

Nadine Strossen explores religious freedom

# Legal Scholars Deplore Setbacks for Federalism

The Supreme Court's 2004 term included a series of setbacks for federalism that have left states and citizens wondering what powers the federal government might usurp next. At the Cato Institute's Fourth Annual Constitution Day Conference on September 21, Cato senior fellow Randy Barnett recounted how federalism has been transformed from a strict separation of state powers from federal powers into a small set of exceptions to the rule that the federal government has nearly unlimited powers. In recent years the Court seemed prepared to limit federal regulatory power, striking down federal gun regulations in *United States v. Lopez* and certain ambitious provisions of the Violence Against Women Act in *United States v. Morrison*. The 2004–05 *Cato Supreme Court Review*, released on Constitution Day, explains how those precedents were largely ignored in the last term, leaving many of our treasured rights vulnerable in the coming year.

*Gonzales v. Raich*—in which the Court ruled that the federal government can prosecute medicinal marijuana users whose in-state production of the drug is sanctioned under state law—was a major victory for federal power. Pepperdine University law professor Douglas W. Kmiec writes, "Federalism is frequently labeled a doctrine of convenience, but it cannot be assailed here that the Court elevated politics over principle." Kevin Newsom, solicitor general of Alabama, called the *Raich* decision a permanent change that cuts off the ability of state voters to use political persuasion to change legislation they oppose. That sort of decision, he said, leads

to political apathy because citizens assume that the federal government is managing even the smallest local decisions.

The Court deferred in several cases to the judgment of state and federal government officials, although that deference was not absolute. In *Castle Rock v. Gonzales*, the Court ruled that citizens do not have a right to police protection because law enforcement officials must have discretion to prioritize some cases over others. Roger Pilon argues that the Court has ignored *Gonzales's* rights under the first principles of criminal law, "having contracted instead with the state, her right to have government protect her—derived from her former right to protect herself—amounts simply to one of the 'privileges' of citizenship." In addition, attorney Daniel E. Troy criticized the *Johanns v. Livestock Marketing Association* decision, which upheld the congressional power to compel speech from commercial actors. However, in *United States v. Booker*, the Court denied Congress the power to set mandatory sentences for federal crimes on the basis of evidence not presented to juries. The director of Cato's Project on Criminal Justice, Timothy Lynch, criticized prosecutors for pushing more than 95 percent of defendants into waiving their rights to jury trials but gave "One Cheer for *United States v. Booker*" for strengthening the rights of those defendants who are tried by jury.

Nadine Strossen, president of the American Civil Liberties Union, delivered the annual B. Kenneth Simon Lecture to end the Constitution Day event. The Constitution's religion clauses, she said, are designed both to protect government from religious influence and to pro-



**Nadine Strossen, professor of law at New York Law School and president of the American Civil Liberties Union, discusses religion and the Constitution as the fourth annual B. Kenneth Simon Lecturer at Cato's Constitution Day conference.**

tect religion from the corrupting influence of government. She argued that the Establishment Clause exists, not to denigrate the importance of religion as an influence on society and government, but rather to protect individual liberty and freedom of conscience from majoritarian pressure. She likened the country's growing acceptance of government funds for religious activities to our increasing willingness to tolerate intrusive searches of our persons and property. Just as the government claims the power to invade people's privacy so long as we are all equally subject to such invasions, the government claims that it may fund religious schools, holiday displays, and charity programs so long as it does not single out religion for such funding. Strossen contended that if religion and government are to be protected from one another we must treat religion as a special case.

The *Cato Supreme Court Review* concludes with an outline of the Court's 2005 term. Other contributors to the book discussed the free flow of interstate commerce, electronic file sharing, and weighing American courts' powers against international treaties.

The *Cato Supreme Court Review* is available in paperback for \$15.00. It can be purchased in bookstores, at [www.catostore.org](http://www.catostore.org), or by calling 800-767-1241. ■



**Roger Pilon, who holds Cato's B. Kenneth Simon Chair in Constitutional Studies, welcomes the 2005 and 2002 Simon Lecturers, Nadine Strossen and Judge Douglas Ginsburg, to Constitution Day.**