT
Asheville, NC • Inn on Biltmore Estate
September 27–30, 2012
Speakers include David Stockman, Charles Murray, and John Allison.

EUROPE'S CRISIS AND THE WELFARE STATE: LESSONS FOR THE UNITED STATES
Washington • Cato Institute
October 10, 2012
Speakers include Richard W. Fisher, Aristides Hatzis, Mirolslav Beblavy, Pascal Salin, and Josef Joffe.

CATO INSTITUTE POLICY PERSPECTIVES 2012
New York • Waldorf-Astoria
October 26, 2012

CATO CLUB NAPLES
Naples, FL • La Playa Beach Club
November 14, 2012

30TH ANNUAL MONETARY POLICY CONFERENCE
Washington • Cato Institute
November 15, 2012
Speakers include Vernon L. Smith, Thomas Hoenig, Charles Plosser, Lawrence H. White, George S. Tavlas, Allan H. Meltzer, and John B. Taylor.

CATO INSTITUTE POLICY PERSPECTIVES 2012
Chicago • The Drake
November 28, 2012

CATO CLUB NAPLES
Naples, FL • Grey Oaks Country Club
December 12, 2012

CATO INSTITUTE POLICY PERSPECTIVES 2013
Naples, FL • Waldorf-Astoria
January 30, 2013

25TH ANNUAL BENEFACTOR SUMMIT
Scottsdale, AZ • Four Seasons Resort
February 21–24, 2013

Cracking Down on Corporate Welfare

As the country continues to rack up mountains of debt, policymakers will need to dramatically cut spending in order to avoid economic calamity. "Whole programs need to be terminated," writes Cato budget analyst Tad DeHaven, "and handouts to businesses are a good place to start." In **"Corporate Welfare in the Federal Budget"** (Policy Analysis no. 703), DeHaven provides a menu of programs that should be eliminated if the $100 billion in direct and indirect subsidies to businesses each year are to be brought under control. In pinpointing these programs, he illustrates how federal business subsidies cause more problems than they solve. These subsidies distort economic activity and undermine markets. "Policymakers do not possess special knowledge that enables them to allocate capital more efficiently than markets," DeHaven writes. In fact, their attempts to steer the market often leads to a corrupt relationship between business and government—with "economic decisions . . . made on the basis of politics." Finally, corporate welfare violates the country's bedrock constitutional principles. "Nowhere in the document is an open-ended power for Congress or the executive branch to choose favored businesses," DeHaven writes. He concludes that policymakers should therefore eliminate these handouts and stop making bad decisions at everyone's expense. For now, however, "the voice of the average taxpaying citizen is drowned out by the pro-spending echo chamber in Washington."

Trading Taxes

The recent financial crisis and the ensuing global meltdown have spurred a number of proposals for avoiding similar catastrophes in the future. In **"Would a Financial Transaction Tax Affect Financial Market Activity?"** (Policy Analysis no. 702), George H. K. Wang of George Mason University and Jot Yau of Seattle University analyze one of the more popular schemes—a tax which proponents say would "curb excessive financial market volatility, stabilize the markets, and raise revenues for various purposes." Wang and Yau consider these claims and discredit each of them in turn. After reviewing the theoretical arguments for and against financial transaction taxes (FTTs), the authors delve into the empirical literature—applying the evidence to their own estimate of the potential impact of a transaction tax on U.S. futures markets. They find that the existing models—which employ a "naïve method"—fail to take into account the fact that U.S. futures trading is very sensitive, or "elastic." "In other words, their models assume the imposition of a tax will not affect the trading volume in the market"—and thereby vastly overestimate the amount of revenue generated. "As such," Wang and Yau write, "a transaction tax would reduce trading volume sig-

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nificantly, may not reduce price volatility, and might only raise a modest amount of tax revenue." They conclude that, far from stabilizing market activity, an FTT "will likely drive business away from U.S. exchanges," shifting it instead to untaxed foreign markets.

The Minimum Wage Myth

Since 1938 the federal government has imposed a minimum wage, and nearly every state now imposes its own wage floor as well. With income inequality a growing concern, states across the country are debating increases in the minimum wage. While the intention of these laws is to help low-income workers, decades of economic research show that minimum wages usually end up harming them, to the detriment of the broader economy. In **"The Negative Effect of Minimum Wage Laws"** (Policy Analysis no. 701), Mark Wilson, former deputy assistant secretary of Labor, writes that "minimum wages particularly stifle job opportunities for low-skill workers, youth, and minorities"—precisely those groups that policymakers are trying to help. "There is no 'free lunch' when the government mandates a minimum wage," Wilson writes. By requiring that certain workers be paid higher wages, the government ensures that businesses will then make adjustments to pay for the added costs, such as reducing hiring, cutting employee work hours, reducing benefits, and charging higher prices. "These behavioral responses usually offset the positive labor market results that policymakers hope for," he explains. Wilson reviews the economic models used to understand minimum wage laws and examines the empirical evidence—describing why most of the academic evidence points to negative effects from minimum wages. He also discusses why some studies may produce seemingly positive results. "Rather than pursuing policies that create winners and losers," Wilson concludes, "policymakers should focus on policies that generate faster economic growth to benefit all workers."

Streetcar Collusions

Spurred by the promise of federal funding, more than 45 American cities are currently expanding, building, planning, or considering streetcar lines. But according to Cato senior fellow Randal O'Toole in **"The Great Streetcar Conspiracy"** (Policy Analysis no. 699), the trend amounts to nothing more than the latest urban planning fad. "Streetcars are a long obsolete technology," he writes, and as such, replacing them with higher quality transit options was a rational decision. Why, then, are so many lines being built? "The real push for streetcars comes from engineering firms that stand to earn millions of dollars designing and building streetcar lines," O'Toole explains. These firms—along with their fellow "smooth-talking consultants and dissembling politicians"—put forth two main arguments for their plans. First, they claim, streetcars promote economic development—but, as O'Toole notes of the subsidies involved, "if streetcars were truly worthwhile, the people who ride them would gladly pay all of the costs." Second, advocates claim that streetcars are "quality transit," superior to buses in several ways. Again, however, O'Toole debunks this claim. "Their low average speeds, limited number of seats, and inflexibility make streetcars inferior to buses in every respect," he writes—except, he adds, "in their ability to consume large amounts of taxpayer money." As such, O'Toole writes, cities looking to enter the 21st century should concentrate on basic—and modern—services, including fixing streets and coordinating traffic signals.

The "Anti-Constitutionality" of IPAB

In 2010 the Obama administration created a new government agency called the Independent Payment Advisory Board (IPAB) as part of the Patient Protection and Affordable Care Act. The act authorized IPAB to cut Medicare payments even further. But the real reason Congress created the agency—according to Diane Cohen, senior attorney at the Goldwater Institute, and Michael Cannon, director of health policy studies at the Cato Institute—is "so that its decisions would automatically take effect, even in the face of popular resistance that would prevent Congress itself from enacting the same measures." In **"The Independent Payment Advisory Board: PPACA's Anti-Constitutional and Authoritarian Super-Legislature"** (Policy Analysis no. 700), the authors begin by describing IPAB's structure, mission, powers, and scope—explaining that when the unelected officials on this board submit a legislative proposal, it automatically becomes law. "Citizens will have no power to challenge IPAB's edicts in court," they write—meaning that its members have "effectively unfettered power to impose taxes and ration care for all Americans." As such, IPAB may be the most unconstitutional measure ever to pass Congress—a new "milestone on the road to serfdom," as the authors put it. "IPAB truly is independent," Cohen and Cannon explain, "but in the worst sense of the word: independent of Congress, independent of the president, independent of the judiciary, and independent of the will of the people." It, in effect, attempts to amend the Constitution by statute, and it therefore may be more accurate to call it, not unconstitutional, but "anti-constitutional." ■

Continued from page 11

for you. Remember: we are talking about states passing laws to implement a federal law. All it takes to derail these new federal entitlements is one committee chairman—one bloc of legislators in either chamber—and that state can block the law's health insurance exchange and Medicaid expansion. You can begin to see just how vulnerable this law is in the wake of the Supreme Court ruling.

The public is likely to reward state officials who do block implementation of this law. As I said, before the ruling, 65 percent of the public and more than 70 percent of independents wanted either part or all of the law struck down. Given that the Court invented a rather slippery rationale for leaving this law on the books, the backlash against Obamacare is likely to grow. The Obama health care law is now weaker and the path to repeal is clearer than it has ever been. ■

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"To Be Governed..."

AN HONEST POLITICIAN

Hobson: What do you miss about your time in the public sector, if anything at this point? You've been in the private sector for a while.

Daschle: Well, to be honest, I miss the power. The senators have an enormous amount of power, probably second only to the president of the United States.

—**Tom Daschle,** ***Marketplace Morning Report,*** June 28, 2012

PRESIDENT OBAMA SAYS WE HAVE "PLENTY OF BIG IDEAS" THAT NEED FUNDING. HERE'S HOW ONE BIG IDEA WORKED OUT

In 2002, the British government estimated the cost of hosting the Olympic Games at $2.8 billion. Ten years later, the price has passed $15 billion and is still rising. When everything is added up—lost business, as many as 13,500 British soldiers patrolling the streets of London (more than are in Afghanistan)—the expenses may come to $38 billion.

—**Anne Applebaum,** ***Washington Post,*** June 13, 2012

COMPROMISE DEFINED AS BIGGER GOVERNMENT

As much as we might associate the GI Bill with Franklin Roosevelt, or Medicare with Lyndon Johnson, it was a Republican—Lincoln—who launched the Transcontinental Railroad, the National Academy of Sciences, land-grant colleges. It was a Republican—Eisenhower—who launched the Interstate Highway System and a new era of scientific research. It was Nixon who created the Environmental Protection Agency; Reagan who worked with Democrats to save Social Security—and who, by the way, raised taxes to help pay down an exploding deficit.

—**President Obama, Cleveland, Ohio,** June 14, 2012

ANOTHER TRIUMPH FOR BIPARTISANSHIP

Lawmakers approved a broad measure Friday that freezes federally subsidized student loan rates for another year, reauthorizes the government flood insurance program and extends federal transportation funding for two more years.

The deal resolved months of acrimonious debate on key legislative concerns on the eve of a Fourth of July recess, and offered President Obama an opportunity to claim victory after a high-profile campaign to pressure Congress into action on both the student loan and transportation issues. . . .

The agreement includes the first long-term transportation spending plan agreed to since 2005, replacing a series of short-term extensions. It passed the House 373 to 52 and the Senate by a vote of 74 to 19.

—***Washington Post,*** June 29, 2012

CRONY CAPITALISM AT COUNTRYWIDE AND FANNIE MAE

Jim Johnson, chief executive officer of Fannie Mae from 1991 to 1998, earned $100 million during his time at the company. Nonetheless, Countrywide employees expressed concern about giving him a loan because he didn't pay his bills regularly and had a low credit score, according to e-mails published in Issa's report.

Because of Johnson's credit report, "I'm concerned about signing on these loans," Countrywide underwriter Gene Soda said in a 2005 e-mail to another Countrywide employee, according to the report.

Countrywide's chief executive officer, Angelo Mozilo, who had a close relationship with Johnson, wrote back, instructing his employees to give Johnson a loan "1/2 below prime."

"Don't worry about" the credit score, Mozilo wrote. . . ."Jim Johnson continues to be a source of many loans for our company and this is just a small token of appreciation for the business that he sends to us."

—**Bloomberg,** July 5, 2012

THE PROBLEM WITH AMERICA: WE'RE TOO DARN FREE

What has happened politically, economically, culturally and socially since the sea change of the late '60s isn't contradictory or incongruous. It's all of a piece. For hippies and bohemians as for businesspeople and investors, extreme individualism has been triumphant. Selfishness won.

Consider America during the two decades after World War II. . . .Greed as well as homosexuality was a love that dared not speak its name.

But then came the late 1960s, and over the next two decades American individualism was fully unleashed. A kind of tacit grand bargain was forged between the counterculture and the establishment.

But what the left and right respectively love and hate are mostly flip sides of the same libertarian coin minted around 1967. Thanks to the '60s, we are all shamelessly selfish.

—**Kurt Andersen,** ***New York Times,*** July 4, 2012