Limited Government

Ave Atque Vale

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For those who prize liberty, May and June 2005 were dark months. In that brief span, three pillars of liberty were destroyed, perhaps forever.[1] The U.S. Congress in May mandated a uniform national identification card for virtually all Americans. In early June, the U.S. Supreme Court embraced the broadest definition ever of the Interstate Commerce Clause (Art. I, sec. 8, clause 2). Less than three weeks later, the same court eviscerated the Takings Clause of the Fifth Amendment. If anyone still doubted the direction in which government power is heading in the United States, these decisions surely dispel such doubts.

The latest assaults on liberty are all the more dismaying because of the manner in which they became law. As we will see, government decision makers could impose these changes on society only by using tactics that made a mockery of both constitutionally mandated procedure and consensual legislative deliberation. As a result, the Constitution in July 2005 differed substantially from the one in force two months earlier, though its wording remained unchanged.

Had the Founders and the states originally contemplated, as we now do, a constitution without the protections of the Takings Clause and the Interstate Commerce Clause, they would not have endorsed it. Nor would they have accepted the Constitution had they understood it to allow the central government to require uniform national identification cards for all Americans. By construing the Constitution to embrace ends contrary to its original meaning without formal amendment of the document, the Supreme Court and Congress have turned the Constitution into some-

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1. The Latin words *ave atque vale* mean "hail and farewell."

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thing that—in the disparity between its words and its application—ever more closely resembles the "constitutions" of authoritarian regimes around the world.

The line separating what is ceded to national government control and what is reserved to autonomous private decision making is a fundamental determinant of a nation's liberty and prosperity. The recent decisions by the Court and Congress have moved that line in a direction that supports a growing American Leviathan. No longer bulwarks of a system of limited government, these bodies now serve predominantly to strengthen the institutional underpinnings of a total state. Accustomed as Americans have become to the unrelenting expansion of central government power throughout much of the past century, the recent changes are breathtaking, as were the strategies used to adopt them.

The New National ID Card

On May 11, 2005, President George W. Bush signed into law the REAL ID Act (Public Law 109-13, Division B, 119 Stat. 302), setting in motion a national identification card system that far exceeds the more limited national ID functions of the Social Security card. The new law aims to transform state drivers' licenses into uniform national identification cards with features that conform to the central government's requirements, bringing to fruition a government effort initiated with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Twight 1999, 172–73).[2] The relevant provisions appear in Title II of the REAL ID Act, titled "Improved Security for Drivers' Licenses and Personal Identification Cards."[3]

The statutory language downplays and obscures the breadth of the new identification provisions. The pitch is that the federal government seeks only to make our drivers' licenses more secure from the twin threats of terrorism and identity theft and that, in any case, states are not forced to comply. Although both claims are false, their usefulness in reducing resistance to the new identification procedures is obvious. Even Congress's decision to piggyback the new ID requirements on the familiar state driver's license reduces public resistance, making the changes appear less threatening than would a new card with its own title. The program's decentralized implementation, slated to occur over time as drivers renew their licenses at state Department of Motor Vehicles (DMV) offices, also mutes the resistance. Like the local civilian draft boards employed first during World War I (Higgs 1987, 133–34), the state DMV offices will deflect opposition away from the federal architects of this national ID card program.

2. Public Law 104-208, Division C (September 30, 1996), 110 Stat. 3009-546 ff. Section 656(b) of the act, "State-Issued Drivers Licenses and Comparable Identification Documents" (subsequently repealed), adopted an approach similar to the REAL ID provisions.

3. Title I of the REAL ID Act modifies existing immigration law by establishing more restrictive rules for those seeking asylum in the United States, making it more difficult for immigrants to challenge orders of removal, tightening immigration rules regarding admission and removal of terrorists, and waiving legal requirements that hinder construction of barriers at U.S. borders.

Effort to craft the law so as to reduce resistance is even more evident in the statutory language that soon will require almost every American to obtain and carry a national ID card. Ironically, the relevant provision of the REAL ID Act does not say "everyone must" have a government-approved identification card. Instead, it accomplishes substantially the same end by making noncompliance prohibitively costly and by defining key statutory terms in ways that create the functional equivalent of a universal mandate. Window dressing aside, as Senator Lamar Alexander (R., Tenn.) stated, REAL ID "really is a national identification card for the United States of America for the first time in our history" (*Cong. Rec.*, Senate, May 10, 2005, S4819).

In language that camouflages the statute's full import, the pivotal provision establishing "minimum standards for federal use" of state drivers' licenses states: "Beginning 3 years after the date of the enactment of this division, a Federal agency may not accept, for any *official purpose,* a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section" (*REAL ID Act* 2005, Title II, sec. 202[a], 199 Stat. 312, emphasis added). The scope of this provision clearly depends on what counts as an *official purpose*. If that term were defined narrowly, then the federal agencies' refusal, beginning in 2008, to accept anything other than the national ID for an official purpose would have little impact on Americans. If it were defined broadly, however, the statutory mandate would effectively require all Americans to submit to the government-approved identification process.

What may be deemed an official purpose according to the terms of the REAL ID Act? Congress has defined *official purpose* in an utterly open-ended fashion: "The term 'official purpose' *includes but is not limited to* accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and *any other purposes that the Secretary* [of the Department of Homeland Security (DHS)] *shall determine*" (*REAL ID Act* 2005, Title II, sec. 202[a][1], emphasis added). In short, the DHS secretary has unlimited discretionary authority to deem any purpose whatsoever an "official purpose."

Even before passage of this measure, senators and representatives mentioned bank transactions as falling within the definition given here. And why not? Given that the term *official purpose* explicitly includes boarding federally regulated commercial aircraft, using anything that the federal government regulates also could be deemed an "official purpose." In 2005, federal regulation touches almost everything. The House-Senate conference report added that "official purpose" includes "hav[ing] access to federally regulated critical infrastructure or similar facilities determined to be vulnerable to attack" (U.S. House of Representatives 2005, H2873). We need not quibble about the fine points, however. Refined distinctions are beside the point when the statutory language gives the DHS secretary plenary authority to sweep any purpose he desires into this definition, with or without a strong federal nexus.

The list of recognized official purposes will grow as the law is implemented. As it grows, the pretense that the national ID card is optional, either for individuals or for states, will be stripped away by the emerging reality that one cannot live a normal

life involving work, travel, taxes, family, banking, and commerce without submitting to the federally specified identification procedures. More concerned with personal convenience and the mirage of security than with the growing scope of federal power, most Americans will demand that their state comply, if it has not already.

What about the card's content? The REAL ID Act enumerates certain "minimum document requirements" or attributes that the new driver's license (as national ID card) must have in order to be acceptable to the federal government. Like the minimum standards for federal use, these requirements are described in a way that makes them seem narrower than they are. First, the act requires the card to show the person's name, sex, address of principal residence, place of birth, driver's license or identification card number, digital photograph, and signature. In the context of this law, even these items are not innocuous. Concerns already have been raised about the dangerous consequences of the requirement that victims of domestic violence display their home address on the front of the card when they need to conceal that address from an abusive spouse or other assailant. Moreover, the required digitized photograph and signature are the leading edge of the coming wave of nationwide biometric identification in the United States. Because the REAL ID Act empowers the DHS secretary (with the participation of the secretary of transportation and the states) to formulate regulations to implement the rules, the required elements will grow (*REAL ID Act* 2005, Title II, sec. 205). As Declan McCullagh has pointed out, the secretary "is permitted to add additional requirements—such as a fingerprint or retinal scan," to the existing minimum requirements (2005).

Other worrisome elements of the minimum document requirements involve mandatory "physical security features" and the use of machine-readable technology. The federal endgame here is to require new types of biometric identifiers and to mandate technology that will enable biometric and other information about individuals to be readily transmitted and stored in databases that can be linked nationwide. The statutory language does not state this objective openly, of course. Instead, it mandates physical security features "designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes" and also requires use of a "common machine-readable technology, with defined minimum data elements" (*REAL ID Act* 2005, Title II, sec. 202[b][8], 202[b][9]).

Although casual readers might assume that the physical-security features include only things such as hard-to-replicate physical materials, a closer reading makes clear that in the government's perspective, biometric identifiers are a key element in preventing tampering, counterfeiting, fraudulent document duplication, and the like. Moreover, the "common machine-readable technology" to be prescribed by the federal government is expected to include radio frequency identification (RFID) chips or other computer chips capable of making vast amounts of personal data, including biometric data, readily accessible to those who read the chips. With RFIDs, biometric IDs, and identical machine-readable technology built into the new national ID cards,

anyone with the technology to read the card will be able in an instant to capture a treasure trove of information about each card-carrying individual.

The likely trajectory of these domestic identification requirements can be seen in current federal efforts, through the DHS, to establish requirements for biometric identification of persons who enter the United States with nonimmigrant visas or without visas under the Visa Waiver Program. In the international context, the government has been much more forthright in both its use of biometric identifiers and its acknowledgment that digital photographs are biometric identifiers. The Enhanced Border Security and Visa Entry Reform Act of 2002, for example, mandates that government officials "shall issue to aliens only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers" (*Enhanced Border Security and Visa Entry Reform Act* 2002, Public Law 107–173, 116 Stat. 543, sec. 303). Under the US-VISIT Program, DHS recently reported that it "has been collecting biometrics—two digital index fingerscans and a digital photograph" for international travelers in the specified categories since January 5, 2004 (U.S. DHS 2005b, 5).[4] In mid-June 2005, DHS announced that for Visa Waiver Program travelers, it is "requiring by October 26, 2005, a digital photograph of the passport holder's face printed on the data page of the passport" and "will impose an October 26, 2006 deadline for the integrated circuit chip, or e-passport, capable of storing the biographic information from the data page, a digitized photograph, and other biometric information in travel documents" (U.S. DHS 2005a, 1). A DHS document published July 1, 2005, describes the department's progress in mandating increasingly sophisticated technology through which biometric and biographic information about foreign travelers will be built into or electronically linked to their travel documents.[5] According to DHS, the latest increment "will provide the capability to automatically, passively, and remotely record the entry and exit of covered individuals using [RFID] tags" that will serve as pointers to biographic and other information about the individual traveler (U.S. DHS 2005b, 6). By statute, the range of those deemed "covered individuals" under these DHS measures is already slated to grow to include "all aliens."

One cannot examine these developments pertaining to international travel without realizing where the REAL ID Act's digital photograph and machine-readable

4. US-VISIT is an acronym for United States Visitor and Immigrant Status Indicator Technology, which DHS describes as the "program established by the Department of Homeland Security (DHS) to implement an integrated entry and exit data system to record the entry into and exit out of the United States of covered individuals; verify identity; and confirm compliance with the terms of admission to the United States" (U.S. DHS 2005b, 2).

5. The ongoing quest for use of biometric identifiers is also evident in a recent article concerning e-passports and the Visa Waiver Program. Reporter Liza Porteus writes: "In October 2006 passports must contain a biometric chip that carries personal information about the traveler, including the digital photo. . . . 'The data storage on the chip could include all three of those—your face, your fingerprint or your iris . . .' said Bill Willis, senior vice president of technology and business development for ImageWare, a company involved in US-VISIT and the International Civil Aviation Organization, which sets guidelines for worldwide travel documents" (2005).

technology requirements are leading us. The connection between the government's stated objective of avoiding counterfeiting and its mandates for biometric identification is becoming increasingly evident. Reporting recent changes to the US-VISIT Program, the Associated Press makes that connection explicit, stating that "[i]nitially the United States considered requiring fingerprinting or iris identification features in biometric passports, making the documents virtually impossible to counterfeit" (2005). In government parlance, avoidance of document counterfeiting and use of biometric identifiers are different sides of the same coin. When federal officials mention one, they imply the other. To the government, digital photographs and machine-readable chips are "less stringent" biometric requirements, stepping stones leading to more stringent biometric identification mandates in the future.[6]

Other provisions of the REAL ID Act impose additional "issuance" standards with which states must comply before issuing each national ID/driver's license, requirements widely criticized as unfunded mandates despite the limited federal grants for which states will be eligible. For example, states are required to verify the supporting documents each applicant presents, checking with the issuing agency to ascertain each document's validity. They must secure from the applicant "valid documentary evidence" of the legal status that explains the person's presence in the United States. By September 11, 2005, states must agree to use the federal government's automated Systematic Alien Verification for Entitlements system to verify the legality of foreign applicants' presence in the United States. In addition, states must require applicants to present a "photo identity document," which the state must verify (*REAL ID Act* 2005, Title II, sec. 202[c][2], 202[c][3], 202[c][1]).

For the state's driver's licenses/ID cards to be deemed acceptable to the federal government, the state also must create digital images of each applicant's "identity source documents" so that they can be stored and transferred electronically. The state must either retain these stored digital images for at least ten years or retain the original paper documents for at least seven years. Moreover, states must subject each applicant for a driver's license to "mandatory facial image capture," a phrase broad enough to encompass not only digital photographs but other biometric facial identification as well. Other required state practices will include confirming the applicant's Social Security account number, prohibiting issuance of a driver's license to an individual possessing an unterminated driver's license issued by another state, and the like.

Despite efforts to present the new national ID requirements as benign, narrow, and voluntary, the veil occasionally slipped during House of Representatives discussion. A quite different tone was unmistakable when Rep. Tom Davis (R., Va.) stated:

6. Reporting the government's decision to delay imposition of more stringent rules until October 2006, the Associated Press article states that "[t]he new rules would allow the visa-waiver nations to comply with less stringent biometric guidelines similar to those set in 2003 by a branch of the United Nations. Those guidelines require digital photos and machine-readable chips to store identifying information in passports" (2005).

> Let me make one thing perfectly clear. States that want their drivers' licenses to be used for federal identification purposes will be required to meet these standards. All of them. If they do not, the citizens of that State will not be able to use their driver's license to identify themselves for *many purposes* that they use them for today, such as boarding an airplane. The bill and the report make clear that the Secretary must determine the uses, *in addition to those set forth in the bill,* for which drivers licenses only from complying states will be accepted. (*Cong. Rec.,* House, May 5, 2005, H3025, emphasis added)

The personal information that will flow from the REAL ID Act is immense. Each state is required to maintain a database that contains at a minimum: (1) "all data fields printed on driver's licenses and identification cards issued by the State," and (2) "motor vehicle drivers' histories" (*REAL ID Act* 2005, Title II, sec. 202[d][13]). This information will include the person's signature, digital photograph, and perhaps other biometric information, as well as home address and the other items discussed earlier. Given the multitude of federal and federally mandated databases now ubiquitous in our society (Twight 1999, 2002, 235ff.), it is absurd to think that the database-based information linked to the national ID will be kept to this minimum. Implicitly acknowledging the risks involved, the statute instructs the states to "subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements" and to "ensure [both] the physical security" of the places where the driver's licenses/national ID cards are produced and the "security of document materials and papers" from which the cards are produced.

These exhortations are futile, of course. Perhaps lawmakers thought we would feel better, hearing the talk about security clearances and the physical security of this highly sensitive personal information. But how can we feel better when on the *very next page* of the REAL ID Act Congress mandates that all of this state database information be *shared nationwide*? The relevant provision requires each state to "[p]rovide electronic access to all other States to information contained in the motor vehicle database of the State" (*REAL ID Act* 2005, Title II, sec. 202[d][12]). Making this information so widely accessible is a commissar's dream, but a citizen's nightmare.

Strategies employed in the House of Representatives enabled this privacy-threatening measure to become law without even one Senate hearing or debate about the REAL ID provisions. Although a statute with such dramatic implications would ordinarily trigger hot debate in Congress, normal deliberative processes were not allowed to occur. In the end, the REAL ID Act became law only because of a classic political transaction-cost manipulation gambit (Twight 1983, 1988, 2002) that, in senators' minds, made it impossible for them to reject the measure.

After passing the REAL ID Act as a stand-alone measure in February 2005, the House, anticipating Senate opposition to the bill, tacked the REAL ID language onto an emergency supplemental spending bill to finance the war in Iraq, H.R. 1268, a bill

that was widely regarded as "must-pass" legislation. The strategy's appeal was obvious: How could anyone oppose "emergency supplemental appropriations for defense, the global war on terror, and tsunami relief," no matter what was attached to the bill? The House passed H. R. 1268, with the REAL ID provisions, on March 16 (388–43) (*Cong. Rec.,* House, March 16, 2005, H1525). In the Senate, however, as Senator Christopher Dodd (D., Conn.) later explained, "an effort to include the [REAL ID] language in the Senate version of the emergency supplemental was withdrawn after bipartisan opposition to its inclusion" (*Cong. Rec.,* Senate, May 10, 2005, S4836). Therefore, after the Senate passed the supplemental spending bill without the REAL ID measure on April 21 (99–0), the different versions of H.R. 1268 went to a conference committee (*Cong. Rec.,* Senate, April 21, 2005, S4093–94).

What happened next was unlike anything high school students ever read about in their civics texts. The conference committee met twice. Before the second meeting ended, with major differences still unresolved between the House and Senate conferees, Senator Richard Durbin (D., Ill.) sought reassurance from Senator Thad Cochran (R., Miss.), the conference committee chairman, that further meetings would be held, at which time conferees would have an opportunity to raise objections and vote on disputed provisions. Their exchange was captured in a transcript of that April 28 meeting. A member of the conference committee later read into the record Senator Durbin's question and Senator Cochran's response.

Senator Durbin stated:

> [I]f this bill contains—as I believe it does—the REAL ID Act, I would like to vote on that so that we can be on the record on an issue that has never been brought before committee in the Senate. My question to you is this, Mr. Chairman: There have been times when conference committees of this magnitude have recessed and never been heard from again. The next thing we find is a conference committee report on the floor on a take it or leave it basis. Can we have your assurance that we will return for votes on amendments such as those we have debated today and those that I have mentioned?

Senator Cochran replied:

> Senator, I would be glad to make the assurance that if there is work to be done, if there are open items to be considered, that we can consider those in conference. I am not prepared to make a commitment as to when that will be. I don't want to lead you to believe that I am going to surreptitiously or in secret reach an agreement on the other side without consulting all the conferees on the Senate side. I think everyone in this conference has a right to participate in this discussion and I wouldn't want to cut off anybody's right to participate. (*Cong. Rec.,* Senate, May 10, 2005, S4826, transcript read by Sen. Patty Murray [D., Wash.])

Senator Durbin and other committee members thought they had been given assurance of a vote on the REAL ID measure.

The assurance proved worthless. No subsequent meeting of the conference committee was ever called. No votes on the REAL ID provisions were taken. Instead, the conference report on the emergency supplemental appropriations bill was issued containing the REAL ID language without discussion or vote by the full conference committee, and the measure was put before the Senate for an up-or-down vote with no opportunity to amend the bill. Senator Robert Byrd (D., W.Va.) summarized these events bluntly, stating that "[a]fter the conference had recessed subject to the call of the Chair, a 55-page modified version of the REAL ID authorizing legislation was laid into the conference report. It was simply grafted onto the emergency supplemental appropriations bill that provides funding for our military operations and our troops, without debate or participation by the conferees" (*Cong. Rec.,* Senate, May 10, 2005, S4820). Senator Bill Nelson (D., Fla.) expressed widely held views in stating that the REAL ID measure "was put in in the dead of night, without the notification that was promised to the minority and without the informing of all the various Senators who were part of the conference committee" (*Cong. Rec.,* Senate, May 10, 2005, S4847). In the end, Senate conferees Patrick Leahy (D., Vt.), Tom Harkin (D., Iowa), Barbara Mikulski (D., Md.), Harry Reid (D., Nev.), and Dianne Feinstein (D., Calif.) took the unusual step of signing the conference report with the notation "with exception for REAL ID," and Senator Byron Dorgan (D., N.D.) signed the report with a stated reservation because the "conference did not reconvene" (*House Report no. 109-72, Cong. Rec.,* House, May 3, 2005, H2836).

On May 10, when the Senate vote on the confernece report version of the emergency supplemental bill occurred, senator after senator expressed outrage about what had been done. Senator Lieberman expressed his "strong objections" to inclusion of the REAL ID measure (*Cong. Rec.,* Senate, May 10, 2005, S4822). Senator Russ Feingold (D., Wisc.) protested that "the Senate has had no opportunity to consider the REAL ID Act" (*Cong. Rec.,* Senate, May 10, 2005, S4823). Alluding to the immigration provisions that were also part of the REAL ID Act, Senator Feingold stated that "[c]ongressional leaders have no business tacking these very significant and controversial changes to immigration law onto an unrelated, must-pass appropriations bill. Clearly this process was used because these changes could not pass the Senate on their own merit" (*Cong. Rec.,* Senate, May 10, 2005, S4823). Senator Patty Murray, a member of the conference committee, expressed her disappointment that the REAL ID measure was "rammed through as an attachment to a desperately needed bill that funds our troops," adding that "there wasn't even a discussion of it in conference, but somehow it is included in a must-pass bill" (*Cong. Rec.,* Senate, May 10, 2005, S4826). Senator Durbin stated that the Senate was given the REAL ID provisions "as part of this funding for the troops on a take-it-or-leave-it basis," noting that the conference report was to be voted on "without 1 minute of hearing in the Senate, without 1 minute of debate on the floor of the Senate" (*Cong. Rec.,* Senate,

May 10, 2005, S4820). Senator Jack Reed (D., R.I.) regarded it as "another example of the majority's desire to pass the most controversial legislation by sliding it into a bill which cannot be amended and is subject only to an up-or-down vote" (*Cong. Rec.,* Senate, May 10, 2005, S4830). Many other senators expressed similar views.

Such sentiments had also been expressed in the House prior to its passage of the coference report version of the bill by a vote of 368 to 58 on May 5. Representative Engel (D., N.Y.), for example, stated: "I am disgusted by the process by which this legislation came to the floor. . . . This is an appropriations bill. It is not the place to write new immigration law or to include seriously flawed driver's license provisions" (*Cong. Rec.,* House, May 5, 2005, H3013). Representative John Dingell (D., Mich.) expressed his "incredible misgivings" about the procedure (*Cong. Rec.,* House, May 5, 2005, H3019). Representative Solomon Ortiz (D., Tex.) lamented the inclusion of "controversial provisions that members wouldn't otherwise support if they weren't linked to funding our troops" and expressed his disappointment that "Congress has gone one step further in creating a national ID" (*Cong. Rec.,* House, May 5, 2005, H3018).

Legislators were well aware of the REAL ID Act's implications for privacy. Senator Christopher Dodd (D., Conn.) commented that the drivers' license regulations "raise privacy issues, as DMVs will gain access to much private information," noting that "all Americans, when renewing or obtaining a new license, will be subject to these provisions" (*Cong. Rec.,* Senate, May 10, 2005, S4736). Echoing that theme, Senator Lincoln Chafee (R., R.I.) observed that "a database of this type will open up many privacy concerns and there must be security safeguards in place to prevent gathered information from being obtained inappropriately" (*Cong. Rec.,* Senate, May 10, 2005, S4737). Senator Nelson assessed the privacy threat in light of the procedures by which the bill was passed:

> With regard to this REAL ID Act, the concern that I have is that we are going to have an invasion of people's privacy without having carefully considered it through committee hearings and through full debate of the issue. For something that is as important to so many Americans as a driver's license, we are going to start on the road of the invasion of privacy. I do not think this is the way to establish what is, in effect, the first step for a national identification card. I don't think this is the way to do it, in the dead of night, by stealth and sleight of hand. (*Cong. Rec.,* Senate, May 10, 2005, S4847)

Despite all the impassioned speeches on the day of the Senate vote, the gambit worked, and the Emergancy Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, became law (Public Law 109–13, 199 Stat. 231). Because the national ID card measure was part of the emergency supplemental appropriations for U.S. troops in Iraq, the Senate voted 100 to 0 for the conference report package—not a single senator voted in opposition to this cavalier destruction of an important component of American liberty. Moreover, aside from loose refer-

ences to a linkage between REAL ID and immigration reform, members of Congress neither identified specifically enumerated constitutional powers that might authorize their action nor cited the Constitution as a potential restraint thereon.

Judicial Rewriting of the Takings Clause

People's freedom from arbitrary government seizure of their homes or businesses is a vital underpinning of liberty that the Fifth Amendment specifically protects. With the words "nor shall private property by taken for public use without just compensation," the amendment's Takings Clause prohibits the federal government (and state governments through the Fourteenth Amendment) from exercising the eminent-domain power to confiscate people's homes, businesses, or land unless for a "public use" and with "just compensation." The words are clear, as was the context that precipitated them. Never, it seemed, would an American need to fear that a government might arbitrarily seize his or her property and transfer it to someone who has curried political favor with government officials.

Judicial reinterpretation of the Takings Clause, however, has gradually eviscerated both its original meaning and its ability to restrain government's avarice and power. Other writers have chronicled the protracted history of that reinterpretation (see, for example, Epstein 1985; Ely 1992; Bethell 1998). Here, I examine its culmination in the U.S. Supreme Court's five to four decision in *Kelo v. City of New London* (U.S. Supreme Court, 125 S. Ct. 2655, No. 04-108 [June 23, 2005]).

The key issue in *Kelo* was the scope and meaning of the "public-use" restraint on government confiscation of private property. The takings challenged in the case occurred when the city of New London, Connecticut, undertook a redevelopment project designed to increase tax revenue and local employment. For years, the city's economy had been in decline, exacerbated by the 1996 closure of the federal government's Naval Undersea Warfare Center there, causing one state agency to label New London as a "distressed municipality." In 1998, however, the city's prospects suddenly improved when the Pfizer pharmaceutical company announced plans to build a new research facility there. Soon thereafter the city council authorized the New London Development Corporation (NLDC), a private nonprofit development company, to seek state-level approval of plans to redevelop the private properties adjacent to the anticipated Pfizer facility in New London's Fort Trumbull area.

Once the redevelopment plan had been approved, the city delegated its eminent-domain power to the NLDC, authorizing it to initiate condemnation proceedings against any owners who refused to sell. The targeted ninety-acre area included 115 privately owned properties. Most owners sold to the city without a fight, but the nine owners who became the plaintiffs in *Kelo* did not. They were not typical holdouts: they did not want more money; they did not oppose new development in the area; they just wanted to keep their homes and businesses.

Plaintiffs Susette Kelo and Wilhelmina Dery were among those unwilling to sell. Kelo did not want to relinquish her beloved water view; she had made substantial improvements to her well-kept home and wanted to stay there. Dery, in her eighties at the time of the lawsuit, did not want to lose the home in which she had been born and spent her entire life, a home that had been in her family for one hundred years. Altogether, the nine plaintiffs included individuals with a combined fifteen properties in redevelopment parcels 3 and 4A of the seven planned parcels. Parcel 3 was to be used for office and research space; parcel 4A was slated for "park support." Although all the plaintiffs' homes and businesses were to be demolished, somehow an "Italian Dramatic Club" in parcel 3 was whimsically spared. As to the unspecified "park support" uses of the plaintiffs' condemned properties, dissenting Justice Sandra Day O'Connor noted that "[a]t oral argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking" (*Kelo,* O'Connor, J., dissenting, 2671–72).

The plaintiffs argued that the government had no constitutional right to confiscate their well-maintained properties and to turn them over to other private parties who would become the future owners of the office space, research space, waterfront conference hotel, restaurants, shopping space, and other facilities planned as part of the redevelopment. They contended that the planned new uses were private uses, not "public uses," and that the government therefore could not legitimately exercise eminent-domain power to seize their properties even if just compensation were paid.

Rejecting the plaintiffs' arguments, the Supreme Court stretched the meaning of *public use* far beyond traditional interpretations, which required either transfer of the condemned property to direct public ownership (for example, military bases or highways) or, in cases of subsequent private ownership, an ongoing legal right for the public to use the condemned property (for example, common carriers such as railroads that are, by law, open to the public). The Court also went beyond prior decisions that had found a constitutionally legitimate "public use" to exist where the taking itself was said to eliminate an existing public harm (such as a safety or health hazard created by urban blight), even though the condemned property subsequently would be transferred to new private ownership for uses not open to the public.

The *Kelo* majority relied heavily on the 1954 "urban blight" decision of *Berman v. Parker* (348 U.S. 26 [November 22, 1954]). The Supreme Court in *Berman* found no violation of the Takings Clause when the government confiscated, for urban renewal purposes authorized by Congress, an area of Washington, D.C., that was primarily but not entirely a slum, a so-called "blighted" urban area. The owner of a well-kept, "unblighted" department store in the area challenged the seizure of his business and the government's planned transfer of the property to a different private use. Rejecting his argument that the taking was not for a public use, the *Berman* Court ruled that the "public purpose" of slum clearance was tantamount to a public use and deferred to the legislature's determination of the need for the project. In broad terms, the Court declared that "[o]nce the question of the public purpose has

been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch" (348 U.S. 35–36).

In 1984, the Supreme Court expanded the purview of the Takings Clause again in *Hawaii Housing Authority v. Midkiff* (467 U.S. 229 [May 30, 1984]), the other key precedent on which the *Kelo* majority relied. This case arose from the concentrated land ownership that had evolved from the Hawaiian Islands' original feudal land tenure. By the 1960s, data showed that "while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 landowners" and that, on Oahu, "22 landowners owned 72.5% of the fee simple titles" (467 U.S. 229). Most residents leased their property from these major landowners.

In 1967, the Hawaiian legislature passed a land-reform act, seeking to eliminate the public injury said to exist as a result of this "land oligopoly." To achieve wider dispersion of land ownership, the legislature created the Hawaii Housing Authority (HHA) to manage condemnation proceedings, allowing certain lessees to ask the HHA to condemn the property they were leasing. Upon acquiring title from the former lessor, the HHA would then resell the property to the former lessee/tenant, facilitating the lessee's acquisition of the property by lending him as much as 90 percent of the purchase price. The end result was transfer of real property from one private owner to another by use of eminent domain for the purpose of reducing the concentration of land ownership.

Lessors whose land had been targeted by the HHA for condemnation proceedings brought suit in *Midkiff*, arguing that the land-redistribution scheme violated the public-use provision of the Takings Clause and therefore was unconstitutional. The Court again held that the condemnation scheme did not violate the public-use provision. Writing for the unanimous Court (minus Justice Marshall, who did not participate), Justice O'Connor stated that "[t]he 'public use' requirement" is "coterminous with the scope of a sovereign's police powers" and found that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a state's police powers" (467 U.S. 240, 242). Accordingly, the Court held that "[r]edistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power" that "must pass the scrutiny of the Public Use Clause" (467 U.S. 243).

After *Berman* and *Midkiff*, the only remaining prerequisite to satisfying the public-use requirement seemed to be the existence of some public harm (urban blight, land oligopoly) that the takings would remedy, legitimizing in the Court's eyes the use of eminent-domain power even though the property ultimately was transferred to another private owner.[7] The Court continued to state that a "purely private taking could not withstand the scrutiny of the public use requirement" (467 U.S. 245).

7. Justice O'Connor cited the fact that in both the *Berman* and *Midkiff* decisions, "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society" (*Kelo*, O'Connor, J., dissenting, 8).

In *Kelo,* the Court removed even this limited prerequisite. New London presented no land oligopoly, no urban blight, no public-health hazard, no existing harm. Indeed, the Court acknowledged that "[t]hose who govern the City were *not* confronted with the need to remove blight in the Fort Trumbull area" when they undertook their redevelopment project (*Kelo,* 2664–65, emphasis added). Nonetheless, it stated that the government's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference," given the city's effort "to coordinate a variety of commercial, residential, and recreational uses of land, with the *hope* that they will form a whole greater than the sum of its parts" (*Kelo,* 2665, emphasis added). According to the Court, the city's mere hope, without evidence, that the project would generate more tax revenue and employment legitimized the takings. Finding "no allegation that any of [the plaintiffs'] properties is blighted or otherwise in poor condition," the Court simply reinterpreted the term *public use* to include any claimed "public purpose," while broadly deferring to local officials' assertions regarding the validity and propriety of the claimed public purpose. In sweeping terms, the Court declared: "Because that [redevelopment] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment" (*Kelo,* 2660, 2665). As Justice Clarence Thomas said in dissent, the Court in *Kelo* "replaces the Public Use Clause with a '[P]ublic [P]urpose' Clause," and "[i]f such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution" (*Kelo*, Thomas, J., dissenting, 2677–78).

The breadth of this decision is difficult to overstate. Now, unless a state adopts more restrictive statutory provisions, state and local governments can condemn any owner's private property based only on the claim that someone else will put the property to a better use. This rationale flatly contradicts the plain meaning and historical understanding of the Takings Clause. As Justice O'Connor wrote, with this ruling "[t]he specter of condemnation hangs over all property" because the Court's decision "holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure." Stressing the insecurity of real property rights created by the Court's ruling, Justice O'Connor asked, "[W]ho among us can say she already makes the most productive or attractive possible use of her property?" and concluded that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory" (*Kelo*, O'Connor, J., dissenting, 2675–76).

Dissenting opinions by Justice Thomas and Justice O'Connor analyzed the majority's decision in light of the original meaning and evolving judicial interpretation of the Takings Clause. Even their devastating critique, however, did not protect Americans from the five to four Supreme Court vote that again expanded government power under the Constitution.

Justice Thomas's dissent in *Kelo* focused on the original meaning of *public use*, noting that the "Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A and giv[ing] it to B'" (*Kelo,* Thomas, J., dissenting, 2680, quoting *Calder v. Bull* [3 Dall. 386, 388 [1798]]). Dissecting the majority's faulty reasoning in adopting a "public-purpose" approach and deferring so broadly to legislative decision making, Justice Thomas wrote: "I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution." He concluded that he would prefer to "revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property" (*Kelo,* Thomas, J., dissenting, 2678, 2686). Justice O'Connor was equally blunt: "Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process" (*Kelo*, O'Connor, J., dissenting, 2671). In her view, the Court's judicial rewriting of the Constitution transforms the Takings Clause into mere "hortatory fluff," making "nearly all real property . . . susceptible to condemnation" (*Kelo,* O'Connor, J., dissenting, 2673, 2677).

The dissenting opinions clearly identify the winners and losers from the process that the Court's majority approves in *Kelo*. Calling the decision's upshot a "perverse result," Justice O'Connor observed that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more" (*Kelo*, O'Connor, J., dissenting, 2677). Justice Thomas stated that the decision would allow those with greater economic and political power to "victimize the weak." In his view, the Court's ruling "guarantees that these losses will fall disproportionately on poor communities" because "[t]hose communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful" (*Kelo,* Thomas, J., dissenting, 2686–87).

The Court's decision in *Kelo v. City of New London* thus put the final nail in the coffin of the property-right protections enshrined in the Fifth Amendment's Takings Clause. With the Court's expansion of government power and its diminution of private-property rights in this case, the political means for satisfying people's desires once more gain at the expense of the economic means, creating predictable categories of winners and losers (Oppenheimer [1914] 1997, 14–15). Moreover, because just compensation in eminent-domain proceedings is usually a small fraction of what an owner would insist on in a voluntary exchange, the added threat of property condemnation post-*Kelo* creates a disincentive for people to invest in homes and businesses in areas of potential future redevelopment. Negative economic, social, and political consequences will surely follow.

Even more damaging to the constitutional republic, however, is today's widespread public acquiescence in the Supreme Court's rewriting of the Takings Clause and other constitutional provisions. With little reflection, Americans have largely abandoned the formal amendment process spelled out in Article V of the Constitution, instead routinely allowing the Court to change the Constitution virtually at will. As past Supreme Court rulings demonstrate, this process cannot but erode the U. S. system of limited government. Of course, it quite suits those who desire to expand government power: they need only to sway a majority of the nine members of the Court to change the fundamental law of the land. In contrast, using the formal amendment process to change the words *public use* in the Takings Clause to *public purpose* would have required widespread public agreement. Had such an amendment proposal originated in Congress, the amendment would have become part of the Constitution only if two-thirds of both Houses agreed to it and the legislatures of three-fourths of the states ratified it.

As I have argued elsewhere (Twight 1983; 2002, 9, 14, 42–43), allowing the Supreme Court to reinterpret or change the Constitution instead of adhering to the formal amendment process reverses the transaction costs involved in expanding the scope of government power. The formal amendment process makes it difficult to alter the limits of government power, imposing heavy transaction costs on those who desire to do so and thereby safeguarding liberties that the Constitution protects. The Supreme Court approach, à la *Kelo*, shifts the burden of these political transaction costs. When the Supreme Court unilaterally changes the Constitution's meaning, the heavy transaction costs intended for those seeking to breach constitutional limits fall instead on those seeking to retain the original limits of government power. For example, a logical recourse today for those desiring to retain the original meaning of the Takings Clause would be to seek a formal constitutional amendment stating, in effect, that *public use* really does establish public use, not public purpose, as a limitation on the government's eminent-domain power. The heavy transaction costs of amending the Constitution would then have to be borne by those who want to retain its original meaning, not by those who wish to change it.

Experts on the Takings Clause have denounced the *Kelo* decision in the strongest language. University of Chicago professor Richard Epstein calls the ruling "regrettable," "truly horrible," "shameful," "a scandalous and cruel act" (2005). Institute for Justice attorney Dana Berliner describes it as "an open invitation for the abuse of [the] power of eminent domain by local government and private developers" (quoted in Braven 2005). Other commentators have used even more colorful language. Internet columnist Paul Jacob writes that the *Kelo* situation is "not an isolated case" and that, nationwide, "[l]ocal officials [are] looking to boost their tax take through eminent domain like a vampire looks for fresh neck arteries" (2005). One businessman has taken more direct action, asking local officials in Weare, New Hampshire, "to seize the home of U.S. Supreme Court Justice David H. Souter in order to build a hotel and museum on the property" (Anonymous 2005). The proposed new hotel,

to be named the "Lost Liberty Hotel," would include the "Just Desserts Café"; the museum would feature "a permanent exhibit on the loss of freedom in America." Even some members of Congress have roused themselves to propose legislation aimed at counteracting the Supreme Court's *Kelo* ruling (Corkery and Chittum 2005).[8]

By forsaking the formal amendment process and allowing the Supreme Court to gin up convoluted rationales to change the Constitution's plain meaning, Americans are transforming their foundational document into mere parchment, preserving its language of liberty but eroding its substance. They continue down this path at their peril.

Judicial Rewriting of the Interstate Commerce Clause

The Supreme Court's decision in *Gonzales v. Raich* (125 S. Ct. 2195, No. 03-1454 [June 6, 2005]) further exemplifies the headlong rush down that path. Decided on June 6, 2005, *Gonzales v. Raich* stretches the Commerce Clause's meaning beyond even its broadest previous interpretations. As Justice Thomas states in his dissent, "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" (*Raich*, Thomas, J., dissenting, 2229).

The Commerce Clause (U.S. Constitution, Art. I, sec. 8, clause 2) gives the U.S. Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Congress is authorized to exercise this and its other enumerated powers by making laws that "shall be necessary and proper" for carrying those powers into execution (Art. I, sec. 8, clause 17). Both provisions are important because, as Justice Antonin Scalia emphasized in his concurring opinion in *Gonzales v. Raich*, the Necessary and Proper Clause in some circumstances may authorize Congress to regulate purely intrastate activities. In Justice Scalia's words, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause" (*Raich,* Scalia, J., concurring, 2216).

For more than one hundred years, all of the words on which the scope of the interstate commerce power depends have been subject to vacillating constitutional interpretation and construction by the Supreme Court. The Court's decisions in Commerce Clause cases have in effect rewritten the constitutional rules regarding the scope of the national government's economic power, granting that government broad or narrow control over the economy in accordance with the Court's broad or narrow definitions of the words *commerce, among the several states, to regulate, neces-*

8. H.R. 3405, a bill "To prohibit the provision of Federal economic development assistance for any State or locality that uses the power of eminent domain power [*sic*] to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes" was introduced in the House of Representatives on July 22, 2005. 109th Cong., 1st sess.

sary, and *proper.* Although narrow definitions of the commerce power held sway from the founding until 1937, thereafter the commerce power has been interpreted ever more broadly, reaching a high point in 1942 not surpassed until the 2005 *Gonzales v. Raich* decision.[9]

The narrow reading of the Commerce Clause holds that the word *commerce* means trade or exchange, not manufacturing or agriculture; that *among the several States* refers to commerce involving people in two or more states; and that *to regulate* refers to the making of rules governing commerce but does not include the power to prohibit that commerce. Such an interpretation clearly gives the national government only limited power over the economy, leaving to the states the regulation of wholly intrastate economic activity and of economic activity other than exchange or trade.

The broad reading of the Commerce Clause, in contrast, contends that its enumerated power may apply to any economic activity (not just the trading of goods and services), that it may apply to wholly intrastate commerce that "substantially affects" interstate commerce, and that national government "regulation" under the Commerce Clause may include prohibition of an economic activity. According to this broad interpretation, very few economic endeavors lie outside the bounds of the national government's regulation, control, or prohibition even if they involve only one state.

Which interpretation is correct? Randy Barnett has recently marshaled irrefutable proof that the narrow interpretation is the correct one. He sought to discover the original public meaning of *commerce* and the other key Commerce Clause words at the time of the Constitution's drafting and ratification because that usage would most clearly establish what people agreed to in drafting and ratifying the document. In addition to providing a detailed analysis of the Constitution's text and contemporary dictionary usage, Barnett examined *every* use of the term *commerce* and related terms in: *(a)* the Constitutional Convention; *(b)* the state ratification debates; *(c)* the *Federalist Papers*; and *(d)* the *Pennsylvania Gazette,* published from 1720 to 1800 and "considered *The New York Times* of the 18th century" (Accessible Archives, Inc., cited in Barnett 2003a, 856).

The results of Barnett's search are clear-cut. The surviving records of the Constitutional Convention show "no instance" in which the word *commerce* is "clearly used to refer to . . . anything broader than trade" (Barnett 2001, 115). Likewise Barnett's study of the *Federalist Papers* finds that "[i]n none of the sixty-three appearances of the term 'commerce' . . . is it ever used to unambiguously refer to an activity beyond trade or exchange" (2001, 116). Again, in the ratification conventions, "the term was uniformly used to refer to trade or exchange rather than all gainful activity" (2001, 116). And of the 1,594 uses of the word *commerce* that Barnett identifies in the *Pennsylvania Gazette,* "just three suggested a possible broader meaning, though

9. For detailed discussion of the relevant Supreme Court precedents, see Barnett 2004, 277–318; Twight 1975, 30–50; and the majority and dissenting opinions in the Supreme Court cases cited in this section.

the content of whatever broader meaning they might convey is completely obscure" (2003a, 861). Barnett concludes that "[o]n the strength of [these] data, I no longer believe that the term 'commerce' was even ambiguous in those days" and that "even if it was, the historical evidence clearly shows which of the two purported meanings was the normal public connotation of the word" (2003a, 862). Similarly, Barnett's findings clearly support power-constraining interpretations of the terms *among the several States, regulation,* and *necessary and proper* (2001, 132–47; 2003a, 863–65; 2003b, 208–20). These findings imply that much of the post-1937 Supreme Court jurisprudence interpreting the Commerce Clause amounts to judicial rewriting of constitutional provisions that once limited the power of the national government, thus altering the government's power from the bench rather than adhering to the Article V procedure for amending the Constitution.

Nonetheless, with full knowledge of Barnett's findings, the Court in *Gonzales v. Raich* embraced the broadest interpretation yet of the Commerce Clause, again demonstrating how far the Court's misguided reasoning has taken Americans away from a government of limited and enumerated powers. Sometimes identified as the "medical marijuana" case, this decision involves California's Compassionate Use Act of 1996, which allows seriously ill patients to use marijuana to alleviate their symptoms so long as they have a physician's recommendation or approval. State enforcement mechanisms, including home visits, seek to guarantee that medical marijuana cannot be used in excess of the statutory limits or diverted to the interstate market.

Angel Raich and Diane Monson, lower court plaintiffs in the case, used medical marijuana in compliance with the Compassionate Use Act. As the Supreme Court explains,

> [t]hey are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal. (*Raich*, Opinion of the Court, 2200)

Monson grew her own marijuana; Raich obtained locally grown marijuana from two caregivers.

The case developed after county deputy sheriffs and federal Drug Enforcement Administration (DEA) agents, knowing of Monson's marijuana use, visited her home on August 15, 2002. Although the county officials found Monson's actions to be lawful under California law, the DEA agents, charged with enforcing the federal Controlled Substances Act prohibition of marijuana, destroyed all six of her cannabis

plants. Under the federal statute, marijuana has been categorized as a "Schedule I" drug, making its production, manufacture, or possession a federal criminal offense.

Monson and Raich subsequently sued Attorney General Alberto Gonzales, claiming that by enforcing the Controlled Substances Act against them the federal government was exceeding its power under the Commerce Clause in addition to violating the Fifth, Ninth, and Tenth Amendments. They did not challenge the constitutionality of the overall Controlled Substances Act, only its application to them. To support their Commerce Clause claim, Monson and Raich argued that their activities were wholly intrastate and that their marijuana never entered interstate commerce, citing California's existing mechanisms for supervising and enforcing the narrow medical usage the state's Compassionate Use Act allows.

The U.S. Supreme Court flatly rejected their Commerce Clause arguments. Posing the question as "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally," the Court held that "[t]he [Controlled Substances Act] is a valid exercise of federal power, even as applied to the troubling facts of this case" (*Raich,* Opinion of the Court, 2201).

The Court relied heavily on the 1942 *Wickard v. Filburn* decision (317 U.S. 111 [November 9, 1942]), long regarded as the Court's broadest reading ever of the Commerce Clause. *Wickard* concerned the constitutionality of the Agricultural Adjustment Act of 1938, which established national wheat-acreage allotments and national wheat-marketing quotas (the latter with the approval of at least two-thirds of affected farmers) apportioned by the secretary of agriculture as allotments to states, thence to counties, and ultimately to individual farms. Farmers who produced in excess of their allotments or quotas faced monetary penalties under the act; these fines applied not only to "excess" wheat intended for interstate commerce but also to wheat grown for consumption entirely on the farmer's own premises. Filburn, who operated a small farm in Ohio, challenged the act when fined for planting above-quota acreage that yielded wheat used exclusively for his family's home consumption.

In holding the Agricultural Adjustment Act to be within Congress's power under the Commerce Clause, the 1942 Court greatly expanded the scope of federal power:

> The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's [Filburn's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . . It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would

> otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. (317 U.S. 128)

The Court thus swept purely intrastate activity into Congress's power over interstate commerce on the rationale that local production and consumption compete with goods moving in interstate commerce and that the aggregate effect of home consumption on the interstate market in this case was substantial. Supplanting old limitations of Commerce Clause power with a "substantial effects" standard, the Court added: "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'" (317 U.S. 125, emphasis added). Nonetheless, despite the breadth of its decision, the *Wickard* Court took pains to establish empirically that wheat grown for home consumption nationwide did in fact have a significant effect on the price of wheat moving in interstate commerce. Relying on a summary of the wheat industry's economic characteristics stipulated by both parties to the lawsuit, the Court determined that wheat grown for home consumption was "the most variable factor in the disappearance of the wheat crop" and varied "in an amount greater than 20 percent of average production" (317 U.S. 127).

In the 2005 medical marijuana case, the Court expressed a belief that "[t]he similarities between this case and *Wickard* are striking" (*Raich*, 2206). The chief similarity said to legitimize the application of federal power to these local (intrastate) activities is that "[i]n both cases . . . production of the commodity meant for home consumption, be it wheat or marijuana, has a *substantial effect* on supply and demand in the national market for that commodity" (*Raich,* 2207 emphasis added).

There was no similarity, however, in the two cases' treatment of empirical evidence regarding home consumption's aggregate effect on interstate commerce. In contrast to the factual evidence presented in *Wickard* regarding home consumption's effects, there is no such evidence in *Gonzales v. Raich.* Raich and Monson cited this lack of evidence as a key distinction between their situation and the *Wickard v. Filburn* case. The Court, however, denied the difference, stating: "while it is true that the record in the *Wickard* case itself *established the causal connection* between the production for local use and the national market, we have before us *findings by Congress* to the same effect" (*Raich,* 2207–08, emphasis added). In other words, in *Gonzales v. Raich* the Court treated mere congressional assertions of a linkage between the intrastate activity and the interstate market as equivalent to objective evidence of such a linkage. The implication is that thenceforth all Congress needs to do to legitimize federal regulation (or prohibition) of noncommercial intrastate activity is to write into a broad statute regulating a particular market (wheat, marijuana) a "finding" that purely local activity in the regulated field has a "substantial effect" on the interstate market.

The Court was explicit in abdicating any duty to investigate the facts of the case, preferring instead to judge only whether Congress had a "rational basis" for its findings: "We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding. . . . [W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]. . . . That the regulation ensnares some purely intrastate activity is of no moment" (*Raich,* 2208–09). Yet no evidence was presented to support the hypothesized "rational basis." In the end, the suggested inquiry was not to ascertain whether Congress actually had a rational basis for its findings, but only whether Congress *might* have had such a foundation. Based on unsupported suppositions about possible diversion of medical marijuana to the recreational drug market, the Court decided that "Congress *could have* rationally concluded that the aggregate impact on the national market of all the transactions exempted [by state medical marijuana laws] from federal supervision is unquestionably substantial" (*Raich,* 2215).

The dissenters strongly objected to the lack of evidence that medical marijuana use threatened in any way the national government's regulation of marijuana and other drugs under the Controlled Substances Act. Justice O'Connor repeatedly cited that critical gap, stating that "[t]here is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the [Controlled Substances Act] regime" (*Raich,* O'Connor, J., dissenting, 2226). Contrasting the evidentiary foundations in the two cases, she stated that the "bare declarations" in the introduction to the Controlled Substances Act were "asserted without any supporting evidence—descriptive, statistical, or otherwise" and "cannot be compared to the record before the Court in *Wickard*" (*Raich,* O'Connor, J., dissenting, 2227). In a separate dissenting opinion, Justice Thomas raised the same issue, stating that "Congress presented no evidence in support of its conclusions, which are not so much findings of fact as assertions of power" (*Raich,* Thomas, J., dissenting, 2233).

By removing any requirement for objective evidence establishing an actual linkage between the targeted local activity and Congress's regulation of interstate commerce, the Court has destroyed the last apparent restraint on the national government's use of the Commerce Clause to regulate purely local, noncommercial intrastate activity. As Justice Thomas stated in his dissent, "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" (*Raich*, Thomas, J., dissenting, 2229).

Those committed to limited government had hoped that the Supreme Court was poised to move in the opposite direction, reducing rather than expanding Con-

gress's Commerce Clause powers. Fueling that hope, two Supreme Court decisions not long before *Gonzales v. Raich* had seemed to place sidebars on those powers. The first, *U.S. v. Lopez* (514 U.S. 549 [April 26, 1995]) declared that the federal Gun Free School Zones Act of 1990, which makes knowing possession of a firearm near a school a federal criminal offense, exceeds Congress's authority under the Commerce Clause. The second, *U.S. v. Morrison* (529 U.S. 598 [May 15, 2000]) held that the provision of federally mandated civil remedies for victims of gender-motivated violent crimes in the 1994 Violence Against Women Act likewise exceeds Congress's Commerce Clause power. In each case, the Court saw the intrastate activity (possession of a firearm, gender-motivated violent crimes) as noneconomic and too remotely related to interstate commerce to lie plausibly within the purview of the Commerce Clause. As the Court stated in *Lopez,* "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" (514 U.S. 567).

With the medical marijuana case, however, the Court has taken another step toward embracing the national police power previously disavowed in *Lopez* and *Morrison*. As Justice Thomas observed, "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" (*Raich,* Thomas, J., dissenting, 2233). Stating that the "majority is not interpreting the Commerce Clause, but rewriting it," he wrote that "[i]f the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States" (*Raich*, Thomas, J., dissenting, 2236). Justice O'Connor found the Court's approach in *Gonzales v. Raich* "tantamount to removing meaningful limits on the Commerce Clause," thereby "threaten[ing] to sweep all of productive human activity into federal regulatory reach" (*Raich*, O'Connor, J., dissenting, 2222, 2224).

As in the eminent-domain case, the majority in *Raich* again elected to rewrite the Constitution from the bench, ignoring the formal amendment process prescribed by Article V while altering the well-documented original public meaning of the Commerce Clause language. By acquiescing in the Supreme Court's unilateral expansion of the national government's power, the public allows this country's foundational commitment to a government of enumerated and limited powers to slip further from its grasp.

A Malleable Constitution

Both dissenting opinions in *Gonzales v. Raich* cited a statement by James Madison in *Federalist No. 45* that explains the division of power to which those who supported the proposed constitution thought they were agreeing:

> The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the State governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State. ([1788] 2001, 241)

It is abundantly clear that this conception of the Constitution has been utterly destroyed. Of course, this outcome is not the result solely of the three recent changes discussed in this article; it is the culmination of a century's worth of legislative and judicial whittling away at core concepts of U.S. constitutional governance.

Nonetheless, these three changes, coming in close succession, mark a point inflection in this incremental process. As if with one voice, they stand for the proposition that Congress and the U.S. Supreme Court can disregard at will many, perhaps most, constitutional limits on the national government's power. Whether those bodies choose to impose uniform national identification cards, take our property, or stop us from planting six plants in our gardens, the will of Congress and any five sitting Supreme Court justices now trumps the lives, liberties, and properties of the people.

Transformed by decades of determined misinterpretation, our Constitution has proved incapable of confining the national government to its specifically enumerated powers. As the Supreme Court has twisted and turned to devise rationales capable of sustaining federal powers clearly outside the bounds of those enumerated in the Constitution, the words of that document have become malleable, elastic, without fixed meaning. The Article V constitutional amendment process has been all but abandoned as Congress and the Supreme Court have changed the meaning of the Constitution at their pleasure, shifting the heavy political transaction-cost burden of constitutional amendment to those who would retain the scope of government power as expressed in the Constitution's actual words. When Justice Thomas wrote in *Raich* of the "steady drift away from the text of the Commerce Clause," stating that "[o]ne searches the Court's opinion in vain for any hint of what aspect of American life is reserved to the States" (*Raich,* Thomas, J., dissenting, 2236–37), his words aptly describe not only Commerce Clause jurisprudence but a wide swath of other constitutional jurisprudence as well.

The Constitution's words now are often interpreted to mean the opposite of what they actually say. The Interstate Commerce Clause grant of authority to the Congress to regulate commerce/trade "among the several states" is said to allow Congress to regulate purely local activities that involve neither commerce nor interstate activities nor activities that "substantially affect" interstate commerce. The Takings Clause

prohibition on government taking of private property unless for a public use with just compensation is likewise defunct, now said to allow use of eminent domain to take property from one person to give to another for an alternative private use if the government declares that it hopes the transfer will increase its tax revenues.

The problem, as both Barnett and Justice Thomas have so clearly articulated, is that if the Constitution's words do not have fixed meanings, we do not have a government of limited and enumerated powers.[10] And if the document is infinitely elastic, it cannot serve its main purpose of protecting people's lives, liberties, and properties from the covetous grasp of government and the special interests that government so often serves.

Of course, we might conceivably change today's cavalier approach to the Constitution. Such a change, however, hardly seems imminent or likely. Most of those who are and will be victims of these policies are too busy with jobs and families to resist or even to discover the need to resist, whereas the beneficiaries are content with the status quo. Left unchecked, Congress and the Supreme Court will continue to strengthen the institutional infrastructure of the new American Leviathan.

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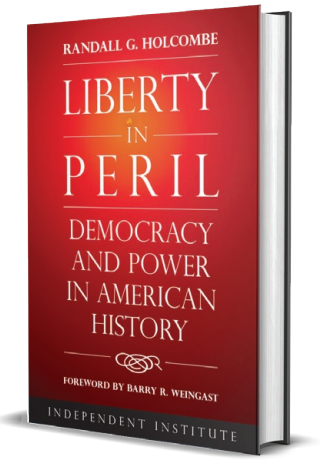

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