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July/August 2006

# Policy Report

Vol. XXVIII No. 4

## Big Business and Big Government

BY TIMOTHY P. CARNEY

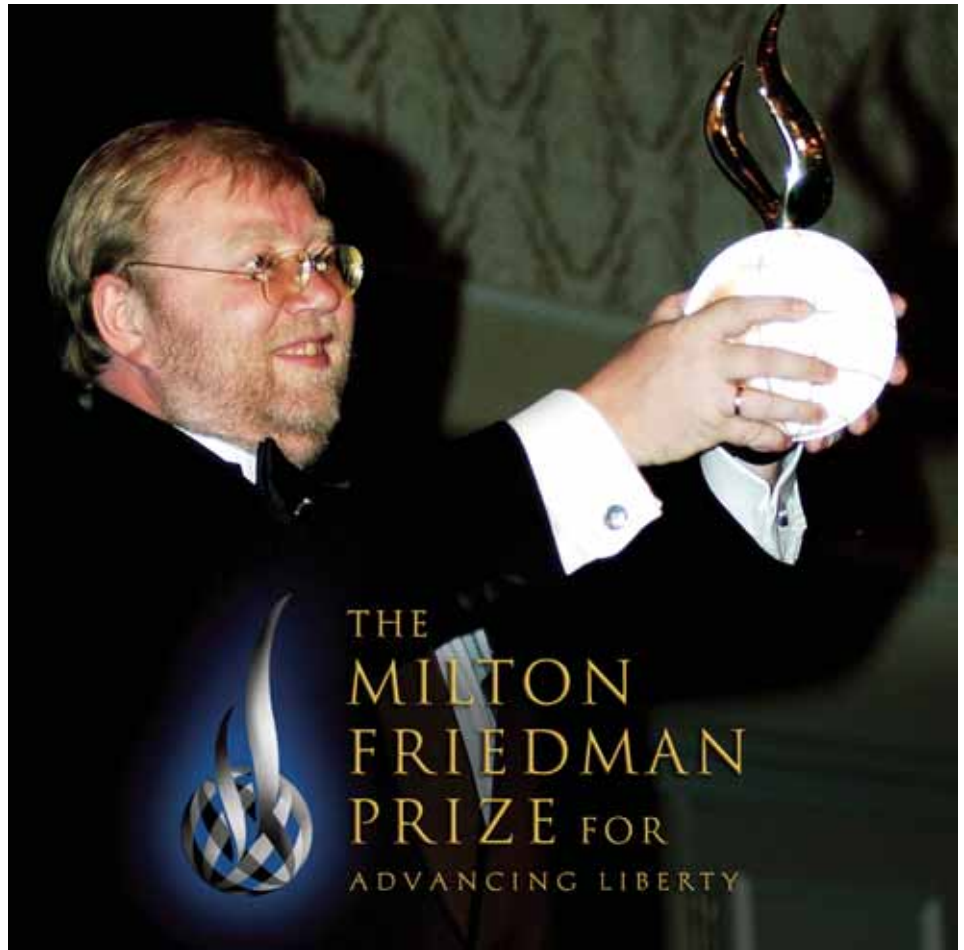
**B**ig business has too much power in Washington, according to 90 percent of Americans in a December 2005 poll.

Every week, headlines reveal some scandal involving politicians, lobbyists, corporate cash, and allegations of bribes. CEOs get face time with senators, cabinet secretaries, and presidents. Lawmakers and bureaucrats take laps through the revolving door between government and corporate lobbying. Whatever goes on behind closed doors between the CEOs and the senators can't be good or the doors would not be closed.

Just what is big business doing with all this influence? There are many assumptions about big business's agenda in Washington. In 2003 one author asserted, "When corporations lobby governments, their usual goal is to avoid regulation."

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TIMOTHY P. CARNEY is the author of *The Big Ripoff: How Big Business and Big Government Steal Your Money* (Wiley, 2006), on which this article is based.



**F**ormer Estonian prime minister Mart Laar was presented with the 2006 Milton Friedman Prize for Advancing Liberty "in recognition of his brave defiance of conventional economic wisdom and his visionary efforts to replace the legacy of communism with a free, dynamic, and flourishing Estonian economy." Francisco Flores, former president of El Salvador and a member of the International Selection Committee, presented the prize to Laar at a gala dinner at Chicago's Drake Hotel on May 18. **MORE ON PAGES 3 - 7**



BY DAVID BOAZ

“Liberals long ago dismissed the Constitution’s restraints on government. Conservatives are now aggressively ignoring them.”

## Editorial

# Remember the Constitution?

A front-page article in the *Wall Street Journal* erroneously told millions of readers that “the Constitution guarantees a public-school K-12 education for every child in the U.S.” Two weeks later the *Journal’s* usually reliable editorial page deplored the “states’ rampant noncompliance with the 2002 No Child Left Behind Act” and the “lax enforcement of NCLB” by Education Secretary Margaret Spellings.

Meanwhile, the Heritage Foundation is endorsing federal education vouchers for children in low-performing schools as proposed in President Bush’s America’s Opportunity Scholarships for Kids initiatives. Both the *Journal* and the Heritage Foundation seem to have forgotten that the U.S. Constitution grants no authority over education to the federal government. Education is not mentioned in the Constitution of the United States, and for good reason. The Founders wanted most aspects of life managed by those who were closest to them, either by families, businesses, and other elements of civil society or by state or local government. Certainly, they saw no role for the federal government in education.

Once upon a time, not so very many years ago, Congress understood that. *The History of the Formation of the Union under the Constitution*, published by the United States Constitution Sesquicentennial Commission, under the direction of the president, the vice president, and the Speaker of the House in 1943, contained this exchange in a section titled “Questions and Answers Pertaining to the Constitution”:

**Q. Where, in the Constitution, is there mention of education?**

**A. There is none; education is a matter reserved for the states.**

Not only is the Constitution silent on the subject of education, but the U.S. Supreme Court has also refused to recognize any right to a taxpayer-funded education. As Timothy Sandefur, author of Cato’s forthcoming book *Cornerstone of Liberty: Property Rights in 21st-Century America*, points out, in *San Antonio Independent School District v. Rodriguez* (1973), the Court specifically declared that education, though important, “is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” Nine years later, in *Plyler v. Doe*, the Court held that *if* a state chooses to give such an education to citizens, it must also offer it to the children of illegal aliens. But it has consistently recognized that taxpayer-funded education is a privilege, not a right.

The case against federal involvement in education is not based simply on a commitment to the original Constitution, as important as that is. It also reflects an understanding of *why* the Founders were right to reserve most subjects to state, local, or private endeavor. The Founders feared the concentration of power. They believed that the best way to protect individual freedom and civil society was to limit and divide power. Thus it was much better to have decisions made independently by 13—or 50—states than to have one decision made for the entire country. Each state can innovate and can observe and copy successful innovations in other states,

and just as important can avoid failed policies tried in other states. As the country gets bigger and more complex, and especially as government amasses more power, the advantages of decentralization and divided power become even greater.

That’s why it was a mistake to further centralize the control of our local schools in the No Child Left Behind Act. And why conservatives, who are usually committed to the virtues of federalism and decentralization, should be applauding the several states’ resistance to federal intrusion, not calling for a crackdown.

The Constitution has few friends in Washington these days. As Gene Healy and Tim Lynch demonstrate in their impressive paper “Power Surge: The Constitutional Record of George W. Bush”:

In its official legal briefs and public actions, the Bush administration has advanced a view of federal power that is astonishingly broad, a view that includes . . .

- a president who cannot be restrained, through validly enacted statutes, from pursuing any tactic he believes to be effective in the war on terror; . . . and
- a federal government with the power to supervise virtually every aspect of American life, from kindergarten, to marriage, to the grave. President Bush’s constitutional vision is, in short, sharply at odds with the text, history, and structure of our Constitution, which authorizes a government of limited powers.

Liberals long ago dismissed the Constitution’s restraints on government. Conservatives are now aggressively ignoring them. So who still speaks for the Constitution? Well, the Cato Institute and its Center for Constitutional Studies, of course. That’s why we’ve distributed more than three million pocket copies of the Declaration of Independence and the Constitution, and why we consistently ask that embarrassing question, “Where in the Constitution is the exercise of this power authorized?”

And now that the Bush administration “has repeatedly sought to strip out the limits the document places on federal power,” as Healy and Lynch put it, some liberals are—*mirabile dictu!*—rediscovering the benefits of constitutional government. Two writers in the left-wing *Nation* magazine recently proposed the establishment of a left-right-and-libertarian Constitutional Protection League, modeled after the broad-based early-20-century Anti-Imperialist League. That’s a fine idea. But we would remind our friends on the left that in 1997 and 2000 Cato published critical studies on the Clinton administration’s abuse of the Constitution. Where were they then? And will they join us a few years hence should another Clinton administration engage in similar abuses?

My friend Fred Smith of the Competitive Enterprise Institute likes to say, “The Constitution isn’t perfect, but it’s a lot better than what we’ve got now.” The good news is that if the American people still want it, we’ve still got it. All we have to do is enforce it.



THE  
MILTON  
FRIEDMAN  
PRIZE FOR  
ADVANCING LIBERTY

# Mart Laar Receives Milton Friedman Prize

In front of several hundred guests at a gala dinner at the Drake Hotel in Chicago on May 18, former Estonian prime minister Mart Laar was awarded a prize named for the man who made him believe that his country could achieve economic freedom. The Milton Friedman Prize for Advancing Liberty was presented by former Salvadoran president Francisco Flores, a member of the selection committee.

Laar was selected in recognition of his visionary work to rid Estonia of the vestiges of communism and to demonstrate to the world that limited government and free trade are the keys to prosperity. During his time as prime minister, Laar helped his country achieve record economic growth by instituting a low flat tax, abolishing tariffs to encourage international trade, and privatizing 90 percent of government-run industries. Laar's dedication to progress and economic freedom has allowed the former communist state to develop into one of the most dynamic economies in the world, ranking in the top 10 countries in the *Economic Freedom*

*of the World* index.

Mart Laar is not an economist, but he understood that his country would need drastic reforms to weather a post-Soviet financial crisis. He turned to Milton Friedman's seminal book, *Free to Choose*. Friedman's recommendations for privatization of government industries, a low flat tax, and the abolition of tariffs to encourage international trade struck Laar as a simple, practical way to spur his country's economy.

Laar remarked at the ceremony: "A lot of western countries, including the United States, gave us advice supporting a big state, big government, big expenditures, high taxes, and progressive taxation. And in this context, I must say it was very useful, again, to remember the Soviet time. Because the first time I heard the name Milton Friedman was in the deep Soviet time, when I read in the newspapers or in some propaganda newsletters of a very bad, dangerous western economist called Milton Friedman." By embracing the dangerous idea of liberty, Laar allowed his people to prosper just as millions of others have prospered in free societies.

The keynote address of the evening was given by political journalist George Will, who cited Friedman for helping to ensure "that economics is the only academic field in the last 30 or 40 years that has actually moved to the right." Of the honoree, Will said, "The moral of the story is liberty is an acquired taste. We have acquired it. We can lose it. But we won't lose it as long as we continue to honor people the way we are honoring one tonight and the way the Cato Institute honors our Founders by keeping their ideas vivid."

The Friedman Prize is awarded biennially to an individual who has made a significant contribution to advancing human liberty. Winners are selected by a distinguished panel of international judges. This year's panel included Anne Applebaum of the *Washington Post* editorial board, John Blundell of the Institute for Economic Affairs, Cato president Ed Crane, Francisco Flores, Rose D. Friedman, FedEx chairman Fred Smith, and *Newsweek International* editor Fareed Zakaria. The winner receives a \$500,000 cash prize made possible by generous earmarked donations.





THE  
MILTON  
FRIEDMAN  
PRIZE FOR  
ADVANCING LIBERTY



1

1. *Mart Laar* 2. *Francisco Flores, former president of El Salvador* 3. *Juan José Daboub, former finance minister of El Salvador, with Cato adjunct scholar Richard Epstein*



2



3

4. *Cato Club 200 members Bill and Rebecca Dunn*  
5. *Chicago state senator James T. Meeks and master of ceremonies Brian Wesbury*



4



5

Dear friends, ladies and gentlemen, I am so honored to accept the Milton Friedman Prize. This prize is not only for me; it's also a prize for all the people who made the Estonian miracle possible. When you want to change your country, you can't do it alone, or even with the help of only your government. Only the people of a country can make real change possible. The task of government is to empower these people, to trust these people, to give these people the liberty to make their choices and make miracles happen.

I grew up in a society where there was no liberty. In free societies, it is hard to understand what liberty really means. You can understand what liberty is only when you have lost it. And when you're living in a society where liberty does not exist, only then can

you know how valuable it is.

Milton Friedman's *Free to Choose* is no longer the only economics book I've ever read, but it was the first book on economics that

I read. Marxist books about economics don't really count because they're all wrong. Ronald Reagan once said, when asked the difference between Marxists and anti-Marxists, that Marxists are those who have read the books of Karl Marx and anti-Marxists are those who have understood them. When you have lived in a

communist society, it is not hard to understand how wrong these theories were.

Estonia got a lot of advice from other nations about how to work toward freedom. A lot of western countries, including the United States, gave us advice supporting a big state, big govern-

REMARKS OF  
MART LAAR ON  
RECEIVING THE  
MILTON FRIEDMAN  
PRIZE

ment, big expenditures, high taxes, and progressive taxation. And in this context, I must say it was very useful, again, to remember the Soviet time. Because the first time I heard the name Milton Friedman was in the deep Soviet time, when I read in the newspapers or in some propaganda newsletters of a very bad, dangerous western economist called Milton Friedman. At the time, I didn't know anything about Friedman's ideas, but I was quite sure that if they were so dangerous to communists, he must be a good man.

I still remember when I first saw an Estonian translation of Friedman's famous book. I remember looking at the name, *Free to Choose*, and thinking that the words "free" and "choose" were both absolutely unthinkable for the communists.

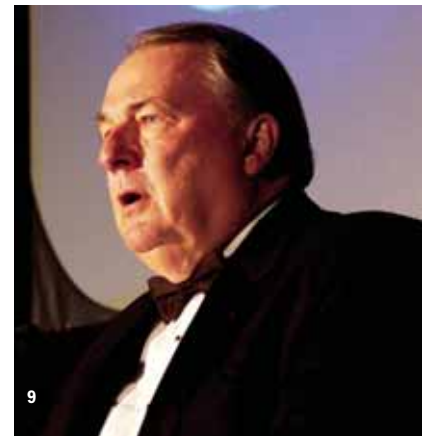
When I read the book, the ideas seemed very logical to me. At the time, I really didn't know that not very many countries had implemented those ideas. Friedman stressed that the best ways to

encourage economic progress were a flat-rate tax and free trade to open the economy. But what impressed me most in his writing was his trust in freedom and in people. It was very clear that only by removing power from government and empowering people can a country really achieve something. Because the government is not creating miracles; the people are. The government's only task is to give them the chance to succeed.

Thinking about economics in terms of human achievement was an idea I carried with me throughout the reform process in my country. Of course, when I started to introduce reforms, I met a lot of western experts who said that I was absolutely crazy because nobody had ever introduced any of the ideas of Milton Friedman. Many of them told me that Milton Friedman was a hokey, very right-wing economist who knew nothing about real economic theories.



6. June Arunga of the Inter-Region Economic Network in Kenya 7. Cato Club 200 member David Booth



8. Cato Board member Fred Young and Sandra Young 9. Cato founder and president Ed Crane 10. Brenda Wesbury and Cato Club 200 member Thomas Smith



THE  
MILTON  
FRIEDMAN  
PRIZE FOR  
ADVANCING LIBERTY



11. Milton Friedman addresses the dinner by video 12. George Will called Cato “the foremost upholder of the idea of liberty in the nation that is the foremost upholder of the idea of liberty.” His speech is available on CatoAudio and in Cato’s Letter. 13. Cato’s R. C. Hoiles fellow Jim Powell, Ed Crane, and Chicago Mercantile Exchange founder Leo Melamed



14. Cato Benefactor Peter Flinch and Kristina Crane  
15. Estonian ambassador Jüri Luik and Diane Smith



I had some doubts when these very good-looking, very well educated economic experts disparaged Friedman. Luckily, I was then only 32 years old, and at that age, you don’t trust older, cleverer experts who tell you that what you want can’t be achieved. To me, Milton Friedman looked like a very good man, especially when I remembered how much the communists hated him. And I found the courage to press for what I believed would lead my country to freedom.

These ideas have been highly successful. We have really empowered the people in Estonia. We have liberated them to make choices that help move the country forward. The results are astonishing. When you look at Estonia now, it’s hard to remember clearly how it was in 1992. The government isn’t responsible for that change; the people are. The government’s role is to give people the chance by opening the economy and by creating a tax system that does not punish people who work more and earn more money, but rather encourages people to do something with their lives. Good govern-

ment policy can give people the opportunity to create something, to be innovative, to look to the future, to dream, and to realize those dreams. I think this is what freedom is about.

The last Milton Friedman Prize was given to the brilliant economist Hernando De Soto, who argued so persuasively against the property confiscation championed by Karl Marx in the *Communist Manifesto*. I am so proud to receive this prize for arguing against another thesis of Karl Marx, the progressive income tax. Such a tax system is in opposition to what freedom is all about. I really support and encourage everybody to support the idea of having a tax revolution like the one we had in Estonia, not only in Central and Eastern Europe, where I think during the next five years all countries will move to the flat-rate income tax, but to move this to other parts of western civilization as well. If we do not, freedom will not succeed.

Progressive taxation was central to Karl Marx’s worldview. I



am so sorry to see that in the western world Marxist thinking is still so popular. Communism is not dead in the West. When I'm walking in the streets of New York, I see T-shirts printed with pictures of Che Guevara, Mao Zedong, and Lenin, the biggest murderers of the 20th century. I really don't understand it. Is this a free country? Is communism really dead?

There are still countries in the world where communism flourishes, and we're not doing enough to talk about what communism really means and what communists throughout history have done in the name of their ideology. China, even with its modest economic reforms, is still a dictatorship where the word "democracy" is forbidden, and we don't talk about that enough. I think one reason we keep seeing populist dictatorships in South America is that we have not yet taken a stand to declare that communism is just as evil as Nazism or any of the other truly evil ideologies of the 20th

century. We have underestimated the power of these evil ideas.

President Ronald Reagan was widely criticized throughout the western world when he called communism an "evil empire." But I remember my own feelings when I heard him say those words; he was the first politician I had ever heard who was not afraid to speak the truth. We must all be brave enough to speak the truth.

I really congratulate the Cato Institute for the work you are doing around the world to deliver the truth about freedom and about liberty. I want to see this very difficult task of spreading liberty around the world progress. Without liberty, our lives are empty and meaningless. Liberty is what gives us the tools to achieve. Liberty is what raises our spirits. And in this context, I can only thank again Milton Friedman, the Cato Institute, and all of you who have supported this idea around the world. When we all move together in this direction, we can make the world a better place.



**16.** *Institute for Humane Studies president Marty Zupan and Cato Board member Ethelmae Humphreys* **17.** *Cato Club 200 members Donald Smith and Rebecca Dunn* **18.** *President Flores presents the Friedman Prize to Mart Laar*



**19.** *American Spectator editor R. Emmett Tyrrell Jr.* **20.** *Cato Club 200 members Harold J. Bowen Jr. and Jay Bowen*



## Threats to freedom in China, Russia, and England

# Stossel Speaks in New York, Atlanta, Washington, Capitol Hill Forums on Health Care, Nation Building, Middle East

**APRIL 5:** In recent years, China has embraced many aspects of free-market economics. Human rights experts have hoped that open trade and the free exchange of ideas with the rest of the world would help loosen the Chinese government's restrictive political and social control over citizens. But **Kin-Ming Liu**, columnist for the *Hong Kong Standard*, has

centered on the example of Iraq, showing that the mission could not succeed without far more resources and better planning than our government is able to provide.

**APRIL 11 and 12:** At *City Seminars* in Houston and Dallas, Bruce Bartlett, author of *Impostor: How George W. Bush Bankrupted America and*

the rights of defendants and witnesses to win indictments against the public interest. Current law, Hasnas said, has the perverse effect of discouraging employees from reporting criminal behavior because whistleblowers' identities are not kept confidential and witnesses can lose their jobs or be indicted on the government's whim. Assistant U.S. Attorney General Alice Fisher pointed out that the government's interests in prosecuting white-collar crime are aligned with corporations' interests in keeping investor confidence high.



**Jim Harper**, director of information policy studies at the Cato Institute and author of the forthcoming book *Identity Crisis: How Identification is Overused and Misunderstood*, speaks at Cato's April 26 conference "Copyright Controversies" (see page 15).

begun to fear that doing business with China will not change the political situation there in any meaningful way. At a private lunch at the Cato Institute, he argued that unless trade agreements are modified to make China loosen its domestic economic and social control, continued trade with China may empower the repressive government and make China more dangerous to the rest of the world.

**APRIL 7:** The latest fad in foreign policy is the claim that "failed states" pose a threat to U.S. national security and that we must step in and rebuild them. But at a Cato Hill Briefing, Cato foreign policy analyst Justin Logan made "The Case against a Standing Nation-Building Office," demonstrating that most identified failed states pose no threat to the United States and that most efforts to rebuild them will be far too costly in both manpower and dollars to succeed. Cato's director of foreign policy studies Christopher Preble con-

*Betrayed the Reagan Legacy*, attacked the Bush administration for profligate spending and flagrant violations of the Constitution that have led so many Americans, including voters in Texas, to conclude that Bush has "bankrupted America." Andrew Coulson, director of Cato's Center for Educational Reform, outlined Cato's plan to promote school choice, addressing the specific challenges that will face Texas education reformers attempting to improve choice for Texas families.

**APRIL 17:** Fraud and white-collar crime are bad for business, and prosecuting people who engage in them can help restore the public's faith in corporations. But at a Cato Book Forum, cosponsored with the Fund for American Studies, for Georgetown University professor John Hasnas's new book *Trapped: When Acting Ethically Is against the Law*, the author argued that the government has taken white-collar prosecutions too far, sacrificing

**APRIL 18:** At a news conference, "The Death of the G8," former Russian economic adviser Andrei Illarionov said that Russia does not share the democratic values, commitment to free enterprise, and foreign policy goals of the original G7 members, and, therefore, its membership in the G8 threatens the identity of the organization as a group of advanced democracies. The hope that Russia may learn from the example of the G7 leadership and embrace universal democratic values has not been realized. Russia must be pressured to end aggression toward its neighbors, reverse anti-democratic laws, and crack down on corruption.



**Andrei Illarionov** meets the press at his April 18 news conference on the decline of freedom in Russia.

**APRIL 20:** When a child is in trouble—abusing drugs, acting out at school, or breaking the law—parents may believe that the only answer is to turn the child over to professionals who can instill discipline and cure drug addiction. But many of the most famous programs for difficult children do more harm than good, taking advantage of parents' fear and abusing the children entrusted to their care. At a Book Forum for *Help at Any Cost: How the Troubled-Teen Industry Cons Parents*



and *Hurts Kids*, author Maia Szalavitz told the disturbing story of many programs that are selling emotional attacks, dangerous physical punishments, and extreme deprivation to parents as the cure for drug addiction. *Rolling Stone* contributing editor Evan Wright attended one such program in the late 1970s, and he recounted the cult-like methods used to try to break him of a supposed addiction that was, in reality, a fairly normal teenage rebellion.

**APRIL 25:** Many of the former Soviet republics have enjoyed a rapid expansion of economic and political freedoms since attain-



**Member of Parliament Alan Duncan discusses threats to freedom by the Blair government at a May 2 luncheon.**

ing their independence. A few of those countries, however, have not lived up to their initial promise and have regressed rapidly in recent years. At a Policy Forum cosponsored by the Atlas Foundation, experts examined the “Last Dictatorship in Europe: Political and Economic Repression in Belarus.” Jaroslav Romanchuk, deputy chairman of the United Civic Party of Belarus, gave a history of the nation’s Soviet past and explained that free elections, an independent judiciary, and civil liberties have been unattainable in modern Belarus. Anders Aslund of the Institute for International Economics argued that because Belarus was the most “successful” at implementing total state control over the economy and public life, corruption today is rampant and the economy will continue to stagnate until industry is privatized.

**APRIL 26:** Intellectual property rights must strike a delicate balance between protecting the interests of content producers in control-

ling and profiting from their work and encouraging the distribution of new creative works. At a Cato conference, “**Copyright Controversies: Freedom, Property, Content Creation, and the DMCA,**” speakers asked whether our current copyright scheme is actually in the public interest. In a panel on the foundations of copyright, Jim DeLong of the Progress & Freedom Foundation and Cato’s Jim Harper maintained that many of the same philosophical arguments that support rights to physical property also support intellectual property rights. Rep. Zoe Lofgren (D-CA) argued that the threat of litigation under the Digital Millennium Copyright Act often stifles innovation. Gary Shapiro of the Consumer Electronics Association explained that Congress has extended copyright terms 13 times so that copyright now protects content providers over consumers who benefit from the existence of the public domain.

**APRIL 27:** American college campuses have long been perceived as notoriously left-wing. At a **Cato City Seminar** in New York, author David Horowitz presented evidence that the liberal bias of college professors and administrators is hurting conservative students. He

speech, but his complaint was with members of Congress who are trying to regulate the political speech of nonprofit and advocacy groups out of existence.

**MAY 2:** Conservative member of Parliament **Alan Duncan** believes that Britain in recent years has seen a significant loss of liberty and that Parliament must act to secure the fundamental rights of British citizens. At a private luncheon at the Cato Institute, Duncan outlined how the threat of terrorism has made Britons complacent about protecting the rights of accused criminals. At the same time, he said, Prime Minister Tony Blair has engaged in an unprincipled power grab, limiting the power of Parliament to make and review laws and removing disfavored MPs from power.

**MAY 4:** In 1950 fewer than 12 percent of mothers of children under six worked full time. Today, more than 60 percent of such women are balancing full-time jobs with motherhood, and, according to the authors of the new book *Leaving Women Behind: Modern Families, Outdated Laws*, their voices are not heard in the political debates over



**Cato president Ed Crane, Board member Howard Rich, and director of health and welfare studies Michael Tanner at a May 25 dinner for Cato’s Board of Directors.**

told stories of academics persecuted for attempting to introduce an opposing point of view and argued that doctrinaire liberalism is bad for students and for society as a whole. Former Federal Election Commission chairman Brad Smith expressed similar concern about the suppression of political

social and economic policy. At a Cato Book Forum, coauthor John Goodman of the National Center for Policy Analysis pointed out that many facially neutral policies such as income tax laws have a disparate effect on working women by lowering their remuneration. Sen. Kay Bailey Hutchison (R-TX)

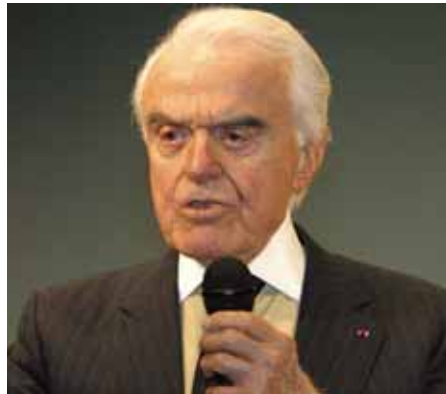
talked about individual retirement accounts for homemakers and other programs that are attempting to correct the imbalance. *Wall Street Journal* senior editorial page writer Kim Strassel discussed how Social Security and other benefits disfavor the pattern of employment followed by working mothers, leaving them with fewer resources to support themselves later in life.

**MAY 4:** The benefits of free trade are not merely economic, said speakers at a Cato Hill Briefing, “**Building Foundations for Freedom, Commerce, and Peace in the Middle East.**” Cato senior fellow Tom G. Palmer, who has made three recent visits to Iraq, contended that trade opens key avenues to political freedom and social toleration. Rep. Paul Ryan (R-WI) pointed out that trade can not only bring a better understanding of liberty to the Middle East but also foster a better understanding of the Middle East in the United States. Zainab Al-Suwajj, executive director of the American Islamic Congress, expressed hope that Arabs will see the United States and the fundamental rights it offers in a new light after reading its founding documents in their own language.

**MAY 5:** At a debate sponsored by Cato’s Center for Constitutional Studies, “**Resolved: The Bush NSA Surveillance Program Is Illegal,**” senior fellow Robert A. Levy argued in the affirmative. The NSA program, he said, does not comply with the Foreign Intelligence Surveillance Act, passed in accordance with Congress’s concurrent wartime powers. And the Patriot Act, which modifies FISA and was signed by George W. Bush, does not allow the president to ignore warrant requirements for domestic surveillance, even in wartime. Center director Roger Pilon responded by questioning the scope of Congress’s enumerated powers and asking how Congress in 1978, by mere statute, could restrict what had been thought for 200 years by the Framers and the courts alike to be an inherent power of a co-equal branch of government, namely, the power of the executive, during both war and peace, to protect the nation through foreign intelligence gathering.

**MAY 8:** With the appointment of Ben Bernanke, the country is facing “**A New Era at the Federal Reserve: Some Challenges and Opportunities for Change.**” At a Cato Policy

Forum, members of the Shadow Open Market Committee proposed policy reforms that would help sustain economic growth and focus the Fed on its core responsibilities. Mickey Levy discussed inflation targeting, reiterating the SOMC’s recommendation that the Fed adopt an explicit inflation target. Gregory Hess counseled a more rule-based monetary policy that would be predictable and help prevent inflation. SOMC cochair Anna Schwartz discussed the nonmonetary policy activities often undertaken by the Fed, suggesting that regulating consumer finance should not be within the Fed’s purview.



**Jack Valenti says that parents, not the FCC, should determine which shows are appropriate for children at a May 10 Policy Forum.**

**MAY 9, 23, and 24:** Contrary to popular opinion, your dog’s mouth is not cleaner than yours. Journalist John Stossel is amazed that people can watch where their dogs’ mouths go and still believe that myth. But as he explained at Cato Forums in New York, Washington, and Atlanta for his new book *Myths, Lies, and Downright Stupidity: Get Out the Shovel—Why Everything You Know Is Wrong*, people have an amazing tendency to ignore empirical evidence. He discussed the disdain for capitalism held by many journalists who ignore its proven record of lifting millions of people out of poverty and providing necessary goods and services, seeing only businesses taking people’s money.

**MAY 10:** Parents need information about the content of television programs and movies in order to decide which programs are appropriate for their children. At a Cato Policy Forum, “**Parental Power: TV Indecency, the FCC, and the Media’s Response,**” Leslie Marx, chief economist at the FCC, suggested that à la carte cable programming would allow par-

ents to refuse to pay for cable channels whose programming is indecent. Former Motion Picture Association of America president Jack Valenti countered that FCC indecency rules are vague and ill-defined, making them too blunt an instrument for determining whether a show is suitable for children. Parents, he said, are in the best position to decide what is best for their children and must control the information coming into their homes.

**MAY 23:** With 45.8 million Americans uninsured, health care experts are looking for new ways to provide medical care to more people. Massachusetts has just passed a law requiring all individuals to carry health insurance, prompting some observers to ask, “**Is the Massachusetts Health Plan a Model for the Nation?**” At a Cato Hill Briefing, Ron Pollack of Families USA suggested that subsidies for the poor under the Massachusetts plan make explicit the high costs that insured patients already pay for uncompensated care. Cato’s director of health and welfare studies Michael Tanner explained that the inexpensive, minimal coverage touted by the bill has already been compromised by mandates for specific, expensive coverage not required by the initial bill. The government, he said, has no business requiring hair transplant coverage, which is now a requirement for all Massachusetts residents. Cato adjunct scholar Arnold Kling, author of *Crisis of Abundance: Rethinking How We Pay for Health Care*, argued that mandating insurance does nothing to fix the major problems of cost-effectiveness that make health care prohibitively expensive.

**MAY 30—JUNE 2:** At Health Care University, a series of four lunchtime lectures on Capitol Hill, Cato health care experts discussed what’s wrong with the American health care system and suggested policies to fix it. Senior fellow Peter Van Doren gave a lesson on insurance markets, explaining what they can and cannot do and how health care spending affects health. Michael Tanner, director of health and welfare studies, looked at reform proposals—including insurance mandates, managed competition, and single-payer health care—that are likely to do more harm than good. Director of health policy studies Michael Cannon proposed reforms that will work: ending distortionary tax policies, expanding health savings accounts, and liberalizing the provision of insurance and care.

“The myth is widespread and deeply rooted that big business and big government are rivals—that big business wants small government.”

*Continued from page 1*

That statement reflects the conventional wisdom that government action protects ordinary people by restraining big business, which, in turn, wants to be left alone. Historian Arthur Schlesinger articulated a similar point: “Liberalism in America [the progression of the welfare state and government intervention in the economy] has been ordinarily the movement on the part of the other sections of society to restrain the power of the business community.”

The facts point in an entirely different direction:

■ Enron was a tireless advocate of strict global energy regulations supported by environmentalists. Enron also used its influence in Washington to keep laissez-faire bureaucrats off the federal commissions that regulate the energy industry.

■ Philip Morris has aggressively supported heightened federal regulation of tobacco and tobacco advertising. Meanwhile, the state governments that sued Big Tobacco are now working to protect those same large cigarette companies from competition and lawsuits.

■ A recent tax increase in Virginia passed because of the tireless support of the state’s business leaders, and big business has a long history of supporting tax hikes.

■ General Motors provided critical support for new stricter clean air rules that boosted the company’s bottom line.

## The Big Myth

The myth is widespread and deeply rooted that big business and big government are rivals—that big business wants small government.

A 1935 *Chicago Daily Tribune* column argued that voting against Franklin D. Roosevelt was voting for big business. “Led by the President,” the columnist wrote, “New Dealers have accepted the challenge, confident the people will repudiate organ-

ized business and give the Roosevelt program a new lease on life.” However, three days earlier, the president of the Chamber of Commerce and a group of other business leaders met with FDR to support expanding the New Deal.

Almost 70 years later *New York Times* columnist Paul Krugman assailed the George W. Bush administration: “The new guys in town are knee-jerk conservatives; they view too much government as the root of all evil, believe that what’s good for big business is always good for America and think that the answer to every problem is to cut taxes and allow more pollution.” At the same time, “big business” just across the river in Virginia was ramping up its campaign for a tax increase, and Enron was lobbying Bush’s closest advisers to support the Kyoto Protocol on climate change.

Months later, when Enron collapsed, writers attributed the company’s corruption and obscene profits to “anarchic capitalism” and asserted that “the Enron scandal makes it clear that the unfettered free market does not work.” In fact, Enron thrived in a world of complex regulations and begged for government handouts at every turn.

When commentators *do* notice business looking for more federal regulation, they mark it up as an aberration.

When a *Washington Post* reporter noted in 1987 that airlines were asking Congress for help, she commented, “Last month, when the airline industry found itself pursued by state regulators seeking to police airline advertising, it looked for help in an

unlikely place—Washington.” In truth, airline executives had been behind federal regulation of their industry for decades and had aggressively opposed deregulation.

In fact, for the past century and more big business has often relied on big government for support.

## The History of Big Business Is the History of Big Government

As the federal government has progressively become larger over the decades, every significant introduction of government regulation, taxation, and spending has been to the benefit of some big business. Start with perhaps the most misunderstood period of government intervention, the Progressive Era from the late 19th century until the beginning of World War I.

President Theodore Roosevelt is usually depicted as the hero of this episode in American history, and his “trust busting” as the central action of the plot. The history books teach that Teddy empowered the federal government and the White House in a crusade to curb the big business excesses of the “Gilded Age.”

A close study of Roosevelt’s legacy and that of Progressive legislation and regulation, however, yields a far different understanding and shows that the experience with meat—big business calling in big government for protection—was a recurring theme. Roosevelt expanded Washington’s power often with the aim and the effect of helping the fattest of the fat cats.

Today’s history books credit muckraking novelist Upton Sinclair with the reforms in meatpacking. Sinclair, however, deflected the praise. “The Federal inspection of meat was, historically, established at the packers’ request,” he wrote in a 1906 magazine article. “It is maintained and paid for by the people of the United States for the benefit of the packers.”

Gabriel Kolko, historian of the era,



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“Theodore Roosevelt expanded Washington’s power often with the aim and the effect of helping the fattest of the fat cats.”

concur. “The reality of the matter, of course, is that the big packers were warm friends of regulation, especially when it primarily affected their innumerable small competitors.” Sure enough, Thomas E. Wilson, speaking for the same big packers Sinclair had targeted, testified to a congressional committee that summer, “We are now and have always been in favor of the extension of the inspection, also of the adoption of the sanitary regulations that will insure the very best possible conditions.” Small packers, it turned out, would feel the regulatory burden more than large packers would.

Consider the story of one of the most famous “trusts” in American folklore: U.S. Steel.

In the 1880s and 1890s, rapid steel mergers created the mammoth U.S. Steel out of what had been 138 steel companies. In the early years of the new century, however, U.S. Steel saw its profits falling. That insecurity brought about a momentous meeting.

On November 21, 1907, in New York’s posh Waldorf-Astoria, 49 chiefs of the leading steel companies met for dinner. The host was U.S. Steel chairman Judge Elbert Gary. The gathering, the first of the “Gary Dinners,” hoped to yield “gentlemen’s agreements” against cutting steel prices. At the second meeting, a few weeks later, “every manufacturer present gave the opinion that no necessity or reason exists for the reduction of prices at the present time,” Gary reported.

The big guys were meeting openly—with Teddy Roosevelt’s Justice Department officials present, in fact—to set prices.

But it did not work. “By May, 1908,” Kolko writes, “breaks again began appearing in the united steel front.” Some manufacturers were undercutting the agreement by dropping prices. “After June, 1908, the Gary agreement was nominal rather than

real. Smaller steel companies began cutting prices.” U.S. Steel lost market share during this time, which Kolko blames on “its technological conservatism and its lack of flexible leadership.” In fact, according to Kolko, “U.S. Steel never had any particular technological advantage, as was often true of the largest firm in other industries.”

In this way, the free market acts as an equalizer. While economies of scale allow corporate giants more flexible financing and can drive down costs, massive size usually also creates inertia and inflexibility. U.S. Steel saw itself as a vulnerable giant threatened by the boisterous free market, and Gary’s failed efforts at rationalizing the industry left only one line of defense. “Having failed in the realm of economics,” Kolko writes, “the efforts of the United States Steel group were to be shifted to politics.”

Sure enough, on February 15, 1909, steel magnate Andrew Carnegie wrote a letter to the *New York Times* favoring “government control” of the steel industry. Two years later, Gary echoed this sentiment before a congressional committee: “I believe we must come to enforced publicity and governmental control . . . even as to prices.”

When it came to railroad regulation by the Interstate Commerce Commission, the railroads themselves were among the leading advocates. The editors of the *Wall Street Journal* wondered at this development and editorialized on December 28, 1904:

Nothing is more noteworthy than the fact that President Roosevelt’s recom-

mendation in favor of government regulation of railroad rates and [Corporation] Commissioner [James R.] Garfield’s recommendation in favor of federal control of interstate companies have met with so much favor among managers of railroad and industrial companies.

Once again, big business favored government curbs on business, and once again, journalists were surprised.

To cast it in the analogy of Baptists and Bootleggers, the muckrakers such as Sinclair were the “Baptists,” holding up altruistic moral reasons for government control, and the big meatpackers, railroads, and steel companies were the “Bootleggers,” trying to get rich from government restrictions on their business. Roosevelt was allied to the “bootleggers,” the big meatpackers in this case. To get federal regulation, he found Sinclair a handy temporary ally. Roosevelt had little good to say about Sinclair and his ilk; he called Sinclair a “crackpot.”

This preponderance of evidence drove Kolko, no knee-jerk opponent of government intervention, to conclude, “The dominant fact of American political life at the beginning of [the 20th] century was that big business led the struggle for the federal regulation of the economy.” With World War I around the corner, this “dominant fact” was not about to change.

The men who gathered at the Department of War on December 6, 1916, struck a startling contrast. Labor leader Samuel Gompers sat at the table with President Woodrow Wilson and five members of his cabinet.

Joining Gompers and those Democratic politicians were Daniel Willard, president of the Baltimore and Ohio Railroad; Howard Coffin, president of Hudson Motor Corporation; Wall Street financier Bernard Baruch; Julius Rosenwald, president of Sears, Roebuck; and a few others. This

# “Before FDR, Hoover got the ball rolling for the New Deal with his Reconstruction Finance Corporation.”

extraordinary gathering was the first meeting of the Council of National Defense, formed by Congress and President Wilson as a means for organizing “the whole industrial mechanism . . . in the most effective way.”

The businessmen at this 1916 meeting had dreams for the CND that went far beyond America’s imminent involvement in the Great War, both in breadth and in duration. “It is our hope,” Coffin had written in a letter to the DuPonts days before the meeting, “that we may lay the foundation for that closely knit structure, industrial, civil, and military, which every thinking American has come to realize is vital to the future life of this country, in peace and in commerce, no less than in possible war.”

The CND, after beginning the project of government control over industry, handed much of its responsibility to the new War Industries Board (WIB) by July of 1917. That coalition of industry and government leaders increasingly took control of all aspects of the economy. War Industries Board member and historian Grosvenor Clarkson stated that the WIB strived for “concentration of commerce, industry, and all the powers of government.” Clarkson exulted that “the War Industries Board extended its antennae into the innermost recesses of industry. . . . Never was there such an approach to omniscience in the business affairs of a continent.”

Business’s aims in the WIB were much higher than government contracts, and certainly business did not lobby for *laissez faire*. As Clarkson puts it, “Business willed its own domination, forged its bonds, and policed its own subjection.” Business, in effect, shouted to Washington, “Regulate me!” Business called on government to control workers’ hours and wages as well as the details of production.

A decade later Herbert Hoover practiced more of the same. Hoover’s record was one

not of leaving big business alone but of making government an active member of the team. As commerce secretary in the 1920s, he helped form cartels in many U.S. industries, including coffee and rubber. In the name of conservation, Hoover “worked in collaboration with a growing majority of the oil industry in behalf of restrictions on oil production,” according to economic historian Murray Rothbard.

In the White House (where history books portray him as a callous and clueless practitioner of *laissez faire*), Hoover reacted to the onset of the Great Depression by pressuring big business to lead the way on a wage freeze, preventing the drop in pay that earlier depressions had brought about. Henry Ford, Pierre DuPont, Julius Rosenwald, General Motors president Alfred Sloan, Standard Oil president Walter Teagle, and General Electric president Owen D. Young all embraced the policy of keeping wages high as the economy went south.

Hoover praised their cooperation as an “advance in the whole conception of the relationship of business to public welfare . . . a far cry from the arbitrary and dog-eat-dog attitude of . . . the business world of some thirty or forty years ago.”

Before FDR, Hoover got the ball rolling for the New Deal with his Reconstruction Finance Corporation. The RFC extended government loans to banks and railroads. The RFC’s chairman was Eugene Meyer, also chairman of the Federal Reserve. Meyer’s brother-in-law was George Blumenthal, an officer of J.P. Morgan &

Co., which had heavy railroad holdings.

## The New Deal and Beyond

**A**fter the groundwork laid by the Progressives, Wilson, and Hoover, the alliance of big business and big government continued throughout the 20th century.

■ Franklin D. Roosevelt implemented the same sort of government controls on the economy during World War II that Wilson had put in place during World War I, complete with rationing and price controls. Big business profited from the controlled economy in much the same ways that it had under Wilson.

■ President Harry Truman wanted his secretary of state’s June 5, 1947, speech to Harvard’s commencement to be a quiet one about the rebuilding of Europe. He didn’t get his wish. The *New York Times* and the *Washington Post* both reported the story on the front pages. Within a day, the whole world knew about the Marshall Plan. But very few knew that a clique of mostly business leaders, called “The President’s Committee on Foreign Aid,” drafted the idea. Secretary of Commerce W. Averell Harriman, son of railroad magnate E. H. Harriman and former chairman of both Union Pacific Railroad and Illinois Central Railroad, ran the committee. Nine other businessmen joined him. “Throughout, business members—particularly Harriman—set the agenda and the tone for the group’s work,” historian Kim McQuaid writes. “Without the corporate politicians, Truman’s effort would have failed. Men like [cotton baron Will] Clayton and Harriman arrayed foreign aid in procapitalist, anti-communist attire.”

■ On Sunday night, August 15, 1971, millions of Americans watched President Richard Nixon lay out his New Economic Policy. Nixon had a reputation as a staunch

“When business plays by the crooked rules of politics, average citizens get ripped off.”

conservative, but his New Economic Policy (a phrase borrowed, bizarrely, from Vladimir Lenin) showed Nixon to be a changed man. The federal government would prohibit any increase in wages, prices, or rents for 90 days. After that a “wage and price council” would dictate to businesses when and how much they could increase wages, salaries, and prices. The next day W. P. Gullander, president of the National Association of Manufacturers, declared that “the bold move taken by the President to strengthen the American economy deserves the support and cooperation of all groups.” That reaction was typical among big businesspeople. The *New York Times* reported on August 17, 1971, “Business leaders applauded yesterday, with varying degrees of enthusiasm, the sweeping proposals announced by President Nixon Sunday night.”

■ George W. Bush, in the name of

“compassionate conservatism,” has handed big business big favors in the form of a prescription drug benefit from Medicare, an energy bill full of brand new special tax credits and subsidies to energy companies, and a record loan guarantee to facilitate business with known nuclear proliferators in China. A report by the directors of the Health Reform Program at Boston University’s School of Public Health found, “An estimated 61.1 percent of the Medicare dollars that will be spent to buy more prescriptions will remain in the hands of drug makers as added profits. This windfall means an estimated \$139 billion in

increased profits over eight years for the world’s most profitable industry.”

“The greatest trick the devil ever pulled,” said Kaiser Soze in the film *The Usual Suspects*, “was convincing the world he didn’t exist.” In a similar way, big business and big government prosper from the perception that they are rivals instead of partners (in plunder). The history of big business is one of cooperation with big government. Most noteworthy expansions of government power are to the liking of, and at the request of, big business.

If this sounds like an attack on big business, it is not intended to be. It is an attack on certain *practices* of big business. When business plays by the crooked rules of politics, average citizens get ripped off. The blame lies with those who wrote the rules. In the parlance of hip-hop, “don’t hate the player, hate the game.”

# FREEDOM, COMMERCE, AND PEACE

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# Copyrights and Property Rights

**O**n April 26, the Cato Institute hosted a conference on “Copyright Controversies: Freedom, Property, Content Creation, and the DMCA.” Speakers included Cato’s director of information policy studies Jim Harper; David K. Levine, coauthor of *Against Intellectual Monopoly*; and Consumer Electronics Association president Gary Shapiro. Excerpts from their remarks follow.

**JIM HARPER:** Property rights are very important, because ownership of property is as important as things like free speech for autonomous living and as bulwarks of resistance to authority. Property is at the very center and the very heart of what makes this a free country and a great society.

The original explanation for property rights is that inherent in the nature of tangible things is that two people can’t possess the same thing at the same time. If I have an apple and you want to eat it too, we can’t both eat it without bumping our faces together and making quite a mess. In economic parlance, an apple is a rivalrous physical good. No two people can possess it at the same time. John Locke gave us the best explanation for how we divvy up things in the physical world: by mixing our labor with something, we make it ours. If you imagine a Garden of Eden or an original place with plentiful common property, the way you make property your own is by mixing your labor with it, by tilling soil, by plucking an apple from a tree, and so on.

It’s a happy coincidence, of course, that ownership of property puts us in a position to trade goods with one another. So that if

I’m particularly good at collecting apples from trees and Drew is particularly good at collecting fish from streams, we can trade apples for fish and have wonderful meals of apple fish pie.

So property rights have a strong utilitarian basis. They do change on the basis of their utility and their efficiency, but essentially, property rights in tangible goods are there so that people play well together in the context of scarcity. When they can’t share physical items, property rights help people to work together.

Intellectual property is not similarly scarce. We can all take bites out of the same intellectual apple without bumping into one another or making a mess. We don’t even have to know about each other to feast on the same intellectual apple. So the starting point, the original explanation for intellectual property, is different.

The question then is: What is intellectual property? Where does it come from? What is the original explanation? I’m of the mind that the Lockean explanation is just as good for intellectual property as it is for tangible property. Ideas and expressions and inventions are all the product of mixing our

labor, in this case our mental labor, with the common property of pre-existing ideas and information. So when we set out to design a new kind of vehicle, just as when begin to eat a bowl of Wheaties in the morning, we’re creating new information. We’re creating new ideas. And we’re creating what could be called intellectual property.

We’re all constantly creating what I’ll call mundane facts simply by living our lives. Whenever a thought passes through your head, you’ve created a new fact, but most of these facts are not interesting to other people. But in the area of personal information, which is where I spend much of my time, mundane facts are sometimes a little bit more important. The fact, perhaps, that I want to buy a Porsche is mundane to most of you, but it becomes important to people who might want to sell me a Porsche. Likewise, the house I

live in; the things I purchase; my income level, family background, number of children, and educational level all start to matter to groups of people who want to know about me. These are important facts. They have slightly more value than the mundane facts that I create day to day.

Because those facts are important, industries have developed to aggregate them, to collect consumer data, credit reporting, and other useful facts. Those fact collections have quite high value to some people. And the data aggregation industry is one that’s certainly threatening to a lot of people, because it’s not well understood. But I think it provides a valuable economic service by putting more and more intelligence into our economy.

But what is the explanation for what has happened when mundane facts that I’ve created are important to others, and they collect them and start to amass them? Is it a wholesale theft of information from me? I don’t think so, but some orthodox privacy advocates do.

I think that if we somehow retained exclusive rights to the facts we create every day, that would turn society on its head. You

would be violating my rights if you spoke later today about something that I had said. That would be a fact, certainly a fact I've created, but it's one that you haven't stolen from me. Rather, I think the better explanation is consistent with property rights: the idea that almost from the moment many facts are created, they're abandoned.

While the default rule in physical property is exclusivity, the default rule in personal information is that what is observable by others is public.

We designate some of the facts we create intellectual property because we've decided that, for good, functional, utilitarian reasons, we should protect people's property rights in those facts even when they're available to others. Under copyright and patent laws, we have said that you can put out information and make it available to the public, but you don't lose exclusivity entirely. Intellectual property law is essentially a determination by society that we're better served by having rules that give incentives to create and distribute particular types of human-created information.

The question is, what is the scope of those rules and what term in these protections is most appropriate and gets the most out of creators? I don't know the answer to that. But I think the question is very important.

**DAVID K. LEVINE:** The Constitution speaks about promoting "the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This is pretty much the view that economists take of intellectual property. And I don't think I can easily be accused of being against free markets or being against property. I am a professional economist. Professional economists, I think more than any other group in the United States, understand very clearly the benefits of markets, the benefits of property.

What I want to raise in your mind is the question of what kind of property exactly is intellectual property. So, in particular, think for a moment, just as a conceptual experiment, what would happen if the government granted some particular company, in this case, me, the exclusive right to sell soap in the United States of America and allowed

me to license that right? Anyone who wanted to sell soap would have to buy a license from me, the owner of the soap right. The soap license would be a property right in the legal sense. It would confer upon me the exclusive right to my customers. I would own every potential consumer of soap. And when I licensed that right, I would be selling my customers.

That sort of arrangement used to be extremely common; governments would grant exclusive rights to sell a product. But economists do not view that grant as property in the same sense that we view property in land or property in physical capital, in plants and automobiles. They call it a monopoly. And it is a kind of property that



DAVID K. LEVINE

economists actually view as not a good thing at all, because monopolies tend to produce lousy products.

Copyright can also be viewed as a monopoly. No economist will argue that if I own a book, I shouldn't have the right to sell that book to the highest bidder, or that I shouldn't be able to profit from my ideas. But would an economist argue in favor of a monopoly over all copies of a book?

Economists agree that the right to control the distribution of a book is a monopoly. Economists, by and large, also argue that this is a desirable monopoly, that it's a good thing to give a monopoly over the distribution of a piece of intellectual property. The Constitution reflects the view that by giving a monopoly, we encourage the creation of things by providing a greater incentive. That's the heart of the argument in favor of intellectual monopoly. A musician

makes a living because he can prevent people from giving away copies of his CD or distributing it for free on the Internet.

If I produce a book and I have a monopoly over all copies of that book, no doubt I will earn more money from that book than if I don't have a monopoly. But that book will also be less useful if I have a monopoly over it. Because the way that I make a profit from a monopoly is by restricting distribution—by producing fewer copies and by making copies more expensive—but that also means that fewer people can read it.

Government-granted monopolies trigger rent seeking. I think probably one of the greatest examples of rent seeking is the retroactive extension of the copyright term. But maybe all this rent seeking and the restricted usefulness of all these products are good things if they get more music produced and more books written.

The other side of the coin is the fact that intellectual work builds on other intellectual work. I can earn more money from my book because of copyright. On the other hand, I may have to pay more money for the ingredients of my book because of copyright.

Does copyright lead to more creation? The evidence is unambiguous: it does not. F. M. Scherer, an industrial organization economist and a proponent of copyright and patents, studied the case of music in the 18th and the 19th centuries. One of the questions that he asked—because at that time copyright covered music for the first time—was whether copyright increased the production of classical music. Much to his surprise, he discovered no evidence that copyright increased the productivity of composers. In fact, the only really clear-cut case he found was that of Verdi, the great writer of operas. Verdi wrote both with copyright and without copyright. When he got copyright over all of his old works, he stopped writing new operas and he lived off the royalties from his old works. Not a great example of copyright inducing greater creation and innovation.

In a more modern example, *The 9/11 Commission Report* was a government document and therefore was produced without copyright. It was made freely available on the Internet. W. W. Norton & Co. publish-

ers was given a license to produce the first copies, and then any publisher could produce and sell copies. Another publisher, St. Martin's, did produce an alternate copy of the report. But solely because Norton was able to go first, as all content creators could with their own work, it earned a profit of \$600,000 from sales.

The music industry reports that unauthorized digital downloads may have caused a drop in sales of as much as 10 or 15 percent. But computers have had another rather significant effect on the production of music on the cost side. Producing music costs much, much less than it did 20 years ago when recording required giant, expensive sound studios. So do you think more music or less music is going to be produced? Do we need copyright to get music produced? Probably not.

The open-source software movement is a great example of creation without copyright. The creators of open-source software don't relinquish their copyright out of charity. They invented the Internet—not Al Gore—and they make money from it. The guru of open source, Linus Torvalds, drives a fancy car and lives in a nice house. He's worth millions of dollars, and he made that money by producing an intellectual product, a software product, and giving it away without copyright. He made money. He had incentive. You don't need copyright to produce incentive.

**GARY SHAPIRO:** We have to view the Digital Millennium Copyright Act in the context of history. There has been a trend over the last several decades toward defining intellectual property as if it were real, physical property, and that trend is bad. Just a generation ago, the law labeled copyright as part of a bundle of intellectual property rights. The phrase “intellectual property” didn't even exist a generation ago; it was just called copyright. The Constitution refers only to copyright and patent. We must be wary of those advocates who define copyright as property using analogies about stealing cars and shoplifting clothes and other products. They are trying to convey the concept that, just as real property, copyright must be protected. They then argue they must call copyright intellectual property.

Yet so-called intellectual property and real property are totally different. Real property is subject to ownership taxes. Real property can be owned forever. Intellectual property is a misleading term: it's only a license. Treating copyright as real property distorts the debate.

The content community has also corrupted the word “piracy.” We know what pirates are. They steal from people. So now there are armies of lobbyists promoting this concept, and I'm unsure of our ability to reverse the idea that intellectual property law is a subset of the law of real property.

Copyright protection has also expanded immeasurably over the last three decades. Terms of protection are much longer. The



original term was set in 1790 at 14 years. Congress has acted 13 times to expand the length of the copyright terms; 11 of those expansions were passed during the last 40 years. Most recently, Congress added 20 years to the term of copyright in 1998, preventing millions of 20th-century works from coming into the public domain.

The content community wants all the benefits and protections of copyright, but they're unwilling to pay their constitutional dues—putting the work in the public domain so they may replenish our creative roots, as the process has worked ever since Shakespeare and all those fables upon which Disney has based its movies. This sudden increase in copyright terms means that copyright has shifted from a brief, exclusive monopoly to a long monopoly that forecloses public access.

The number of things that are copy-

rightable has also increased. Technology has obviously increased our ability to create copyrighted works. Every e-mail, text message, blog, website, digital photo, video, and audio recording is copyrightable. The World Intellectual Property Organization Treaty, ratified by the Senate, states that any time you fix something tangibly, it's copyrighted. So there are literally billions of works that are created every day that are copyrighted. Meanwhile, digital technology requires the making of numerous copies in the course of normal use of computers, bringing millions of consumer actions under the ambit of copyright law. If I lend you my copy of a paper book, I don't have to make a copy. If I lend you my E-Book, it has copyright implications.

The DMCA also gives copyright owners broader powers to control the use of their work. They can insist on the use of digital rights management technologies, and the DMCA makes circumventing those protections illegal. The Department of Justice wants even more criminal penalties. Kids could go to jail for noncommercial infringement in the process of exercising their fair use rights. There are foreign academics who are afraid to come to the United States because they don't want to be arrested for violation of the DMCA.

The DMCA creates new restrictions on technology, and those restrictions lead to lawsuits and a sharp decline in available venture capital. The Supreme Court says that if a manufacturer or a service provider is inducing a copyright violation, the copyright owner can sue. The DMCA includes technical protection measures, and there are new proposals to expand the DMCA's restriction on software that can bypass copyright protection. The Senate is considering a proposal to criminalize the manufacture of products that record from digital radio. Manufacturers are being told how to build products. The Tivo competitor Replay TV was sued out of business.

It's time we shifted the balance back, away from the copyright-protect only community, because our country relies on technology to fuel the economy. And to the extent that we are stifling innovation and threatening to throw people in jail, we are doing the wrong thing.



# Bush and the Constitution

Every U.S. president takes an oath swearing to preserve, protect, and defend the Constitution of the United States. President Bush has repeatedly stressed the importance of that commitment, but, as Cato senior editor Gene Healy and director of the Cato Project on Criminal Justice Timothy Lynch show in a new Cato White Paper, “**Power Surge: The Constitutional Record of George W. Bush,**” a disturbing trend has emerged of executive actions that vastly overstep the president’s constitutional authority. Among the examples they cite in their paper are Bush’s refusal to veto unconstitutional laws—including campaign finance restrictions that he acknowledged violate the First Amendment—and a disregard for the principles of federalism and states’ rights. But perhaps the most alarming evidence that Bush has overstepped his constitutional authority, they write, comes in his prosecution of the War on Terror. He has authorized the detention of American citizens without trial or access to counsel, surveillance without warrant or oversight, and the use of torture tactics in interrogations of terrorism suspects. Lynch and Healy make the case that the Bush administration’s actions are incompatible with the principles of constitutionalism and

warn that his legacy will be a weakening of the constitutional order that protects the American way of life.

## Saving Health Savings Accounts

Health savings accounts (HSAs) have been promoted as a way to give workers control over their own health care and discourage wasteful spending. But critics of HSAs argue that they exacerbate some of the worst problems in current health insurance law and may restrict some consumers’ choices further. Michael Cannon, Cato’s director of health policy studies, has been a leading advocate of HSAs, but he agrees with many of the criticisms. The answer, he says, is to expand HSAs to give consumers more options. In “**Health Savings Accounts: Do the Critics Have a Point?**” (Policy Analysis no. 569), Cannon takes on the most salient critiques of HSAs, showing how increasing contribution limits, allowing workers to use their HSA dollars to purchase any type of insurance, and expanding health insurance choices will make HSAs more effective and more attractive to consumers.

## Denial of Service

Dr. Jacques Chaoulli had a patient in need of a new hip. Unfortunately, because Canadian

citizens were barred from paying privately for medical treatment, 73-year-old George Zeliotis had no choice but to join a years-long waiting list for a hip replacement of questionable quality from the public health system. Dr. Chaoulli, who had seen many patients suffer and even die in the overburdened public system, decided to take on Canada’s public health monopoly. In “**A Seismic Shift: How Canada’s Supreme Court Sparked a Patients’ Rights Revolution**” (Policy Analysis no. 568), Chaoulli describes the landmark Canadian Supreme Court decision affirming that the rights of life, liberty, and security include the right to seek medical treatment without government interference. Chaoulli expresses hope that the decision will draw attention to the fundamental unfairness of a system under which equal access to care often means equality of suffering for patients.

## When Everyone’s an Artist

The Constitution gives Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” But has copyright actually promoted creativity, and is our current copyright scheme in

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the public interest? Law professors F. Gregory Lastowka and Dan Hunter argue in their new paper, “Amateur-to-Amateur: The Rise of a New Creative Culture” (Policy Analysis no. 567), that new technologies have rendered much of existing copyright law obsolete. Current law assumes that content will be created and distributed by centralized forces, but technology allows individuals to put movies, music, and written works on the market for a fraction of their former cost. The fall of copyright law, the authors say, would end the entertainment industry as we know it and lead to an unprecedented growth of new artistic and derivative works as producers took advantage of new creative technologies and distribution channels to allow potentially unlimited audiences to enjoy their creations.

### Self-Defense for Japan

Japan has one of the most technologically advanced military forces on the planet, but the nation is constitutionally forbidden from deploying its military in the region. Christopher Preble, Cato’s director of foreign policy studies, believes that the time has come for Japan to take responsibility for its own defense and for the military affairs of the East Asian region. In “Two Normal Countries: Rethinking the U.S.-Japan Strategic Relationship” (Policy Analysis no. 566), he says that the United States should not interfere in the debate over constitutional reforms in Japan and contends that fears of revived Japanese militarism are exaggerated. His paper advocates a renegotiation of the U.S.-Japan security relationship to set a timeline for the withdrawal of the 35,000 American troops currently stationed in Japan. Security in that region should be the concern of nations in the region, and Preble predicts that greater Japanese military power would promote peace and security in East Asia and strengthen military and strategy cooperation between Japan and the United States.

### Government Mandates Lead to Government Controls

Many conservatives have embraced the idea of mandatory private health insurance as a way to lessen support for national socialized health care. However, as Cato’s director of health and welfare studies Michael Tanner

shows in “Individual Mandates for Health Insurance: Slippery Slope to National Health Care” (Policy Analysis no. 565), individual mandates for health insurance will undermine free-market reforms by encouraging the view that ensuring health coverage for individuals is the purview of the government. Such mandates, with their accompanying subsidies and regulations, are expensive, burdensome for individuals, and ultimately unenforceable. Moreover, they provide significant opportunities for rent seeking when the required benefits packages are defined. Government-mandated insurance paves the way for additional regulations and requirements that will make government-run health care more likely, not less, in the long term. The health care debate, Tanner explains, must move away from arguments over expanding coverage to the more important question of how to give consumers control over the costs and quality of their medical care.

### Defining Away Freedom of Speech

Since the 1970s, Congress has acted repeat-

edly to curb the rights of citizens and independent organizations to engage in political speech. Congress is now preparing to act to force independent 527 groups to register as political committees, thus imposing on them the array of spending and contribution restrictions that limit speech by other political groups. In “Free Speech and the 527 Prohibition” (Briefing Paper no. 96), Stephen Hoersting of the Center for Competitive Politics contends that such independent organizations cannot be made to register with the Federal Election Commission simply because they engage in speech that affects elections. The Supreme Court has ruled that equalizing the ability of individuals and groups to influence elections is not a compelling reason to regulate speech, and Hoersting cautions against supporting these restrictions in hopes of gaining partisan advantage. Limiting the activities of 527s will only shift political activity onto other, less transparent legal structures and will decrease overall political speech, which Hoersting reminds readers is crucial to participatory democracy.

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# “To Be Governed...”

## **NO SURPRISE**

State lawmakers praised the adoption of an amendment, sponsored by U.S. Senator John Cornyn, to the Senate immigration bill that would provide funds to state and local governments.

—**National Council of State Legislatures**, news release, May 19, 2006

## **BUT WE'RE GOING TO, REAL SOON**

“In public education, we don't ask kids to think,” [D.C. public schools Chief Accountability Officer Meria J.] Carstarphen said.

—**Washington Post**, Apr. 17, 2006

## **A GROWING NUMBER OF STATES ARE PASSING LAWS TO RAISE HEALTH INSURANCE COSTS**

A growing number of states are passing laws requiring health insurers to cover children under their parents' plans well into adulthood.

—**Wall Street Journal**, Apr. 11, 2006

## **HILLARY MUST HAVE BEEN HELPING HIM INVEST**

[Rep. Alan] Mollohan [D-WV] has steered at least \$178 million to nonprofit groups in his district over the past five years using “earmarks”—special-interest provisions that are slipped into spending bills to direct money to pet projects. The money . . . has formed and financed a

tight-knit network of nonprofit institutions in West Virginia that are run by people who contribute regularly to Mr. Mollohan's campaigns, political-action committee and a family foundation. One of these people also invests in real estate alongside Mr. Mollohan and his wife. . . . Mr. Mollohan's government financial disclosure form, which shows only broad ranges of debts and assets, showed household assets of up to \$565,000 in 2000, offset by debt of up to \$465,000, including \$100,000 in credit-card bills. Four years later, the couple's reported assets had soared to between \$6.3 million and \$24.9 million, with liabilities of \$3.7 million to \$13.5 million, mostly mortgages.

—**Wall Street Journal**, Apr. 7, 2006

## **BUT WE'RE SMART ENOUGH TO MAKE THE LAWS**

Petitioning a bill out of committee is no ordinary event in Annapolis. It's an exceedingly rare procedural tactic. To [use a petition to get a gay marriage ban out of committee], the Republicans needed the signatures of 47 House members. There are 43 Republicans in the House, so they needed to round up four Democrats. The four who crossed party lines were Theodore J. Sophocleus and Joan Cadden, both of Anne Arundel, Rosetta C. Parker (Prince George's) and

Kevin Kelly (Allegany). All signed near the bottom of the petition. After they were exposed, only Parker disavowed the act of partisan disloyalty. She rose on the floor of the House on Friday to tell members she had no idea what she was signing. She said the person who approached her didn't explain what it was.

—**Washington Post**, Feb. 5, 2006

## **YOU SCRATCH MY BACK**

Fairfax's county executive yesterday proposed giving his bosses, members of the County Board of Supervisors, a 27 percent raise starting in 2008 after the next election. County Executive Anthony H. Griffin's recommendation, which was not discussed publicly at the board's regular meeting, would push supervisors' pay from \$59,000 a year to \$75,000. If approved after a public hearing April 3, the increase would be the first in eight years. Also yesterday, the board was told that county residents likely will have to pay higher car taxes this year. . . . The 10-member board, which appoints the county executive, awarded Griffin his own, 4.5 percent raise in January, bringing his annual salary to \$213,960. He said the proposed pay raise for his employers was strictly his idea.

—**Washington Post**, Mar. 14, 2006

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