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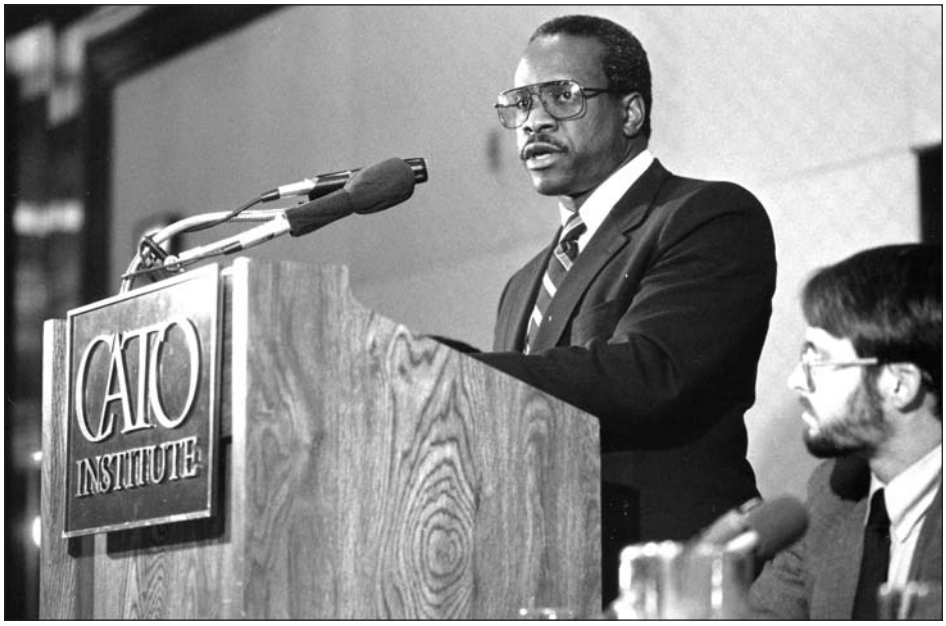
Abandoning the Limits on Federal Power

by Clarence Thomas



Clarence Thomas, shown here at a Cato Institute conference in 1988, ended the 2004–2005 Supreme Court term with two stirring dissents in cases involving federalism (reprinted here) and property rights.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

Respondents' local cultivation and consumption of marijuana is not "Commerce . . . among the several States." By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. The majority supports this conclusion by invoking, without explanation, the Necessary and Proper Clause. Regulating respondents' conduct, however, is not "necessary and proper for carrying into Execution" Congress' restrictions on the interstate drug trade. Thus, neither the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

The Commerce Power

As I explained at length in *United States v. Lopez* (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. The Clause's text, structure, and history all indicate that, at the time of the founding, the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. The term "commerce" commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public.

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States." Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding sug-

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This is the text of Justice Clarence Thomas's dissent from the Supreme Court's ruling in the case of Gonzales v. Raich *(previously* Raich v. Ashcroft*) handed down June 6, 2005. Citations and footnotes have been omitted. Unattributed quotations are from earlier opinions of the Supreme Court.*

In This Issue

Limited Government versus the Supreme Court

They may prove to be blessings in disguise. Two recent Supreme Court decisions—one on federalism, the other on property rights—should serve as wake-up calls for those who believe in limited government and individual liberty. For too long conservatives who understand the Enumerated Powers Doctrine and the role the Constitution plays in limiting the power of government have allowed the religious right to essentially hijack the debate over judicial philosophy in America. The litmus test for any judge must always be his or her view on *Roe v. Wade,* as though abortion and abortion alone should determine who sits on the federal bench.

Now, abortion is a serious issue—one in which I've always believed neither side gave due credit to the valid arguments of the other. And I am a pro-choice advocate (up until the fetus is viable outside the womb) who nevertheless believes Roe was wrongly decided, giving a police power to the federal government that the Constitution denies the federal government. That said, the manner in which the debate over abortion so controls the debate over judicial philosophy is absurd. Simply put, there are more important issues out there, such as federalism and private property rights, the cornerstones of our liberty.

The federalism case was *Gonzales v. Raich,* in which the Supremes, by a 6-to-3 vote, ruled in a California medical marijuana case that the federal War on Drugs trumped a state law that allowed the sick and dying to ease their pain through the use of marijuana. (The federal government's war on pain killers across the board is bizarre.) This shameful decision clearly undermines the essence of federalism. Governance within our constitutional framework is to occur primarily at the state and local level. The national government is there to protect our liberties and to leave the states pretty much alone. Of course, that concept was undermined long ago, when Franklin Roosevelt threatened to pack the Court if it didn't go along with his extraconstitutional initiatives.

But this is the Rehnquist Court, the one that breathed new life into federalism in *Lopez,* telling Congress it didn't have the power to tell the people of Texas what kind of gun laws they had to have. So, the *Raich* decision was a real blow to those of us who believe in federalism. Interestingly, Justice Antonin Scalia voted with the majority, prompting my colleague Roger Pilon to dub Scalia a "fair-weather federalist." True. Nino evokes federalism when it suits him. When it doesn't, as when his cherished War on Drugs is in any way constricted, he doesn't recognize federalism when it's staring him in the face.

The second lamentable decision, and the one provoking the loudest protests, was *Kelo v. City of New London,* where in a 5-to-4 vote the Supremes ruled it was fine for a local government to use the frightening power of eminent domain, not for public use as stated plainly in the Fifth Amendment, but for private gain that would generate added tax revenues for the city. Fifteen private residences are to be destroyed to make room for an office building and upscale housing for corporate executives. Never mind if your house has been in the family for generations, you're out of luck. As Justice Sandra Day O'Connor put it in a stinging dissent, the fallout of this decision will not be "random." The little guy will get hit for the benefit of the wealthy and politically powerful—in virtually every instance.

"Whatever happened to liberals looking out for the little guy? What happened is that liberals are more interested in enhancing the power of government than they are in protecting the rights of average Americans."

The good news with *Kelo* is that the reaction has been so strong that federal legislation has been introduced that would prevent the federal government from using economic development as a rationale for employing eminent domain. It would also apply to states and localities that planned to use federal funds for their development projects. Good for Congress if they pass this legislation. They are overdue to do something right. Further, our good friends at the Institute for Justice, who fought the good fight in the Supreme Court, will be taking the battle to the states where, in one after the other, they will reassert the primacy of private property in America.

One last point: The so-called liberal bloc on the high court was in the majority on both of these egregious decisions. In both judgments it was the little guy who got screwed. Whatever happened to liberals looking out for the little guy? What happened is that liberals are more interested in enhancing the power of government than they are in protecting the rights of average Americans—something private property and federalism were specifically designed to do.

—Ed Crane

450 economists back reform

Social Security Ads Run As Battle Heats Up

To help mobilize broad public support for Social Security reform, the Cato Institute has embarked on an ambitious media blitz to educate the public on the benefits of personal accounts. Radio ads have begun airing in metropolitan areas across the nation, from Portland, Maine, to Seattle, Washington, and from Bismarck, North Dakota, to Little Rock, Arkansas. A newspaper ad featuring the names of 450 economists who support personal accounts, including five Nobel laureates, appeared in the *Washington Times* and *Roll Call,* two newspapers that are widely read on Capitol Hill.

The focus of the Social Security debate has shifted from the abstract to the practical, as the president has revealed some details of his reform proposals and committees in both houses of Congress have begun debating the idea of personal accounts. As the politicians start focusing on the nuts and bolts of reform, the Cato Institute has continued to stress the broad themes that have given the idea wide public appeal. An April memo from Cato president Ed Crane to presidential adviser Karl Rove that was printed in the *Wall Street Journal* emphasized that the Social Security issue should be about "liberty and opportunity," not "green-eyeshade issues such as solvency, transition costs, unfunded liabilities, and rates of return."

Cato's advertising campaign has stressed those themes. An ad that has appeared in the *New York Times,* the *Washington Post,* and numerous magazines, including *Business Week, The Economist, National Review,* and *New Republic,* emphasizes the values of ownership, inheritability, and choice. Online Cato ads featuring those themes have appeared on some of the most popular weblogs, including Instapundit and AndrewSullivan.com.

Cato has produced a new booklet, *It's Your Money: A Citizen's Guide to Social Security Reform,* and mailed it to 300,000 Americans. In 32 pages, it explains the challenges faced by the Social Security system and Cato's plan to address them. By reaching hundreds of thousands of thoughtful American citizens, Cato has the opportunity to deepen public understanding of the Social Security issue and the advantages of allowing workers to invest their Social Security contribution in private investments they would own and control.

As it prepared to launch its nationwide media campaign, Cato continued making headlines on Capitol Hill. Michael Tanner, director of Cato's Project on Social Security Choice, testified before the House Ways and Means Committee in April and again in May. He testified before the Senate Finance Committee in May and again in June. *Roll Call* magazine named Tanner one of the five most influential people in the Social Security debate. And the Johnson-Flake Social Security reform bill, which is based on Cato's proposals, has more cosponsors than the next two most popular Social Security bills combined.

Cato's Social Security effort is the most ambitious since 1994, when the Institute was instrumental in killing President Clinton's proposals for socialized health care. Sponsors have already contributed more than $1 million to the effort. To help expand the advertising campaign, make a donation at www.socialsecurity.org. ■

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Debates on Social Security, oil policy, WTO, and NCLB

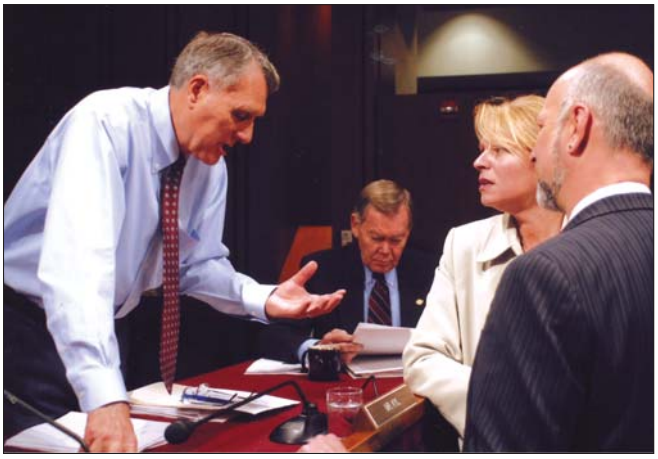
Graham, Lieberman Discuss Budget Reforms

◆**April 6:** At a Capitol Hill Conference, **"Short- vs. Long-Term Thinking: Incorporating the Long-Term Fiscal Outlook into the Myopic Budget Process,"** two U.S. senators warned that reckless fiscal policies were putting the nation on a path to crisis. Sen. Joseph Lieberman (D-CT) outlined his proposal to change the budget rules to better account for the long-term fiscal impact of legislation. Sen. Lindsey Graham (R-SC) argued that a breakthrough on Social Security reform was needed to put the nation on a sustainable fiscal course. Cato's Jagadeesh Gokhale proposed that the "scoring" procedures be reformed to incorporate present value calculations of proposed future spending.

◆**April 18:** The arms control community needs to seriously consider the possibility that the world's current arms control regime is doomed to fail, argued Charles Peña, Cato's director of defense policy studies, at a Capitol Hill Briefing, **"The Future of the Nuclear Nonproliferation Treaty (NPT): Prospects and Problems."** The nonproliferation treaty has not prevented the spread of nuclear weapons to India, Pakistan, or North Korea, he pointed out, and other nations are likely to want them too. However, that need not be catastrophic. Deterrence worked during the Cold War, he noted, and there's no reason to think it won't work in the future. Cato senior fellow Doug Bandow stressed that it might be impossible to come up with a package of carrots and sticks that will persuade ambitious or militaristic nations to remain nonnuclear.

◆**April 22:** At a Cato Book Forum for ***Saving Our Environment from Washington: How Congress Grabs Power, Shirks Responsibility, and Shortchanges the People,*** author and Cato adjunct scholar David Schoenbrod told of his experiences litigating for a cleaner environment in the 1970s. Schoenbrod concluded that environmentalists would do well to rediscover the founding principles of our Republic: federalism and the separation of powers. He urged Congress to return power over local environmental matters to the states and to take direct responsibility for federal environmental rules instead of delegating rulemaking power to administrative agencies.

◆**April 25:** Republicans in Congress betrayed traditional Republican principles of federalism and judicial independence when they intervened in the case of Terri Schiavo charged Berkeley law professor John Yoo at a Cato Policy Forum, **"In Defense of an Independent Judiciary."** But recent assaults on judicial independence and judicial review have extended beyond the Schiavo controversy. Roger Pilon, Cato's vice president for legal affairs, surveyed the history of judicial review, showing that the practice already had a long history in the British common law by the time the Constitution was drafted and that the Framers clearly intended for the judiciary to have the power to declare laws unconstitutional. Jonathan Turley of the George Washington University Law School emphasized that discord between the branches of government is an essential part of our constitutional design.



At George Washington's home, Mount Vernon, Cato president Edward H. Crane addresses Cato University participants on the American heritage of liberty and its decline in recent decades.

Sen. Jon Kyl (R-AZ), chairman of the Senate Republican Policy Committee, talks with Cato's Susan Chamberlin and Michael Tanner after Tanner's testimony to the Senate Finance Committee on Social Security choice.

◆**April 26:** Civil liberties are suffering serious collateral damage in the federal government's war on white-collar crime, said attorney N. Richard Janis at a Cato Policy Forum, **"Deputizing Company Counsel as Agents of the Federal Government."** Federal prosecutors have been given such expansive powers—including the right to criminally prosecute individual executives—that companies rarely choose to fight criminal prosecutions. John Hasnas of the George Mason Law School argued that such infringements of civil liberties is unavoidable if one wants to effectively prosecute the growing list of white-collar crimes, many of which are vaguely defined and extraordinarily complex. Perhaps, he suggested, the price for such laws is too high to pay. Timothy Coleman of the Department of Justice defended the current regime.

◆**April 27:** A decade ago Richard McKenzie of the University of California, Irvine, realized that negative public attitudes about orphanages didn't match his own experiences growing up in a North Carolina orphanage in the 1950s. He began writing about his experiences and published a book about his childhood. At a Cato Movie Screening, he presented his latest project, ***Homecoming: The Forgotten World of America's Orphanages,*** which features the memories of those who grew up in orphanages during the mid-20th century. McKenzie suggests that, in light of the dismal record of the welfare and foster care systems, it might be time to consider resurrecting orphanages for children who can't be placed with stable families.

◆**April 28:** At a Capitol Hill Briefing, **"The Grand Old Spending Party,"** Sen. Tom Coburn (R-OK) blamed career politicians for the sorry state of the federal budget. No private business could get away with similar fiscal policies, he said, pledging to ferret out waste. Veronique de Rugy of the American Enterprise Institute laid the blame squarely at the feet of the Republican Party, whom she accused of abandoning their principles. Despite ballooning federal spending, she noted, President Bush supported the biggest expansion of Medicare since the program was created. Cato's Stephen Slivinski suggested that divided government is better for fiscal restraint. Congressional Republicans, he said, would likely have been stingier if Al Gore or John Kerry had been in the White House.

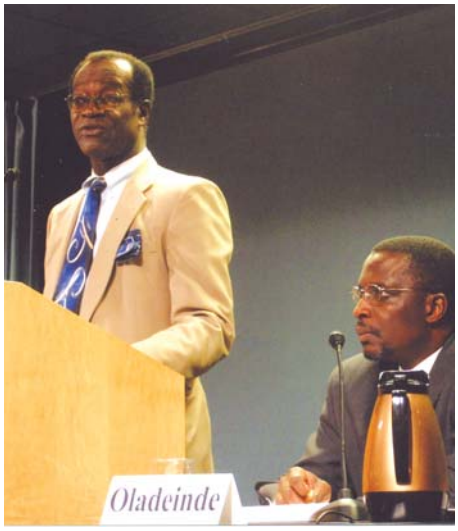
◆**April 28–May 1:** The spring Cato University seminar in Washington, D.C., **"Applied Economics: User Friendly Tools to Understand Politics, Business Enterprise, and Life,"** featured a treasure trove of economic insights from leading libertarian scholars. Rep. Ed Royce (R-CA) explained how economics should—but often doesn't—inform public policy. Michael Munger of Duke University showed how economics explains politics and the importance of culture, custom, and choice in a democracy. Dan Griswold, director of Cato's Center for Trade Policy Studies, explained international trade policy and the trade deficit. Cato president Ed Crane and vice president David Boaz inspired the crowd with Cato's vision of limited government, market-based cooperation, and free enterprise.

◆**May 2:** The semiannual meeting of the Shadow Open Market Committee, a group of leading monetary economists who monitor the policies of the Federal Reserve, was held at the Cato Institute on May 1. The next day, they presented their findings at a Cato Policy Forum, **"Monetary Policy after Greenspan: Challenges and Opportunities."** Committee members sounded a mostly upbeat note, pointing out that the economy was enjoying robust growth with minimal inflation. Alan Stockman of the University of Rochester argued that America's large trade deficit is a symptom of overseas investors' strong interest in investing in the American economy. Lee Hoskins, former president of the Cleveland Fed, stressed the importance of continuity with Alan Greenspan's monetary policies when a new Fed chairman takes the helm.

◆**May 3:** Two experts on campaign finance regulation, Republican Cleta Mitchell and Democrat Robert Bauer, answered a resounding no to the question **"Should We Ban 527s?"** At a Capitol Hill Briefing, Mitchell stressed that so-called 527 groups, organizations that spend unregulated sums of money on political advertisements, have as much right to buy airtime as do the politicians they criticize. Bauer argued that there is nothing inherently problematic about more money being spent on political speech and pointed out the hypocrisy of journalists who demand that everyone else's political speech be regulated while insisting on strict First Amendment protection for their own profession.

◆**May 3: "Can Health Savings Accounts Cover the Uninsured?"** Health care experts at a Cato Policy Forum agreed that they can. Greg Scandlen of the Galen Institute noted several features of HSAs that are of particular benefit to the uninsured. The money in the accounts can be carried from job to job and can be drawn down during times of unemployment. And HSAs put downward pressure on health care costs generally, bringing insurance within reach of more people. Robert Helms of the American Enterprise Institute offered a historical perspective on the plight of the uninsured, describing how third-party payment has led to spiraling health care costs as service providers have had little incentive to find savings. Cato's Michael Cannon advocated increasing the cap on HSA contributions and allowing employees to use their HSAs to pay health insurance premiums.

◆**May 4:** When discussing Africa's plight, it is crucial to distinguish between Africa's elites and its peasants, argued George Ayittey, author of ***Africa Unchained: The Blueprint for Africa's Future,*** at a Cato Book Forum. To point out that Africa's leaders are largely responsible for the continent's plight is not to blame the victims—Africa's peasants—for their woes. Market reforms empower ordinary peasants who now toil in the informal sector, he said. He warned that Western aid will inevitably find its way into the pockets of wealthy dictators, worsening the plight of ordinary peasants by strengthening the elites' hold on power. Fred Oladeinde of the Foundation for Democracy in Africa affirmed Ayittey's call for economic liberalization, but he disputed the contention that Africa does not need foreign aid.



Fred Oladeinde of the Foundation for Democracy in Africa listens as George Ayittey discusses his book *Africa Unchained* at a May 4 Cato Book Forum.

◆**May 4:** At a **Cato City Seminar** in Chicago, Dean Baker, codirector of the Center for Economic and Policy Research, asserted that the finances of Social Security are fundamentally sound and that the projected funding gap could be closed with incremental adjustments to the program. Michael Tanner, director of Cato's Project on Social Security Choice, disputed Baker's claim that the problem is a minor one and emphasized that personal accounts have benefits beyond restoring the system to solvency.

◆**May 5:** C. Boyden Gray, former White House counsel to the first President Bush, argued that government intervention was necessary to reduce America's dependence on foreign oil at a Cato Policy Forum, **"Foreign Oil Dependence and National Security: What to Do?"** The oil industry, he noted, has received a wide range of special privileges over the last century. Subsidies and other advantages for alternative fuels are necessary to level the playing field, he said. Jerry Taylor, Cato's director of natural resource studies, countered that energy independence would do nothing to cushion the American economy from foreign price shocks. Oil prices, he noted, are set in a global market, and the American economy will be subject to world prices regardless of whether

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EVENTS *Continued from page 5*

the United States is a net importer or exporter.

◆**May 9:** Famed First Amendment lawyer Floyd Abrams appeared at a Cato Book Forum to promote his new book, ***Speaking Freely: Trials of the First Amendment.*** He saluted Cato for its consistent defense of free speech and lamented that few others, on either the left or the right, are as steadfast in supporting freedom of speech. For example, he said, many liberals opposed government limitations on campaign spending in a 1972 case concerning a newspaper ad critical of President Nixon. However, he said, most liberals today are supportive of campaign regulations, which are often used against well-funded conservative interest groups. Similarly, he said, conservatives showed little interest in government regulation of the airwaves until fears were raised that the Fairness Doctrine might be used against conservative talk show host Rush Limbaugh.

◆**May 11:** **"Does the World Trade Organization Serve America's Interests in the Global Economy?"** Rep. Ron Paul (R-TX) said no at a Cato Policy Forum. The WTO, he warned, is a threat to American sovereignty and a step toward world government. Moreover, he said, the United States would do better to lower its own trade barriers unilaterally. Douglas Irwin of Dartmouth College countered that the WTO is an imperfect but vital institution in the fight for freer trade. Unilateral free trade, while theoretically sound, is politically infeasible, he argued. Moreover, he noted, compliance with WTO decisions is always voluntary. Grant Aldonas, who served as undersecretary of commerce for international trade under the current Bush administration, agreed with Irwin that the WTO was necessary, but he stressed the importance of criticizing the institution when it falls short of its free-trade principles.

Robert Pozen, a member of the President's Commission to Strengthen Social Security, discussses his "progressive price indexing" reform plan at a May 23 Cato Policy Forum.

U.S. Chamber of Commerce president Thomas Donohue, Cato trade policy director Dan Griswold, and Princeton University professor Douglas Massey, author of a Cato study on immigration, testify on May 26 at a Senate Judiciary subcommittee hearing on immigration reform.

◆**May 12:** At a Cato City Seminar in New York, **"Social Security and the Future of Limited Government,"** Club for Growth president and former congressman Pat Toomey emphasized that reforming Social Security with personal accounts will change the nature of the relationship between the American people and their government. He criticized Democrats as the party of dependence and predicted that increasing stock ownership by ordinary Americans will broaden public support for free-market policies. Cato president Ed Crane discussed the Constitution's limitations on government power and criticized the abandonment of those limits since Franklin Roosevelt's Court-packing scheme in 1937. Senior White House adviser Al Hubbard promoted the president's Social Security proposals.

◆**May 12:** India's recent steps toward liberalization hold great promise, argued Deepak Lal of UCLA at a Cato Book Forum for his latest book, ***The Hindu Equilibrium: India C. 1500 B.C.–2000 A.D.*** However, Lal argued, several challenges may thwart further economic development. One is the weight of the past; there is resistance to economic reforms among traditionalists, who reject modernity in favor of India's caste system. Another is India's many state-run industries, which Lal argued impose large deadweight losses on the economy. However, he said, if India can surmount those barriers, it may surpass China as Asia's preeminent economic power. Anne Krueger, first deputy managing director of the International Monetary Fund, raised several serious concerns about India's progress, including a crumbling electric industry and massive fiscal deficits.

◆**May 19:** Does Social Security contain the seeds of its own destruction? Michele Boldrin of the University of Minnesota suggested that it might at a Cato Policy Forum, **"Fertility and Social Security."** By promising government-funded retirement benefits, he argued, Social Security may have lessened parents' dependence on their children. That, in turn, reduced the incentive of parents to have children in the first place. Unfortunately, declining birthrates have created a demographic squeeze in which a dwindling number of workers struggle to support a growing number of retirees. John Rust of the University of Maryland questioned Boldrin's assumptions, suggesting that other factors, such as birth control and increased career opportunities for women, better explain the drop in fertility.

◆**May 23:** Robert Pozen, a Democratic member of the President's Commission to Strengthen Social Security, has proposed a reform of the Social Security benefit formula that would preserve the promised benefits of low-income workers while gradually reducing the benefits of high-income workers as a share of their

preretirement income. Pozen's proposal has become a focus of heated debate since President Bush expressed support for the concept. At a Cato Policy Forum, **"Progressive Price Indexing for Social Security: What It Is, What It Isn't,"** Pozen laid out the details of his proposal and argued that other proposals to close the system's financing gap either would fail to achieve the needed savings or would prove politically unpalatable. Jason Furman of the Center on Budget and Policy Priorities argued that any reform plan must include some tax increases. David John of the Heritage Foundation countered that personal accounts are vital to the retirement prosperity of younger workers, who are seeing ever-declining rates of return under the current system.

◆**May 24:** Nicholas Boles, director of the British think tank Policy Exchange and a Conservative candidate in the recent parliamentary election, discussed **the future of British politics** with Cato scholars at a roundtable lunch. He argued that both Tony Blair and the Conservative Party were weakened by the election results and that the Conservatives need to "modernize" their image and policies for future electoral success. They should offer more choice in public services and more social tolerance, as well as try to update their outmoded landed-gentry image.

◆**May 25:** Today's budget process was designed by tax-and-spend liberals at the height of their power in the late 1970s. Not surprisingly, the rules have numerous built-in biases toward spending increases. At a Capitol Hill Briefing, **"Unstacking the Deck: The Need for Budget Process Reform,"** Rep. Jeb Hensarling (R-TX) outlined his Family Budget Protection Act, which would reform the budget rules to level the playing field. His proposal would restrict the use of "emergency" spending bills to evade spending caps, ensure that House members could enforce budget rules through points of order, and impose sunset requirements on all government programs. Cato's Stephen Slivinski emphasized the need for greater commitment to spending restraint among Republican leaders.

◆**May 26:** Can we afford Social Security reform? In fact, argued Cato senior fellow Jagadeesh Gokhale at a Capitol Hill Briefing, **"Social Security Reform for Deficit Hawks,"** we can't afford *not* to reform the program. With the Social Security system facing a $12 trillion shortfall, personal accounts will save the government trillions of dollars in the long run by harnessing the power of private wealth creation. Although some short-term debt will be required to finance the transition, Gokhale said, that debt is merely the formal recognition of the system's implicit obligations. Cato's Mike Tanner concurred, noting that the Johnson-Flake reform bill, which is based on Cato proposals, would reduce the government's unfunded liability by $6.3 trillion in present value.

Utah state representative Margaret Dayton, Nina Rees of the U.S. Department of Education, Cato author Lawrence Uzzell, and former assistant secretary of education Chester Finn held a spirited debate on the No Child Left Behind Act at a May 31 Policy Forum.

◆**May 27:** Our elected officials talk about war as a last resort. But, argued Andrew Bacevich at a Cato Book Forum for ***The New American Militarism: How Americans Are Seduced by War,*** they don't seem to mean it. Muscular interventionism has become a routine instrument of foreign policy since the end of the Cold War, as the United States has become involved in armed conflicts in Iraq, Yugoslavia, Somalia, Haiti, and elsewhere. Americans, Bacevich said, have begun to view military strength as an expression of American greatness. James Fallows of the *Atlantic Monthly* praised Bacevich's book and warned that the United States may face the prospect of being "at war" indefinitely, as we pursue an open-ended and amorphous war on terrorism.

◆**May 31:** Two panelists at a Cato Policy Forum, **"The Future of the No Child Left Behind Act,"** expressed the hope that the act would be repealed as soon as possible. Margaret Dayton, a member of the Utah House of Representatives, has authored legislation requiring Utah education officials to ignore those provisions of the No Child Left Behind Act that conflict with state law. Education, she stressed, is a state responsibility under the Constitution. Larry Uzzell, author of a new Cato study on the act, said that federal officials are engaged in a charade in which states inflate their education statistics and federal officials pretend not to notice. Nina Rees of the U.S. Department of Education disagreed, claiming that the federal government has helped to improve educational achievement in recent years. Chester Finn of the Thomas B. Fordham Foundation argued that something needed to be done and called the No Child Left Behind Act a step in the right direction. However, he conceded, the act is flawed and needs to be improved. ■

The War on an Independent Judiciary

On April 25 the Cato Institute held a Policy Forum, "In Defense of an Independent Judiciary," in the Institute's F. A. Hayek Auditorium. Speakers included Roger Pilon, Cato's vice president for legal affairs; John Yoo, a visiting scholar at the American Enterprise Institute who served as deputy assistant attorney general in the Office of Legal Counsel in John Ashcroft's Justice Department; and Todd Gaziano, director of the Center for Legal and Judicial Studies at the Heritage Foundation. Excerpts from their remarks follow.

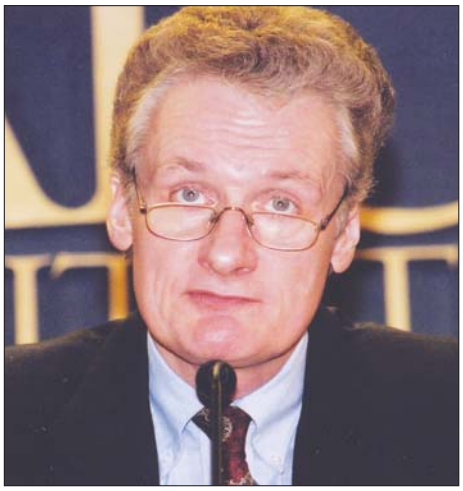
Roger Pilon: It comes as no news today that we're in the midst of an intense battle for the nation's courts. With the Terri Schiavo matter, however, it has seemed more a battle against the courts, with the attacks coming mainly from the right, although some are coming from the left as well. And it isn't just the independence of the judiciary that's at risk; it's the institution of judicial review as such, as if it were somehow foreign to our constitutional design—invented from whole cloth by the Supreme Court itself in the seminal 1803 case of *Marbury v. Madison*.

Given those recent attacks, a very brief history seems in order. Our legal system evolved in large measure from English common law. Initially, toward the middle of the 12th century, judges in the king's courts began deciding disputes between individuals, consulting both reason and custom to "discover" the law; but eventually the courts began ruling on disputes involving the Crown and Parliament. That early form of "judicial review" reached fruition in Dr. Bonham's case, decided by the Court of Common Pleas in 1610, in which Lord Coke invoked "higher law" to disallow an act of Parliament:

> And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.

The first law professor in the colonies, George Wythe, who taught Thomas Jefferson, John Marshall, and many others of the founding generation at the College of William and Mary, invoked that kind of argument when he spoke of the power of courts to review the acts of the political branches. And the Founders, for their part, came increasingly to appreciate that power during the 11-year period from 1776, when independence was declared, to 1787, when the Constitution was drafted. For as democracy was taking root in the new states, the vices that public choice economic theory would later explain were coming to the fore: legislatures were running amok, abrogating debts, expropriating property, and otherwise restricting liberty. Viewing such actions with increasing alarm, those who would soon be framing the new constitution saw the judiciary as a brake on that kind of democratic lawlessness.

Thus, by the time they began drafting the Constitution, the Framers understood the need for an independent judiciary that would serve, as James Madison put it in the first session of Congress, as "an impenetrable bulwark against every assumption of power in the Legislative or Executive." Indeed, Alexander Hamilton had stated the basic argument a year earlier in *Federalist* 78:



Roger Pilon: "The Framers understood the need for an independent judiciary that would be 'an impenetrable bulwark against every assumption of power in the Legislative or Executive.'"

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

It seems to me that that pretty much settles the question of whether the power of judicial review was written from whole cloth a few years later in *Marbury v. Madison* or, instead, was clearly understood before that and was incorporated in the "judicial Power" that was granted in Article III of our written Constitution. I don't think it could be any clearer that the Framers contemplated that the courts would exercise judicial review.

Yet in the early years of the Republic the courts were not all that active, and for good reason: questions never got to the courts because members of the political branches opposed policies they believed to be unconstitutional. Unlike today, Congress actually debated whether it had authority to enact various proposals. And when constitutionally questionable measures did get out of Congress, presidents would often veto them, not so much on policy as on constitutional grounds. The political branches took the Constitution seriously, that is, they didn't leave it solely to the courts to uphold our basic law. Thus, although the courts occasionally exercised judicial review, it was infrequent because the other two branches often killed unconstitutional legislation before it reached the courts.

Let me touch now on the Civil War Amendments, because it's where so much of the confusion arises today, especially for conservatives, many of whom seem still to be at war with those amendments—if not with the Civil War itself—and with the role of the courts, in particular, in enforcing the provisions of section 1 of the Fourteenth Amendment.

It strikes me that if you read the debates leading up to the war, the debates in the 39th Congress, which drafted the Fourteenth Amendment, and the debates of the ratifying conventions, you can come away with no other view than that those who wrote and ratified section 1 of the amendment—including the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause—meant for it to be enforced against the states by the courts. In fact, the version of section 1 on which Congress finally settled, unlike the previous versions, was self-executing, meaning it did not rely on subsequent legislation by Congress to be enforceable.

"Conservatives are joining forces today with Rooseveltian liberals, leaving us with few consistent advocates of limited government."

The Fourteenth Amendment "completed" the Constitution by incorporating at last the principles of the Declaration of Independence, which had been compromised at the founding by the document's oblique recognition of slavery. Now, for the first time, we had far-reaching federal remedies against state violations of our rights, which changed fundamentally the relationship between the federal government and the states. No longer would state actions be immune from scrutiny by federal courts concerning whether they were consistent with rights guaranteed by the Bill of Rights, which was understood to incorporate our natural and our common law rights. However unevenly courts would go on to exercise their new authority—and it was very uneven—people could now look to the courts for protection against overweening government, federal or state.

Yet it was that very brake on political power that would prove the undoing of the grand constitutional design. The most scathing attacks on the power of judicial review would come from Progressives in the years before and during the New Deal, culminating in Franklin Roosevelt's infamous Court-packing scheme and in the Court's effectively abandoning review of legislation affecting vast areas of life. Indeed, there is a striking parallel between the attacks on the judiciary one hears today from conservatives and those one heard from the Roosevelt administration during the New Deal. And there is irony too. For conservatives, who are generally opposed to large government, are joining forces today with Rooseveltian liberals, leaving us with few consistent advocates of limited government. In their zeal to use government for their own ends, and their misunderstanding of the Constitution's limits on democracy, both camps have abandoned the basic Madisonian insight, that the courts are there to stand as a "bulwark"—between us and tyranny.

John Yoo: First, I think, as a textual matter, judicial review, which is just the power of the federal courts to enforce the Constitution instead of a federal statute when the two are in conflict, arises directly from the text. The first clause you would want to look at would be the Supremacy Clause, which says that the Constitution is the supreme law of the land and orders state judges to put aside any conflicting state laws.

The Supremacy Clause makes two things clear: First, that the Constitution is the supreme law of the land. And second, that the Constitution is law that should actually be applied in courts. The going theory, I think, among many liberal scholars is that the Constitution is a political document, not a legal document, and that it was never meant to actually be enforced in courts. But in the Supremacy Clause, you have a direct order to state judges to apply the Constitution in cases before them. It seems like a very straightforward recognition that the Constitution is really law.

The second textual provision we want to look at is the Oath Clause, which requires all federal officers to take an oath to uphold the Constitution first, above everything else. And then the third clause to look at would be Article III of the Constitution, which gives the federal courts jurisdiction over all cases arising under

John Yoo: "The real damage that's done here is to core conservative principles of constitutional law. What ever happened to federalism?"

the Constitution, federal laws, or treaties. Again, another direct recognition that the Constitution is law that would give rise to cases or controversies that would be heard in federal court.

You could also look at the structure of the Constitution. It creates three independent branches of government, and each of those branches has a particular duty. The executive branch implements the laws and participates in the legislative process through the veto. The Congress passes the laws. And the judiciary decides cases or controversies arising under federal law.

Judicial review is really no different from what the other two branches should be doing but, as Roger observed, often are not doing, which is interpreting the Constitution in the course of performing their own duties. So we would not think it irregular, and in fact we would hope, that the president would veto laws that he believed to be unconstitutional. And we would hope and expect that Congress would refuse to enact laws that it believed to be unconstitutional.

Similarly, judicial review is just the courts performing the same duty—to put the Constitution first—when they perform their own unique constitutional function, which is to decide disputes between parties. So what is judicial review? Judicial review arises when a court has to make a choice between the rules set out in the Constitution and a rule that's set out in a federal statute.

So if you look, for example, at *Marbury v. Madison*, the first case where the Supreme Court exercised judicial review, there was a conflict between a federal statute, passed in 1789, and the Constitution. And the Court had to choose one or the other. There was no way for it to escape that choice. And judicial review really just means that the Court, like all other federal officers of the government, have to put their allegiance to the Constitution first and pick the constitutional rule over an inconsistent statutory rule.

Having said that, let me make some observations about the *Schiavo* case. Because, in that case, I do think that criticism of the courts is appropriate. The question is, when does that criticism go over the line into excessive threats against the federal judiciary? Lately we've had comments by some of the political leaders in Congress and also by members of interest groups outside Congress that members of the federal judiciary ought to be investigated because of their decisions. That we ought to consider impeachment proceedings against some. I think that really crosses the line.

I think that the federal courts in the *Schiavo* case actually did what they were supposed to do and reached the right result. I was very surprised when I read the legislation Congress passed in the *Schiavo* case and compared it to what the papers, or the media, made it sound like the legislation did. You would have thought that the legislation required that the federal courts order Ms. Schiavo's feeding tube not be removed.

But in reality, all Congress did was give the federal courts jurisdiction to review state court decisions about the *Schiavo* case. It didn't require the federal courts to reach any particular result. It didn't even require the courts to issue an injunction. All it did was say the fed-

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"The federal courts in the *Schiavo* case did what they were supposed to do and reached the right result."

POLICY FORUM *Continued from page 9*

eral judges could look at the case. And, in fact, it didn't even create what we call a cause of action. It didn't give Ms. Schiavo's parents or any other party the right to stop what was going on in Florida. All it did was extend federal court jurisdiction over the case.

So the federal judges exercised that jurisdiction. But they found that there had been no cause of action created for Ms. Schiavo or her family or other representatives. And that is why it's so odd to hear the criticisms of the courts. You have interest groups and politicians criticizing federal judges for being activists, for going beyond their judicial duty, when all they did was refuse to get involved in a political dispute in which there was no substantive cause of action. In fact, what the federal judges were doing was exercising judicial restraint. They were doing the very opposite of activism. It would have been activism if a federal judge had taken that jurisdiction and then run with it, creating a wholly new cause of action that had never been recognized before.

I think the real damage that's done here is to core conservative principles of constitutional law. What ever happened to federalism? Conservatives used to criticize *Roe v. Wade*, I think quite appropriately, because it seized an issue from state legislatures and ultimately nationalized and judicialized it, so that only the Supreme Court could decide that issue.

And what did you have here? You had Congress trying to push the courts into doing the same thing with this life or death decision. It's hard to see analytically why this is really any different from the abortion debate and why conservatives would want the federal government to nationalize the issue of the right to die.

I think this is a trend in Republican politics right now. Look at the Bush administration's efforts to stop the use of medical marijuana in California. Look at the gay marriage amendment. Those are social issues on which Republicans are giving up their federalist principles and pushing for uniform national laws. Which is exactly what we used to criticize liberals for in *Roe v. Wade*.

It is to be hoped that the damage is not going to be permanent. But I do think that the Republicans in Congress have made it very difficult for conservative lawyers to maintain principled arguments in any of these areas.

Todd Gaziano: Any concern with judicial tyranny should be consistent with an overarching concern for all forms of government tyranny. The legitimate exercise of judicial review is a vital protection against tyranny by the other branches. Chief Justice Marshall's explanation of judicial review in *Marbury v. Madison* was correct, even if it is mistaken for the "judicial supremacist" approach some espouse today. I agree with Roger and John's analysis of that case and the proper role of judicial review. Marshall wrote that the courts must apply the Constitution in their proceedings, like the other branches, which is hardly a radical understanding of what a judge's oath requires. More recently, however, some courts, especially the federal courts, have tried to assume

Todd Gaziano: "I'm concerned about judicial tyranny. But the much larger problem is government tyranny and, in particular, national government tyranny."

a greater power. In *Cooper v. Aaron* (1958), the Supreme Court wrote that once it decides an issue, that is the final word on the subject. Once it speaks, there can be no further debate. That's a tyrannical notion, inconsistent with *Marbury* and contrary to the duty of all citizens to follow the actual Constitution not erroneous constitutional decisions that don't personally bind them.

Despite the supremacist brand of judicial tyranny, I still think Hamilton was right in *Federalist* 78 that the courts would be (and are) the least dangerous branch. And I think Madison was correct in *Federalist* 48 that the legislative branch is always the most dangerous branch. Yes, I'm concerned about judicial tyranny. But it's a symptom of a much larger problem: government tyranny and, in particular, national government tyranny.

Judges act tyrannically when they use their power to impose personal preferences that are contrary to what the Constitution and laws require. But they can act tyrannically either by striking down laws based on imagined rights not in the Constitution or by *not* striking down laws that clearly do violate the Constitution. Of the two tyrannical acts, I think they err much more often today in not striking down laws. Congress and the president act tyrannically when they do what they want instead of what the Constitution commands, such as passing blatantly unconstitutional campaign finance controls. The courts conspire in that tyranny when they don't strike down such abominations. In recent years, congressional tyranny and judicial inaction are a greater cause for concern than other forms of judicial activism.

I do want to touch on the Schiavo controversy briefly. My own views largely match what John Yoo said. I discussed my views in more detail at a Heritage Foundation event last week, but I don't think my colleagues at Heritage will mind my saying that they shared my position. All of us at the Heritage Legal Center thought the Schiavo legislation was flatly unconstitutional, and for multiple reasons.

Putting aside the actionable constitutional problems (e.g., that the bill provided it wasn't creating a new federal cause of action made the standing and subject matter jurisdiction problems more serious), the legislation also violated core constitutional principles. My federalism argument against what Congress did included that it relieved the pressure on the Florida Legislature to pass several laws of general applicability that could have saved Schiavo. The legislature clearly did have constitutional authority to enact several such fixes. But Congress's unconstitutional act let state legislators off the hook and may have allowed what many people believe was a tragic death.

For Congress to act wisely, it really must study the substantive provisions of the Constitution and the proper role of judicial review more closely. Most members of Congress work very hard at most of their job. But, unfortunately, they took a shortcut in the Schiavo matter. Some members of Congress were lazy, and they took the advice of some well-meaning but sadly ill-informed people about the proper role of judicial review. Before Congress criticizes the courts, it needs to understand what real tyranny is. Its first obligation is to do no harm itself. ■

"If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."

ABANDONING LIMITS *Continued from page 1*

gests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act (CSA) regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market—*intra*state or interstate, noncommercial or commercial—for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely *intra*state and noncommercial.

Roger Pilon, director of Cato's Center for Constitutional Studies, and Cato president Ed Crane welcome Clarence Thomas to the Cato Institute for a lunch with the center's scholars in 1997.

Necessary and Proper?

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.

In *McCulloch v. Maryland* (1819), this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.

Congress has exercised its power over interstate commerce to criminalize trafficking in marijuana across state lines. The Government contends that banning Monson and Raich's *intra*state drug activity is "necessary and proper for carrying into Execution" its regulation of interstate drug trafficking. However, in order to be "necessary," the *intra*state ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." It must be "plainly adapted" to regulating interstate marijuana trafficking—in other words, there must be an "obvious, simple, and direct relation" between the *intra*state ban and the regulation of interstate commerce.

On its face, a ban on the *intra*state cultivation, possession, and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the *intra*state ban is "necessary and proper" as applied to medical marijuana users like respondents.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. The Court of Appeals found that respondents' "limited use is distinct from the broader illicit drug market," because "th[eir] medicinal marijuana . . . is not intended for, nor does it enter, the stream of commerce." If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has "obvious" and "plain" reasons why regulating *intra*state cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other *intra*state producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians" and prohibits "the diversion of marijuana for nonmedical purposes." California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its pro-

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"If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States."

ABANDONING LIMITS *Continued from page 11*

gram, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, and that he obtain a physician's recommendation or approval. Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines.

This class of *intra*state users is therefore distinguishable from others. We normally presume that States enforce their own laws, and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. The scant evidence that exists suggests that few people—the vast majority of whom are aged 40 or older—register to use medical marijuana. In part because of the low incidence of medical marijuana use, many law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts.

These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking." Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use—drugs like morphine and amphetamines—are available by prescription. No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions.

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multi-billion-dollar interstate market for marijuana. It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating *intra*state medical marijuana obviously essential to controlling the interstate drug market.

To be sure, Congress declared that state policy would disrupt federal law enforcement. It believed the across-the-board ban essential to policing interstate drug trafficking. But as Justice O'Connor points out, Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power. Congress cannot define the scope of its own power merely by declaring the necessity of its enactments.

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the *intra*state possession and use of marijuana.

No General "Police Power"

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper." The means selected by Congress to regulate interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution.

In *Lopez,* I argued that allowing Congress to regulate *intra*state, noncommercial activity under the Commerce Clause would confer on Congress a general "police power" over the Nation. This is no less the case if Congress ties its power to the Necessary and Proper Clause rather than the Commerce Clause. When agents from the Drug Enforcement Administration raided Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits. Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropria[te] state police powers under the guise of regulating commerce."

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not intrusted to the government."

Drifting Away from the Text

The majority advances three reasons why the CSA is a legitimate exercise of Congress' authority under the Commerce Clause: First, respondents' conduct, taken in the aggregate, may substantially affect interstate commerce; second, regulation of respondents' conduct is essential to regulating the interstate marijuana market; and, third, regulation of respondents' conduct is incidental to regulating the interstate marijuana market. Justice O'Connor explains why the majority's reasons cannot be reconciled with our recent Commerce Clause jurisprudence. The majority's justifications, however, suffer from even more fundamental flaws.

The majority holds that Congress may regulate *intra*state cultivation and possession of medical marijuana under the Commerce Clause, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design.

The majority's treatment of the substan-

"In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."

tial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce—any more than Congress may regulate activities that do not fall within, but that affect, the subjects of its other Article I powers. Whatever additional latitude the Necessary and Proper Clause affords, the question is whether Congress' legislation is essential to the regulation of interstate commerce itself—not whether the legislation extends only to economic activities that substantially affect interstate commerce.

The majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the *intra*state manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market. The majority ignores that whether a particular activity substantially affects interstate commerce—and thus comes within Congress' reach on the majority's approach—can turn on a number of objective factors, like state action or features of the regulated activity itself. For instance, here, if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade.

The substantial effects test is easily manipulated for another reason. This Court has never held that Congress can regulate noneconomic activity that substantially affects interstate commerce. To evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as the "the production, distribution, and consumption of commodities." This carves out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite."

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term. The majority's opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from "commerce," to "commercial" and "economic" activity, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established . . . interstate market." Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate interstate commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce—not to mention a host of local activities, like mere drug possession, that are not commercial.

What Is Reserved to the States?

One searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States. Yet this Court knows that "[t]he Constitution created a Federal Government of limited powers." That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce.

The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. I have already explained why the CSA's ban on local activity is not essential. However, the majority further claims that, because the CSA covers a great deal of interstate commerce, it "is of no moment" if it also "ensnares some purely *intra*state activity." So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and *intra*state activity alike. This cannot be justified under either the Commerce Clause or the Necessary and Proper Clause. If the activity is purely *intra*state, then it may not be regulated under the Commerce Clause. And if the regulation of the *intra*state activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.

Nevertheless, the majority terms this the "pivotal" distinction between the pres-

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Cato senior fellow Randy Barnett, who argued the *Raich* case at the Supreme Court, meets the press in front of the Court after the argument on November 29.

Moeletsi Mbeki says Africans need property rights

Study Assesses "Grand Old Spending Party"

The Republican Party swept into office in 1995 with ambitious plans to trim the cost of government. And Republicans in the 104th Congress scored some notable victories for fiscal restraint. But, as Cato's director of budget studies Stephen Slivinski shows in "The Grand Old Spending Party: How Republicans Became Big Spenders" (Policy Analysis no. 543), those days are long gone. Under the Bush administration, federal spending has soared, and the war on terrorism cannot explain the increases. Real nondefense discretionary spending has increased at the fastest rate since the Nixon administration. One reason for that, Slivinski said, is that Republicans control both the White House and Congress. When President Clinton was in office, congressional leaders delighted in denying Clinton the spending increases he requested. In contrast, Congress has tended to acquiesce to President Bush's spending requests. Bush, in turn, has yet to veto a spending bill. Slivinski proposes reforms to the budget process that would make it easier to restrain the growth of the federal government.

Stephen Slivinski

◆No School Left Unregulated

A lot of tough talk accompanied the signing of the No Child Left Behind Act in 2002. President Bush hailed a new era of accountability and educational excellence in which the federal government would hold states' feet to the fire and ensure that all children would get a good education. But as Lawrence A. Uzzell, former staff member of the Department of Education, documents in "No Child Left Behind: The Dangers of Centralized Education Policy" (Policy Analysis no. 544), the reality has been very different. Instead of cracking down on schools that fail to improve academic standards, state officials have lowered the bar for failing districts while federal officials have looked the other way. States have fudged dropout rates, dumbed down tests, ignored violence in schools, and loosened teacher qualifications in order to comply with the letter of the law. Needless to say, such machinations do nothing to improve students' proficiency. Uzzell concludes that federalizing education standards is an exercise in futility. He proposes that the No Child Left Behind Act be repealed, returning control over educational decisions to state governments and locally elected school boards.

◆Do Ivies Raise Incomes?

Marie Gryphon challenges the conventional wisdom that affirmative action benefits minority students in "The Affirmative Action Myth" (Policy Analysis no. 540). Recent studies have found that, after controlling for academic preparedness and relevant personal characteristics, attendance at an elite university does not raise a student's long-term earning potential relative to attendance at a less prestigious school. Hence, Gryphon argues, affirmative action programs do little to close the earnings gap between white and minority students. Even worse, preferences can place minority students in schools for which they are dramatically less prepared than their white peers, leading minority students to get discouraged and drop out at higher rates. The best way to close the racial achievement gap in college, she argues, is to ensure that minorities get a high-quality education before they start college.

Marie Gryphon

◆Government: Africa's Most Deadly Parasite

In "Underdevelopment in Sub-Saharan Africa: The Role of the Private Sector and Political Elites" (Foreign Policy Briefing no. 85), Moeletsi Mbeki of South Africa's Institute of International Affairs writes that many observers in the 1960s expected African nations such as Ghana to outperform Asian nations such as South Korea economically in subsequent decades. Needless to say, those analysts had the situation backwards. South Korea, which was poorer than Ghana in 1965, grew steadily, while Ghana fell ever deeper into poverty. The problem, Mbeki argues, is that Africa's political elites use their power to exploit the powerless. Such parasitism not only impoverishes today's poor; it also destroys the country's capital stock, perpetuating the nation's poverty. Mbeki, brother of South African president Thabo Mbeki, notes that South Africa, with well-organized labor unions and small business groups, is an exception to that pattern. Thanks to relatively secure property rights and a vigilant press, the productive classes in that country have the will and the organization to fight back. Mbeki contends that the first step toward developing similar institutions in other countries is to give peasants secure legal property rights in the land they farm and greater freedom to sell their products on the open market instead of being forced to deal with state-controlled marketing boards.

◆Shoulder-Fired Terror

As airport security is tightened across the United States, terrorists may start searching for other ways to bring down aircraft. In "Flying the Unfriendly Skies: Defending against the Threat of Shoulder-Fired Missiles" (Policy Analysis no. 541), Charles Peña, director of defense policy studies, warns that our airplanes remain dangerously vulnerable to attack by portable anti-aircraft missiles. Such missiles, which can be purchased on the black market for as little as $5,000 and carried by a single terrorist, could be used to bring down a large commercial airliner in the United States, killing hundreds and inflicting billions of dollars in collateral damage on the U.S. economy. To guard against such attacks, Peña urges the federal government to outfit commercial jetliners with defensive countermeasures that can confuse the guidance systems of incoming missiles. Such a system would cost $11 billion to deploy and $2.1 billion annually to maintain, he calculates.

Charles Peña

◆Accountable to Whom?

Critics of school choice like to highlight examples of corruption and incompetence such as those in Florida's voucher program.

Lectures and translations for Iraq's constitutional period

Palmer Spreads Libertarian Ideas in Iraq

Cato Institute senior fellow Tom G. Palmer visited Iraq in April to promote the values of constitutionally limited government, toleration, and free markets. In addition to speaking in the assembly hall of the parliament to members of the Iraqi National Assembly, he met with political figures, clerics, academics, journalists, women's groups, business people, and activists to promote libertarian ideas and to discover people who would be able to establish a think tank, translate and publish libertarian works, and provide pro-freedom input into the political processes in that country.

A highlight of his visit was addressing 61 members of the Iraqi parliament on "Principles of Constitutional Democracy." He had spent significant time working with Iraqi translators to prepare documents and a graphic-rich Powerpoint presentation in Arabic. The presentation started with the *Epic of Gilgamesh*, which is set in Iraq and is well-known to Iraqis. Palmer explained how it illustrates the dangers of unlimited power and the necessity of controlling power. The presentation focused on five basic principles of constitutional democracy: (1) No power is above the law. (2) All are equal before the law. (3) The people delegate power. (4) The rights of the people are constitutionally protected. (5) An effective constitution is like the architecture of a well-built house that must last for many generations. (The entire presentation is available on the Cato website in both English and Arabic, and both PDF and Powerpoint, at http://www.cato.org/ people/palmer.html.)

Cato senior fellow Tom G. Palmer talks with two members of the Iraqi parliament after his presentation to members.

That presentation, along with an Arabic translation of a short paper Palmer wrote on "Challenges of Democratization," was later distributed to all the members of the Iraqi National Assembly as a part of their preparations for writing a new constitution. In addition, Palmer had commissioned and supervised preparation of a bilingual edition of Cato's pocket edition of the American Declaration of Independence and the U.S. Constitution, which was also distributed.

Palmer also assembled a group of Iraqis who are committed to classical liberal principles and arranged for them to travel to Turkey, where they met with Turkish libertarians, took part in a major conference on "Freedom and Democracy," and participated in a training program on setting up and managing independent pro-freedom organizations. He hopes that that group will form the nucleus of a movement

Continued on page 17

But Neal McCluskey argues in "Corruption in the Public Schools: The Market Is the Answer" (Policy Analysis no. 542) that critics willfully ignore much more serious problems in government school systems. Surveying studies of corruption in public schools, he reaches the surprising conclusion that regulatory measures designed to improve accountability and effectiveness actually have the opposite effect. The reason, he said, is that as the burden of red tape grows, principals are left with no choice but to bend the rules in order to do their jobs. Moreover, multiple layers of regulation make it easier for school officials to pass the buck. In contrast, McCluskey said, markets provide a potent mechanism for achieving accountability: schools that fail to satisfy parents lose customers and go out of business. When it comes to accountability, he concludes, the fundamental issue is to whom are schools accountable, parents or government bureaucrats?

◆Reform We Can Afford

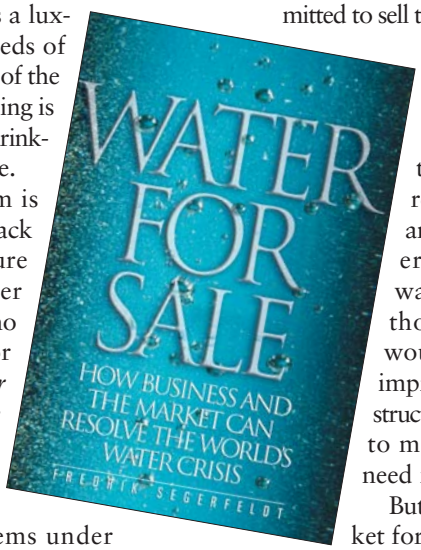
In February the Social Security Administration released an analysis of the Social Security Investment Program Act, sponsored by Reps. Sam Johnson (R-TX) and Jeff Flake (R-AZ), which is based on Cato's Social Security reform proposal. The report concluded that the legislation would restore the Social Security system to sustainable solvency but that doing so would cost $6.5 trillion (in present value) over the next four decades. That's a big number, but Mike Tanner, director of Cato's Project on Social Security Choice, notes in "A Better Deal at Half the Cost: SSA Scoring of the Cato Social Security Reform Plan" (Briefing Papers no. 92) that it's much better than any of the alternatives. Salvaging the current system would cost $12.8 trillion in present value. Another leading large account plan, sponsored by Rep. Paul Ryan (R-WI) and Sen. John Sununu (R-NH) would cost $7.9 trillion, not counting trillions of dollars in additional liability the federal government might incur if personal accounts perform worse than projected. When compared with the alternatives, he concludes, the Cato plan is a bargain. ■

Mike Tanner

Businesses could deliver clean, plentiful water

Water for the People

Those of us in the West—rich and poor alike—take for granted that we will get clean, safe drinking water when we turn on the tap. Yet that is a luxury beyond the reach of hundreds of millions of people. In large parts of the developing world, indoor plumbing is reserved for the rich, and getting drinking water at all is a daily struggle.



In most places, the problem is not a shortage of water but the lack of institutions and infrastructure to effectively manage the water supply and deliver it to those who need it. And as Swedish author Fredrik Segerfeldt shows in *Water for Sale: How Business and the Market Can Resolve the World's Water Crisis,* the blame largely rests with governments that have placed their water systems under the control of cumbersome, centrally planned, and often corrupt bureaucracies.

A promising alternative is private investment. Private companies can raise the capital necessary to quickly improve water infrastructure, and competition can ensure that water services are provided efficiently and affordably. Equally promising is private ownership of water rights. Segerfeldt notes that if businesses and farmers are permitted to sell their surplus water to others, they will have an incentive to economize, switching to products that require less water and working harder to reduce wastage. Together, those two reforms would dramatically improve water infrastructure and get water to more people who need it.

But wouldn't a market for water cause the price to go up? Segerfeldt acknowledges that in some cases the price of tap water would increase. However, he points out that the billion people without a reliable water source often rely on street vendors who charge more than ten times the official rate. Hence, even if the price of tap water went up dramatically, it would still be far cheaper than the water the poorest residents are forced to buy today. And the supply would be cleaner and more reliable as well.

For Americans who have taken access to running water for granted all our lives, the prospect of overpriced water seems like a reasonable cause for fear. But it must ring hollow to those who have no reliable access to safe water at all. Even if privately provided water would be too expensive for a few residents to afford—and the evidence says otherwise—it's still better to offer residents a clean, reliable water source that's within the reach of the vast majority than to wait for years, perhaps decades, for the government to scrape together the resources to bring them subsidized water.

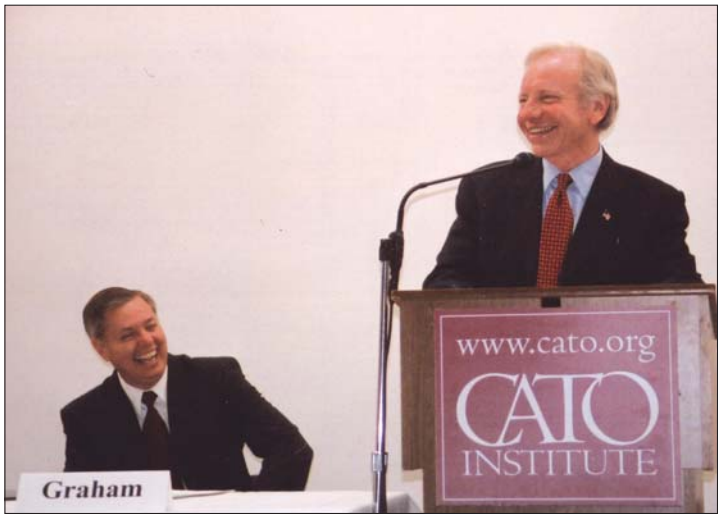
Leaders in developing countries agree. Beatriz Merino, former prime minister of Peru, says that "water policy affects the future of millions of people across the globe. Segerfeldt offers an efficient, sure, and safe alternative for this future."

Water for Sale is available in paperback for $12.95 in bookstores, at www.catostore.org, or by calling 800-767-1241. ■

Current process conceals long-term costs, blocks reform

Budget Process Debated at Hill Conference

The federal budgeting process focuses on 10-year budget projections. President Bush and congressional leaders frequently exploit that fact to hide the true cost of policies, phasing them in over several years so that the bulk of the costs occur beyond the 10th year. A flagrant example was the legislation to add prescription drug benefits to Medicare, which passed in 2003. It was slated to cost $400 billion in the first 10 years, but this year the White House admitted it will cost more than $1.2 trillion between 2005 and 2015. The long-term cost will be many trillions of dollars more. Such gimmicks allow policymakers to have their cake and eat it too, by promising lavish new benefits while leaving hard choices about how to pay for them to their successors.



Sen. Lindsey Graham (R-SC) reacts to remarks of Sen. Joseph Lieberman (D-CT) on the budget process at an April 6 Cato conference on Capitol Hill.

At a Cato conference on Capitol Hill, "Short- vs. Long-Term Thinking: Incorporating the Long-Term Fiscal Outlook into the Myopic Budget Process," budget experts debated how to make Congress take long-term costs more seriously. Two senators kicked off the event with their own ideas. Sen. Lindsey Graham (R-SC) criticized the 2003 Medicare bill and urged his colleagues to be more responsible as they reform other entitlement programs, especially Social Security. Reforming Social Security will create the momentum necessary to tackle other serious budget problems, he said. Personal accounts are an important component of Social Security reform, Graham said, but it is also vital that any reform proposal have bipartisan support.

Sen. Joseph Lieberman (D-CT) spoke in favor of present-value accounting, a technique based on the idea that a dollar today is worth more than the promise of a dollar next year. By "discounting" future expenditures in this fashion, policymakers can better understand a proposal's long-term impact on the federal budget. Lieberman stressed that, unless Congress learns to better control its appetite for spending, there is a real possibility that the United States will someday face a catastrophic financial crisis.

Barry Bosworth of the Brookings Institution urged Congress to shift its focus from Social Security to Medicare, which, he argued, is in much more serious fiscal straits. Robert Greenstein of the Center on Budget and Policy Priorities blamed the Bush tax cuts for the deficit and argued that repealing them would give the federal government the resources to deal with the coming Social Security shortfall. Cato chairman William Niskanen disagreed, emphasizing that although Social Security is not facing an immediate crisis, Congress should seize the opportunity to fix a system that will eventually become a crushing burden on the American taxpayer. Cato senior fellow Jagadeesh Gokhale agreed, noting that "saving" using accounting gimmicks like the Social Security Trust Fund is a recipe for failure, since Congress will have an irresistible temptation to spend the surpluses as it has done since 1983. Only genuine private savings through individual accounts will ensure that the money is not spent on other government programs, he said.

A panel of experts debated the merits of present-value accounting. Douglas Holtz-Eakin, director of the Congressional Budget Office, stressed the difficulties of incorporating present-value calculations into the budget. He noted that such calculations are sensitive to assumptions and that, if they became an essential part of the budget process, the person choosing the assumptions would face intense political pressures. Stuart Butler of the Heritage Foundation lamented that the current budget rules sometimes penalize reforms, such as Social Security private accounts, that improve the long-term fiscal position of the federal government but require the payment of up-front costs. ■

PALMER *Continued from page 15*

for personal freedom, free enterprise, and limited government.

Palmer had been very active during the waning years of the Soviet Union in promoting libertarian ideas in communist countries, and he continued that work in Iraq, notably by commissioning translations into Arabic of books and essays from the classical liberal tradition. Frederic Bastiat's influential book *The Law* had just appeared in Arabic, and Palmer commissioned translations of Bastiat's essay "What Is Seen and What Is Not Seen" (which explodes fallacies in socialist thinking); *Libertarianism: A Primer,* by David Boaz; *Common Sense Economics: What Everyone Should Know about Wealth and Prosperity,* by three Cato adjunct scholars, James Gwartney, Richard Stroup, and Dwight Lee; F. A. Hayek's essay "The Use of Knowledge in Society"; and other works.

Palmer also spoke before groups of Iraqi lawyers and clerics on "Principles of Constitutional Democracy," to economists on "Rational Choice and Political and Economic Institutions," and to women activists on constitutionalism, "A Free Market for a Prosperous Iraq," and "Effective Public Speaking." ■

ABANDONING LIMITS *Continued from page 13*

ent case and *Lopez* and *Morrison*. In *Lopez* and *Morrison*, the parties asserted facial challenges, claiming "that a particular statute or provision fell outside Congress' commerce power in its entirety." Here, by contrast, respondents claim only that the CSA falls outside Congress' commerce power as applied to their individual conduct. According to the majority, while courts may set aside whole statutes or provisions, they may not "excise individual applications of a concededly valid statutory scheme."

It is true that if respondents' conduct is part of a "class of activities . . . and that class is within the reach of federal power," then respondents may not point to the *de minimis* effect of their own personal conduct on the interstate drug market. But that begs the question at issue: whether respondents' "class of activities" is "within the reach of federal power," which depends in turn on whether the class is defined at a low or a high level of generality. If medical marijuana patients like Monson and Raich largely stand outside the interstate drug market, then courts must excise them from the CSA's coverage. Congress expressly provided that if "a provision [of the CSA] is held invalid in one of more of its *applications,* the provision shall remain in effect in all its valid applications that are severable."

Even in the absence of an express severability provision, it is implausible that this Court could set aside entire portions of the United States Code as outside Congress' power in *Lopez* and *Morrison*, but it cannot engage in the more restrained practice of invalidating particular applications of the CSA that are beyond Congress' power. This Court has regularly entertained as-applied challenges under constitutional provisions, including the Commerce Clause. There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis. The CSA undoubtedly regulates a great deal of interstate commerce, but that is no license to regulate conduct that is neither interstate nor commercial, however minor or incidental.

If the majority is correct that *Lopez* and *Morrison* are distinct because they were facial challenges to "particular statute[s] or provision[s]," then congressional power turns on the manner in which Congress packages legislation. Under the majority's reasoning, Congress could not enact—either as a single-subject statute or as a separate provision in the CSA—a prohibition on the *intra*state possession or cultivation of marijuana. Nor could it enact an *intra*state ban simply to supplement existing drug regulations. However, that same prohibition is perfectly constitutional when integrated into a piece of legislation that reaches other regulable conduct.

Finally, the majority's view—that because some of the CSA's applications are constitutional, they must *all* be constitutional—undermines its reliance on the substantial effects test. The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market. "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." The breadth of legislation that Congress enacts says nothing about whether the intrastate activity substantially affects interstate commerce, let alone whether it is necessary to the scheme. Because medical marijuana users in California and elsewhere are not placing substantial amounts of cannabis into the stream of interstate commerce, Congress may not regulate them under the substantial effects test, no matter how broadly it drafts the CSA.

A Blow to Federalism

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern." The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent. ■

Cato Calendar

Constitution Day
Washington • Cato Institute
September 14, 2005
Speakers include Nadine Strossen, Marci Hamilton, Dan Troy, and Randy Barnett.

Cato Club 200 Retreat
Santa Fe • La Posada de Santa Fe
September 29–October 2, 2005
Speakers include Vernon Smith, Patrick Byrne, and Dr. Jacques Chaoulli.

Global Farm Trade: Ripe for Reform?
***Second Annual Trade Conference Cosponsored with* The Economist**
Washington • Cato Institute
October 6, 2005
Speakers include Clayton Yeutter, Hugo Paeman, and Cal Dooley.

Cato University
The Art of Persuasion: Skills for Everyone
Washington • Cato Institute
October 20–23, 2005
Speakers include Nick Gillespie, Tom G. Palmer, Dan Griswold, and Don Boudreaux.

Monetary Institutions and Economic Development
***23rd Annual Monetary Conference Cosponsored with* The Economist**
Washington • Cato Institute
November 3, 2005
Speakers include Secretary John Snow, Rodrigo Rato, Deepak Lal, Reuven Brenner, and Samuel Brittan.

Perspectives 2005
Houston • Four Seasons
November 8, 2005

Perspectives 2005
Dallas • Crescent Court
November 10, 2005

Perspectives 2005
New York • Waldorf-Astoria
December 9, 2005

18th Annual Benefactor Summit
Phoenix • Royal Palms
March 1–5, 2006

Get more details at www.cato.org/events.

WEDDING BELLS

Yet more weddings of Cato colleagues this month. Michael Cannon, director of health policy studies, and Liz Dixon, former research assistant for Cato's Center for Trade Policy Studies, were married in Washington on May 21 (left). Stephen Slivinski, director of budget studies, and Krystal Brand, former intern coordinator, tied the knot in Stafford, Virginia, on May 7 (right).

News Notes

University of Chicago Honors Niskanen

Cato chairman **William A. Niskanen** received a Professional Achievement Award from the University of Chicago Alumni Association at the university's 2005 Alumni Convocation. The award was established "to recognize alumni who have brought distinction to themselves, credit to the University and benefit to their communities through their vocational work." Other award recipients included *Washington Post* columnist David Broder and philosopher Richard Rorty. The announcement of the award noted that the Cato Institute "has emerged as one of the most important public-policy advocacy groups in the world" and cited a description of Niskanen as "the embodiment of what the University of Chicago stands for in terms of scholarship, professionalism, integrity, and dedication."

William A. Niskanen

Stephen Moore, a senior fellow and former director of fiscal policy studies at the Cato Institute, has been named senior economic writer for the *Wall Street Journal*'s editorial page. He joined Cato in 1990 and wrote many studies on topics such as corporate welfare, immigration, state and local spending, "The ABCs of the Capital Gains Tax," and the profligate spending policies of presidents George Bush, Bill Clinton, and George W. Bush. He created and coauthored biennial editions of "The Fiscal Policy Report Card on America's Governors." He also coauthored with **Julian L. Simon** *It's Getting Better All the Time: 100 Greatest Trends of the Past 100 Years*. Recently, he served as president of the Club for Growth and then the Free Enterprise Fund. As a *Wall Street Journal* writer, he will give up his outside affiliations.

Friday evening, May 27, was foreign policy night on C-SPAN. Speeches by President Bush and Secretary of State Condoleezza Rice were sandwiched between two showings of a Cato Book Forum featuring **Andrew Bacevich,** author of *The New American Militarism,* and *Atlantic Monthly* national correspondent James Fallows.

Justice Clarence Thomas's dissent in *Gonzales v. Raich,* printed as the lead article in this issue of *Cato Policy Report,* included three citations to articles by Cato Institute senior fellow **Randy E. Barnett,** who argued the case before the Supreme Court. The articles are "The Original Meaning of the Commerce Clause" in the *University of Chicago Law Review,* "New Evidence of the Original Meaning of the Commerce Clause" in the *Arkansas Law Review,* and "The Original Meaning of the Necessary and Proper Clause" in the *University of Pennsylvania Journal of Constitutional Law*. The Cato Institute also filed a friend-of-the-court brief in the case written by Douglas Kmiec, a leading conservative legal scholar who served in the Justice Department under Presidents Ronald Reagan and George Bush.

"To Be Governed..."

◆Especially us taxpayers

The estimated cost of Fairfax County's new emergency communications complex has jumped to $122 million from $60 million in three years, alarming some county supervisors who fear the public was not prepared for the expense. . . . Voters approved $29 million toward construction of the two-story building in 2002. . . .

Supervisor Gerald W. Hyland (D-Mount Vernon) said: "I don't think any of us are ever happy when you start a project and the amount you end up with is almost four times what you initially talked about."

—*Washington Post,* April 27, 2005

◆If the aim was larger government and more spending

"I think we [congressional Republicans] have used the legislative and executive branch as well as anybody to achieve our policy aims," said Rep. Tom Cole (R-Okla.). "It is a remarkable governing instrument."

—*Washington Post,* May 26, 2005

◆Shales drinks the Kool-Aid

His country needed him, needed him so much that he would eventually be elected president four times. He might have stayed in the White House even longer, but "this too, too solid flesh" turned out to be not solid enough. Even so, FDR looks in retrospect like the 20th century's Lincoln. . . .

[Kenneth] Branagh . . . shows us how naturally FDR took to politics and how the word "politician" can have some joy about it. It is, after all, the art of loving people.

—Tom Shales in the *Washington Post,* April 30, 2005

◆You got a permit for that Nyquil?

New state laws and the voluntary actions of retailers are not enough. That's why we're working together to make the Oklahoma law national. Our legislation would:

Move cold medicine containing pseudoephedrine behind the counter.

Limit the amount one person can buy to 9 grams a month—that's the equivalent of 300 30-milligram pills.

Require purchasers to show identification and to sign for cold medication.

—Dianne Feinstein and Jim Talent, *Washington Post,* April 30, 2005

◆Explain that logic

In a book to be published this fall, a group of scholars will argue that Wal-Mart Stores, having replaced General Motors as the nation's largest company, has an obligation to treat its employees better.

—*New York Times,* May 4, 2005

◆Understanding regulation

Just a year ago, Pfizer Inc. was leading the charge against state lawmakers who want to restrict sales of over-the-counter cold medications that contain pseudoephedrine (PSE), which can be used to manufacture the illegal stimulant methamphetamine. Pfizer's Sudafed contains PSE and is one of the products that some states want kept behind pharmacists' counters and subject to sales limitations.

Now the drug maker has changed sides, a move that has helped boost the chances of bills pending in more than two dozen states and a proposed law in Congress, which is expected to hold hearings on the issue this month.

What caused Pfizer's change of heart? In January, the company rolled out a reformulated product, Sudafed PE, that contains no pseudoephedrine and thus can't be used to make meth. That makes it immune from existing or pending laws, and would give Sudafed PE valuable shelf space to itself.

—*Wall Street Journal,* April 13, 2005

◆Winning in court what they can't win in the marketplace

Several major technology companies are seeking to join the European Union's antitrust case against Microsoft Corp., dealing a setback to the software giant's strategy of making peace with industry brethren that had allied themselves with government regulators.

Companies including International Business Machines Corp., Oracle Corp., Nokia Corp., Red Hat Inc. and RealNetworks Inc. want to help E.U. antitrust enforcers defend their decision last year to require changes to Microsoft's dominant Windows operating system in Europe and to fine the company more than $600 million.

—*Washington Post,* April 7, 2005

◆Looks like their needs to be more education

In my State of the City Address, I said that in order to be a GREAT city—THIS city needs to excel in three areas: Education, Public Safety and Jobs.

This downtown Phoenix Campus of ASU is the catalyst for the first—and the foundation for the other two. Because without education, there are not many jobs. And without education their is a lot more crime.

—"Mayor's Message" from Phoenix Mayor Phil Gordon, April 21, 2005

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