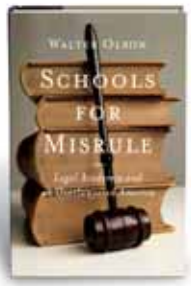

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Cato Policy Report

March/April 2011 Vol. XXXIII No. 2

Obamacare Is Unconstitutional

BY ROGER VINSON

On March 23, 2010, President Obama signed The Patient Protection and Affordable Care Act. This case was filed minutes after the President signed it. This case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

James Madison, the chief architect of our federalist system, observed in Federalist No. 51:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Founders endeavored to resolve Madison's identified "great difficulty" by creating a system of dual sovereignty. The Tenth Amendment reaffirmed that relationship: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Framers believed that limiting federal power, and allowing the "residual" power to remain in the hands of the states (and of the people), would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." The great Chief Justice John Marshall noted "that those limits may not be mistaken, or forgotten, the Constitution is written."

THE SCOPE OF THE COMMERCE CLAUSE

To say that the federal government has limited and enumerated power does not get one far, however, for that statement is a long-recognized and well-settled truism. The ongoing challenge is deciding whether a particular federal law falls within or outside those powers.

For this claim, the plaintiffs contend that the individual mandate exceeds Congress' power under the Commerce Clause. At issue here is the assertion that the Commerce Clause can only reach individuals and entities engaged in an "activity"; and because the plaintiffs maintain

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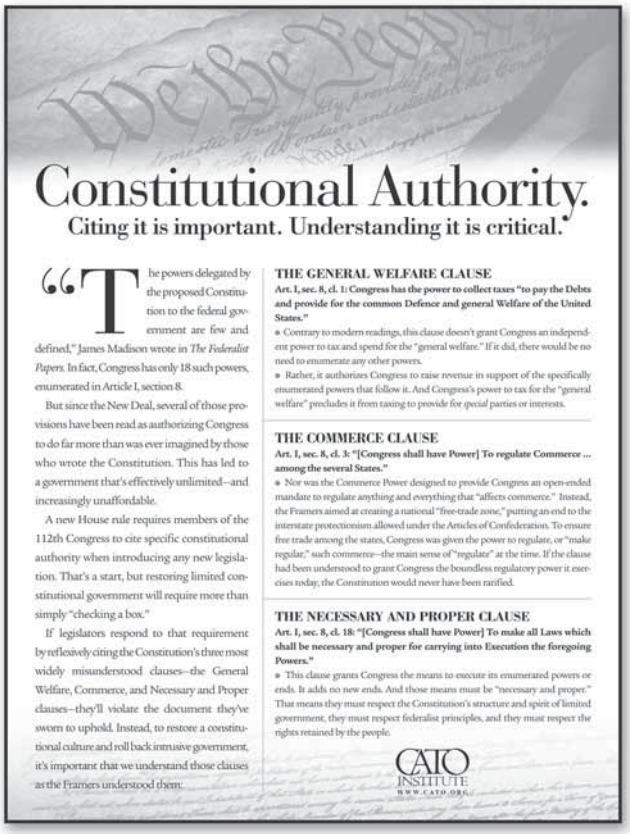
ROGER VINSON is senior U.S. district judge for the Northern District of Florida. This article is excerpted from his decision in *Florida v. Department of Health and Human Services*, issued on January 31, 2011, and available in full online. Internal citations have been omitted.



Constitutional Authority.

Citing it is important. Understanding it is critical.

"The powers delegated by the proposed Constitution to the federal government are few and defined," James Madison wrote in *The Federalist Papers*. In fact, Congress has only 18 such powers, enumerated in Article I, section 8.

But since the New Deal, several of those provisions have been read as authorizing Congress to do far more than was ever imagined by those who wrote the Constitution. This has led to a government that's effectively unlimited—and increasingly unaffordable.

A new House rule requires members of the 112th Congress to cite specific constitutional authority when introducing any new legislation. That's a start, but restoring limited constitutional government will require more than simply "checking a box."

If legislators respond to that requirement by reflexively citing the Constitution's three most widely misunderstood clauses—the General Welfare, Commerce, and Necessary and Proper clauses—they'll violate the document they've sworn to uphold. Instead, to restore a constitutional culture and roll back intrusive government, it's important that we understand those clauses as the Framers understood them:

THE GENERAL WELFARE CLAUSE

Art. I, sec. 8, cl. 1: Congress has the power to collect taxes "to pay the Debts and provide for the common Defence and general Welfare of the United States."

- Contrary to modern readings, this clause doesn't grant Congress an independent power to tax and spend for the "general welfare." If it did, there would be no need to enumerate any other powers.
- Rather, it authorizes Congress to raise revenue in support of the specifically enumerated powers that follow it. And Congress's power to tax for the "general welfare" precludes it from taxing to provide for *special* parties or interests.

THE COMMERCE CLAUSE

Art. I, sec. 8, cl. 3: "[Congress shall have Power] To regulate Commerce ... among the several States."

- Nor was the Commerce Power designed to provide Congress an open-ended mandate to regulate anything and everything that "affects commerce." Instead, the Framers aimed at creating a national "free-trade zone," putting an end to the interstate protectionism allowed under the Articles of Confederation. To ensure free trade among the states, Congress was given the power to regulate, or "make regular," such commerce—the main sense of "regulate" at the time. If the clause had been understood to grant Congress the boundless regulatory power it exercises today, the Constitution would never have been ratified.

THE NECESSARY AND PROPER CLAUSE

Art. I, sec. 8, cl. 18: "[Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."

- This clause grants Congress the means to execute its enumerated powers or ends. It adds no new ends. And those means must be "necessary and proper." That means they must respect the Constitution's structure and spirit of limited government, they must respect federalist principles, and they must respect the rights retained by the people.

CATO INSTITUTE
WWW.CATO.ORG

The Cato Institute's latest full-page ad, following earlier ones on climate change, the stimulus, and budget cutting, ran in the *Washington Post*, *Politico*, *The Hill*, *Roll Call*, and *Human Events*. This ad urged Congress to better understand the limits on power established in America's founding document.

BY ROBERT A. LEVY

Chairman's Message

Who Elected Lisa Jackson?

> "With Congress unwilling to advance the Obama agenda, Washington's alphabet agencies will be operating overtime."

Here's how a *Washington Post* editorial described the ultimatum that President Barack Obama posed to Congress: "Pass climate-change legislation, or the Environmental Protection Agency will use its authority under the Clean Air Act to curb carbon emissions without your input." That generated some pushback, even from some Democrats. Former Rep. Ike Skelton (D-MO) said, "We cannot tolerate turning over the regulation of greenhouse gas emissions to unelected bureaucrats at EPA." Rep. Collin Peterson (D-MN) warned, "If Congress doesn't do something soon, the EPA is going to cram these regulations through all on their own."

Meanwhile, EPA administrator Lisa Jackson officially celebrated the New Year by launching the EPA's drive to restrict emissions of carbon dioxide and other greenhouse gases—foisting regulations on the public, decreed not by our lawmakers, but by an administrative official. Therein lies a major problem, and it has constitutional implications.

Article I, section 1 of the Constitution states, "All legislative Powers. . . shall be vested in a Congress," which means legislating is for the legislature—not delegated to the EPA or any of the 320 executive and independent agencies in Washington, D.C. Regrettably, that doctrine—known as the nondelegation doctrine—is now moribund. Until the 1940s, the Supreme Court required Congress to enact an "intelligible principle" to guide agencies in exercising delegated legislative power. Since then, however, not a single statutory program has been invalidated as an unconstitutional delegation.

Fast forward to April 2007. That's when a 5-4 majority of the Supreme Court held in *Massachusetts v. Environmental Protection Agency* that the EPA could decide, without congressional input, whether carbon dioxide poses a health and safety risk under the Clean Air Act. This past December, Administrator Jackson decided "yes," and accepted the Court's invitation to fashion rules—again without congressional input—slashing CO2 emissions. As a result, U.S. companies may have to comply with Kyoto-type global warming standards, imposed by administrative fiat, despite Congress's rejection of the Kyoto Protocol.

Like clockwork, a handful of major utility CEOs defended the EPA because its rulemaking would "yield important economic benefits." Conveniently omitted was the fact that the presumed benefits would flow to the CEOs' companies—yet another example of short-sighted corporate rent seekers with little appreciation for long-term consequences. It's bad enough when supposed capitalists wrongly perceive that the market can be efficiently disciplined by bureaucrats. It's even worse when businessmen embrace regulation because their companies might gain a temporary edge at the expense of rivals who lack political clout.

If you're looking for an "intelligible principle," there isn't one. Our lawmakers seem content to let Lisa Jackson supply her own principle. Never mind that the constitutional basis of the nondelegation doctrine is that Congress, not independent agencies, must make important policy choices, which form the core of legislative power. For purposes of that doctrine, it does not matter which principle is ultimately chosen; what matters is that Congress supplies it. The concept is straightforward: Congress is free to legislate or not, but it may not effectuate a wholesale transfer of legislative power to administrative or executive officials. That's the essence of the separation of powers.

If Congress needs technical assistance to legislate, it can certainly obtain such assistance from congressional staff, universities, professional associations, think tanks and, naturally, from the agencies that will be responsible for implementation. But Congress itself has to review the recommendations and give its stamp of approval. After the "shellacking," Congress needs a bipartisan consensus to pass laws. Who are the 535 "legislators" that Lisa Jackson has to convince? And what do the voters, taxpayers, and affected industries do if Ms. Jackson gets it wrong?

Of course, the EPA is just the tip of the iceberg. With Congress unwilling to advance the Obama agenda, Washington's alphabet agencies will be operating overtime—the Department of Health and Human Services regulating health care, the Federal Communications Commission controlling the Internet, and the new Consumer Financial Protection Bureau making mischief under the Dodd-Frank Act. To grasp the scope of the problem, consider that federal agencies now dwarf Congress when it comes to making rules that control what Americans can do. The Code of Federal Regulations comprises more than 200 bound volumes—about six times as large as the U.S. Code containing all laws passed by Congress.

Nowhere in our Constitution was Congress given, explicitly or implicitly, the power to delegate. Our administrative agencies cannot be, said Justice Benjamin Cardozo, "roving commission[s] to inquire into evils and upon discovery correct them." Those who make the laws must be directly accountable to the voters.

Robert A Levy

Regulation, *Winter 2010–2011*

Health Care, Green Energy, and Competition

The new issue of *Regulation* brings articles on the incentives of health care reform, the high cost of green energy, and noncompetition by contract, among many others. In the cover story, David A. Hyman argues that "legislation that does not address the underlying incentive problem is not, in fact, 'reform,' no matter what else it may accomplish." By this measure, he shows, ObamaCare fails. Jonathan A. Lesser demonstrates how high-cost subsidized renewable resources destroy jobs and hurt consumers. Douglas W. Caves, Laurits R. Christensen, and Joseph A. Swanson, the authors of a 1981 article on railroad deregulation, look back on their observations 30 years later. Alan Hyde offers new empirical evidence revealing the economic harm of noncompete covenants, contracts that prevent employees from conducting business similar to what they did for prior employers. Also included are articles on the U.S. seed industry and on the impact of deregulation on the freight-rail industry. The issue features reviews of books on energy policy, the law and economics of legal institutions, preventing future financial crisis, and the impact of gun-control laws on crime.

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

Cato Journal, *Winter 2011*

Debating Foreign Aid, Reforming Health Care

In the latest issue of the *Cato Journal*, J. R. Clark and Dwight R. Lee discuss the moral dimensions of markets and economics. Also in this issue, D. Eric Schansberg looks at the prospects for free market reform in health care, and Robert Carbaugh and Thomas Tenerelli discuss the economic problems of the USPS and possible changes in its structure that would help keep it solvent.

In "Giving Up on Foreign Aid?," Yale economist Gustav Ranis disputes the arguments in two previous essays in the *Cato Journal* on the benefits of foreign aid. Two of the authors he critiques—David B. Skarbek and Peter T. Leeson—respond with "What Aid Can't Do: Reply to Ranis."

The issue also includes reviews of books on past financial crises, the history of Afghanistan, the foundations of America's political structure, and the economics of microfinance.

***Cato Journal* is available by subscription or online at www.cato.org/pubs/journal.**

Cato News Notes

HEALTH CARE AND THE STATES

On January 6–8, the Cato Institute hosted a State Health Policy Summit in Orlando. With 45 attendees representing think tanks in 42 states, the summit featured presentations from health policy experts including Cato's Michael F. Cannon, Michael D. Tanner, and Jagadeesh Gokhale. Topics included "Fighting ObamaCare in the Courts" with Clint Bolick of the Goldwater Institute and "How Much Wasteful Health Care Spending?" with Dr. John E. Wennberg of Dartmouth Medical School. Florida governor Rick Scott delivered the keynote address.

CATO WELCOMES GUILLERMO ZULOAGA, VENEZUELAN CHAMPION OF FREE PRESS

Guillermo Zuloaga, president of Venezuela's Globovision TV, has joined the Cato Institute as a fellow in free speech. Zuloaga, now in exile, became an international symbol of press freedom for maintaining Globovision's independence in the face of severe harassment of the company's journalists, himself, and his family by Venezuelan president Hugo Chávez's government. "We are delighted and honored to be working with Guillermo, who has paid a high price to exercise and defend free speech in Venezuela at a time when Hugo Chávez is intensifying his authoritarian project and when most other television stations are state-owned or have lost their independence," said Edward H. Crane, president of the Cato Institute. At Cato, Zuloaga's work will highlight the growing threats to free speech in Latin America and the ways in which the Venezuelan government—as well as democratically elected governments throughout South America—are undermining press freedom.

SITA NATARAJ SLAVOV JOINS CATO AS A VISITING SCHOLAR

Sita Nataraj Slavov, professor in the department of economics at Occidental College in Los Angeles, is spending time at Cato as a visiting scholar. She is conducting research on Social Security with senior fellow Jagadeesh Gokhale. Her work will focus on the impact the program has on incentives to acquire human capital through education and on-the-job training.

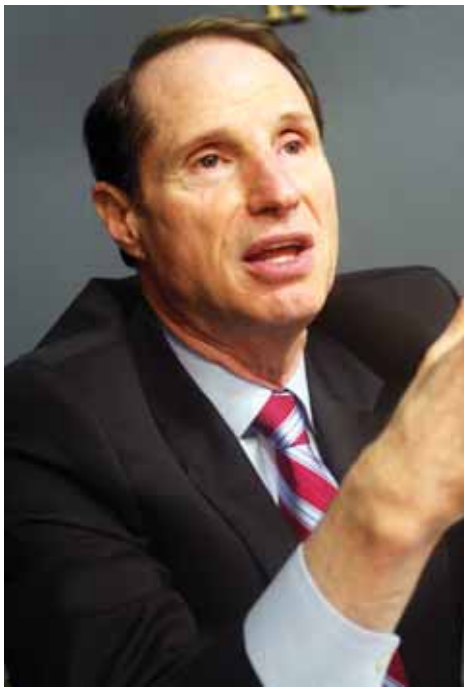
DESMOND LACHMAN explains why the euro is in the process of unraveling at a Policy Forum in December. Lachman, resident fellow at the American Enterprise Institute, was joined by MARIAN L. TUPY (center), former policy analyst at Cato's Center for Global Liberty and Prosperity, and ANDERS ASLUND (right), senior fellow at the Peterson Institute for International Economics, to discuss the financial crisis in the Baltic countries and the implications for the rest of Europe.

At a Cato Policy Forum in January, PATRICK BYRNE, CEO of Overstock.com and chairman of the Foundation for Educational Choice, said that public schools spend $14,000 each year per student, which is 41 percent higher than the OECD average. Byrne argued that school choice is the best way to reduce costs and use money more productively and efficiently.

Health policy experts discussed state-based solutions to America's health care troubles at the Cato Institute–hosted State Health Policy Summit in Orlando in January. Jason Hwang (second from right) offered proposals found in his co-authored book, *The Innovator's Prescription: A Disruptive Solution for Health Care*, which was the American College of Healthcare Executives 2010 Book of the Year.

HUMBERTO SANTOS, researcher at the Universidad Diego Portales in Chile, has studied the academic performance of public schools, independent private schools, and chains of private schools in Chile's voucher program. He presented his findings at a Cato Policy Forum on January 28, which showed that not only do private schools outperform public schools, but large private chains outperform independent schools. Also speaking at the forum was Peje Emilsson, founder of Kunskapsskolan, the largest chain of for-profit private schools operating in Sweden's nationwide voucher program.

DANIEL GRISWOLD (right), director of the Center for Trade Policy Studies at the Cato Institute, testifies before the Judiciary Committee's Subcommittee on Immigration Policy and Enforcement at the House of Representatives in January. Griswold explained that it's faulty analysis to think that immigrants push Americans out of jobs. "There is no causal relationship between inflows of immigration and higher overall unemployment in the U.S. economy," he said.



At a Policy Forum on January 26, Sen. RON WYDEN (D-OR) called for reform of the laws governing access to information from location-tracking technology such as GPS by law enforcement officers. "I look forward to the leadership of Cato on this issue," he said, "as Cato has led us so often in the past."

At a Policy Forum in December, banking consultant and Cato adjunct scholar BERT ELY (right) discussed the constitutionality of Dodd-Frank, the sweeping financial regulation overhaul passed in the wake of the financial crisis. Ely doesn't expect it to be repealed, but said the House can expect to see bills addressing the "really rough aspects of the legislation." The panel was moderated by MARK A. CALABRIA (left), director of financial regulation studies at the Cato Institute.

Continued from page 1

that an individual's failure to purchase health insurance is, almost by definition, "inactivity," the individual mandate goes beyond the Commerce Clause and is unconstitutional. The defendants contend that activity is not required before Congress can exercise its Commerce Clause power, but that, even if it is required, not having insurance constitutes activity.

The Commerce Clause is a mere sixteen words long, and it provides that Congress shall have the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

For purposes of this case, only seven words are relevant: "To regulate Commerce . . . among the several States." There is considerable historical evidence that in the early years of the Union, the word "commerce" was understood to encompass trade, and the intercourse, traffic, or exchange of goods. In a frequently cited law review article, constitutional scholar Randy E. Barnett has painstakingly tallied each appearance of the word "commerce" in Madison's notes on the Constitutional Convention and in *The Federalist*, and discovered that in none of the 97 appearances of that term is it ever used to refer unambiguously to activity beyond trade or exchange.

The Supreme Court's first description of commerce (and still the most widely accepted) is from *Gibbons v. Ogden*. Chief Justice Marshall explained that "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

To acknowledge the foregoing historical facts is not necessarily to say that the power under the Commerce Clause was intended to (and must) remain limited to the trade or exchange of goods, and be confined to the task of eliminating trade barriers erected by and between the states. The drafters of the Constitution were aware that they were preparing an instrument for the ages, not one suited only for the exigencies of that particular time.

> "This case is not really about our health care system at all. It is principally about our federalist system."

NOVEL AND UNPRECEDENTED

The plaintiffs rely heavily on *Lopez* and *Morrison* in framing their arguments, while the defendants look principally to *Wickard* and *Raich*. These cases all have something to add to the discussion. However, while they frame the analysis, and are important from a historical perspective, they do not by themselves resolve this case. That is because, as Congress's attorneys in the Congressional Research Service and Congressional Budget Office advised long before the Act was passed into law, the notion of Congress having the power under the Commerce Clause to directly impose an individual mandate to purchase health care insurance is "novel" and "unprecedented." Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States. However, unprecedented or not, I will assume that the individual mandate can be Constitutional under the Commerce Clause and will analyze it accordingly.

IS INACTIVITY ACTIVITY?

The threshold question that must be addressed is whether activity is required before Congress can exercise its power under the Commerce Clause. Commerce Clause jurisprudence has contracted and expanded (and contracted and expanded again) during our nation's development. But, in every one of those instances—in both the contractive and expansive—there has always been clear and inarguable activity, from exerting control over and using navigable waters (*Gibbons*) to growing or consuming marijuana (*Raich*). The Supreme Court has never been called upon to consider if "activity" is required.

The defendants contend, however, that despite the inarguable presence of activity in every Supreme Court case to date, activity is not required under the Commerce Clause. In fact, they go so far as to suggest that to impose such a requirement would be bold and radical. According to the defendants, because the Supreme Court has never identified a distinction between activity and inactivity as a limitation on Congress's commerce power, to hold otherwise would "break new legal ground" and be "novel" and "unprecedented." First, it is interesting that the defendants—apparently believing the best defense is a good offense—would use the words "novel" and "unprecedented," since those are the exact same words that the CRS and CBO used to describe the individual mandate before it became law. Furthermore, there is a simple and rather obvious reason why the Supreme Court has never distinguished between activity and inactivity before: it has not been called upon to consider the issue because, until now, Congress had never attempted to exercise its Commerce Clause power in such a way before. In every Supreme Court case decided thus far, Congress was not seeking to regulate, under its commerce power, something that could even arguably be said to be "passive inactivity."

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is itself "commercial and economic in nature, and substantially affects interstate commerce," it is not hyperbolizing to suggest that Congress could do almost anything it

wanted. It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain, for it would be "difficult to perceive any limitation on federal power" (*Lopez*), and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended.

Having found that "activity" is an indispensable part [of] the Commerce Clause analysis, the constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity."

Preliminarily, based solely on a plain reading of the Act itself (and a commonsense interpretation of the word "activity" and its absence), I must agree with the plaintiffs' contention that the individual mandate regulates inactivity. Section 1501 states in relevant part: "If an applicable individual fails to [buy health insurance], there is hereby imposed a penalty." By its very own terms, therefore, the statute applies to a person who does not buy the government-approved insurance; that is, a person who "fails" to act pursuant to the congressional dictate.

The defendants insist that the uninsured are active. In fact, they even go so far as to make the claim—which the plaintiffs call "absurd"—that going without health insurance constitutes "economic activity to an even greater extent than the plaintiffs in *Wickard* or *Raich*."

The defendants contend that there are three unique elements of the health care market which, when viewed cumulatively and in combination, belie the claim that the uninsured are inactive. First, as living and breathing human beings who are always susceptible to sudden and unpredictable illness and injury, no one can "opt out" of the health care market. Second, if and when health services are sought, hospitals are required by law to provide care, regardless of inability to pay. And third, if the costs incurred cannot be paid (which they frequently cannot, given the high cost of medical care), they are passed along (cost-shifted) to third parties, which has economic implications for everyone. Congress found that the uninsured received approximately $43 billion in "uncompensated care" in 2008 alone. These three things, according to the defendants and various health care industry experts and scholars on whom they rely, are "replicated in no other market" and defeat the argument that uninsured individuals are inactive.

> "It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause."

First, it is not at all clear whether or why the three allegedly unique factors of the health care market are Constitutionally significant. What if only one of the three factors identified by the defendants is present? After all, there are lots of markets—especially if defined broadly enough—that people cannot "opt out" of. For example, everyone must participate in the food market. Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a farmer could grow as in *Wickard*, under this logic Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, nonconsumers of wheat bread adversely affect prices in the wheat market.

Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile—now partially government-owned—because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

That the defendants' argument is "unsupported by Commerce Clause jurisprudence" can perhaps best be seen by looking to *Lopez*. Although that case is distinct from this one in some notable ways, in the context of the defendants' "health care is unique" argument, it is quite similar.

THE LOPEZ CASE

In *Lopez*, the majority was concerned that using the Commerce Clause to regulate things such as possession of guns in school zones would "obliterate" the distinction between what is national and what is local and effectively create a centralized government that could potentially permit Congress to begin regulating "any and all aspects" of our lives, including marriage, divorce, child custody, and education. The dissent insisted that this concern was unfounded because the statute at issue was "aimed at curbing a particularly acute threat" of violence in schools that had "singularly disruptive potential." This was "the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce."

Two things become apparent after reading these arguments attempting to justify extending Commerce Clause power to the

legislation in that case, and the majority opinion (which is the controlling precedent) rejecting those same arguments. First, the contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a "particularly acute" problem that is "singular [],'' "special," and "rare"—that is to say "unique"—will not by itself win the day. Uniqueness is not an adequate limiting principle, as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.

Second, and perhaps more significantly, under *Lopez* the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court "to pile inference upon inference," which is, in my view, exactly what would be required to uphold the individual mandate. For example, in contrast to individuals who grow and consume marijuana or wheat (even in extremely small amounts), the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce—not "slight," "trivial," or "indirect," but no impact whatsoever—at least not any more so than the status of being without any particular good or service. If impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure multiplied by zero is also zero. Consequently, the impact must be zero, and of no effect on interstate commerce. The uninsured can only be said to have a substantial effect on interstate commerce in the manner as described by the defendants: (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider, or with assistance of family, friends, and charitable groups, and the costs are thereafter shifted to others. In my view, this is the sort of piling "inference upon inference" rejected in *Lopez* and subsequently described in *Morrison* as "unworkable if we are to maintain the Constitution's enumeration of powers."

> "The causal link between what is being regulated and its effect on interstate commerce cannot require a court 'to pile inference upon inference.'"

While $43 billion in uncompensated care from 2008 was only 2% of national health care expenditures for that year, it is clearly a large amount of money, and it demonstrates that a number of the uninsured are taking the five sequential steps. And when they do, Congress plainly has the power to regulate them at that time (or even at the time that they initially seek medical care), a fact with which the plaintiffs agree. But, to cast the net wide enough to reach everyone in the present, with the expectation that they will (or could) take those steps in the future, goes beyond the existing "outer limits" of the Commerce Clause and would, I believe, require inferential leaps of the sort rejected in *Lopez*. The defendants' argument that people without health insurance are actively engaged in interstate commerce based on the purported "unique" features of the much broader health care market is neither factually convincing nor legally supportable.

The defendants next contend that the uninsured have made the calculated decision to engage in market timing and try to finance their future medical needs out-of-pocket rather than through insurance, and that this "economic decision" is tantamount to activity.

The problem with this legal rationale, however, is it would essentially have unlimited application. There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort. It is not difficult to identify an economic decision that has a cumulatively substantial effect on interstate commerce; rather, the difficult task is to find a decision that does not.

CONCLUSION

Because I find both the "uniqueness" and "economic decision" arguments unpersuasive, I conclude that the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.

Congress must operate within the bounds established by the Constitution. For the reasons stated, I must reluctantly conclude that Congress exceeded the bounds of its authority in passing the Act with the individual mandate. Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void. This has been a difficult decision to reach, and I am aware that it will have indeterminable implications. At a time when there is virtually unanimous agreement that health care reform is needed in this country, it is hard to invalidate and strike down a statute titled "The Patient Protection and Affordable Care Act."

My conclusion in this case is based on an application of the Commerce Clause law as it exists pursuant to the Supreme Court's current interpretation and definition. Only the Supreme Court (or a Constitutional amendment) can expand that.

The Patient Protection and Affordable Care Act is unconstitutional. ■

The Military-Industrial Complex at 50

To mark the 50th anniversary of Eisenhower's farewell address, the Cato Institute hosted a conference (page 12) of distinguished speakers to discuss the meaning and impact of prescient remarks. Among these were Susan Eisenhower, chairman emeritus of the Eisenhower Institute and granddaughter of President Eisenhower; Eugene Gholz, associate professor and distinguished scholar at the Robert Strauss Center on International Security and Law at the University of Texas, Austin; John C. Hulsman, senior research fellow at the Hague Centre for Strategic Studies; Richard K. Betts, director of the Saltzman Institute of War and Peace Studies at Columbia University; and Christopher Preble, director of foreign policy studies at the Cato Institute. Preble also read prepared remarks from Andrew Bacevich, professor of international relations and history at Boston University, who was unable to attend in person.

SUSAN EISENHOWER: "The Farewell Address" was a bookend to "A Chance for Peace," the first major speech of Eisenhower's presidency, delivered just weeks after the death of Joseph Stalin in 1953. We are marking the 50th anniversary of the Farewell Address on the 17th of January, but taken together these speeches underscore the transformational times in which Dwight Eisenhower served as president.

There is a contemporary resonance to these addresses because we are also living in such times. The difference is that the United States is not in the strong position that it was in 1953. After all, in 1953, even though money was constrained, the United States was the world's largest creditor nation, and it had emerged from World War II as the globally preeminent power. Today, however, if our position on the international stage is changing it is largely because of involuntary trends.

Like the 1950s, we also live in times of rapid technological advancements, and we have a changing view of the threats we confront. Like those times, we also have a set of shifting moral values, and we have radically new ways we communicate—then it was television, today it is the Internet.

As a member of the Eisenhower family it is deeply gratifying that part of my grandfather's legacy are these two speeches. The fact that a set of ideas he advanced 50 years ago could still serve as a platform for debate today is indeed a wonderful thing. Perhaps one of the reasons the speeches still have contemporary relevance is that Eisenhower was projecting his thoughts about the future; he was playing for the long game. How many times in his speeches did his mention his grandchildren? I may be one of them, but we're all the grandchildren of that generation.

Eisenhower was thinking about the decades to come—even the next century—so much that he put a time capsule in his house at Gettysburg. It's buried in one of the walls. To my distress, is not to be opened until 2056, which means that I'll be long gone. It doesn't seem fair, now does it? But this is so Eisenhower, still talking to generations yet to come.

ANDREW BACEVICH: Politics is a blood sport. The making of national security policy is nothing if not political, with blood and treasure, power and access, ego and ambition on the line. So senior officers learn how to lobby, leak, ally with strange bedfellows, manipulate the media, and play off the Congress against the White House. That's how you get things done in Washington.

Theoretically, the top brass should privilege the national interest over parochial concerns, render disinterested advice when asked, and then loyally implement whatever decision competent civilian authorities may make. Theoretically, civilian authorities should treat their military counterparts with the respect deserving of professionals. They should allow the military wide latitude in matters pertaining to war. Theory does not conform to reality. Conflict exists between the top brass and top civilian officials for precisely the same reason that conflict pits Republicans against Democrats, the White House against Capitol Hill, the Senate against the House: because power is at stake.

The ideal of civilian control stands in relation to actually existing civil-military relations as the ideal of the common good stands in relation to actually existing politics. It represents an aspiration rather than a fact. It will never define reality. Responsibility for this unhappy circumstance does not lie with one side or the other but with both. To insist that senior officers and senior civilians should find a way to work in harmony recalls Rodney King's plaintive appeal during the 1992 Los Angeles riots: "Can't we all just get along?" Any such expectation of human behavior, applied to politics, flies in the face of the whole record of history. As with the poor, the competition for power will be ever with us.

Somewhere around 2004 or 2005, Americans began awakening to the real implications of having deep-sixed the citizen-soldier. Inside the Beltway, it became apparent that the United States was con-

fronting the problem of too much war and too few warriors. With few allies stepping up to the plate to help, the Pentagon turned increasingly to mercenaries, a.k.a. private security firms, to ease the burden on a badly overstretched force.

Outside the Beltway, it became apparent that the American people retained very little say in the employment of an army over which they had forfeited any ownership. If there remained any doubts on that score, President Barack Obama's decision to escalate the Afghanistan War ended them.

"We the people" need to understand: it's no longer our army—it hasn't been for years— it's theirs and they intend to keep it. The American military belongs to Bill Clinton and Madeleine Albright, to George W. Bush and Dick Cheney, to Hillary Clinton and Robert Gates, to Admiral Mullen and General Petraeus. They will continue to employ that military as they see fit. If Americans don't like the way the army is used, they need to reclaim it. This can only happen by resuscitating the tradition of the citizen-soldier.

In Washington, people will wring their hands over the unseemly state of relations between civilian and military elites, as brass hats and politicians maneuver against each other for advantage. That's their problem.

The problem for the rest of us is a far greater one: grasping the implications for our democracy, moral as well as political, of sending the few to engage in endless war while the many stand by—passive, mute, and whether they like it or not, deeply complicit.

EUGENE GHOLZ: President Eisenhower warned against the crowding out of commercial economic activity by military spending. He feared that companies would decide what to do based on the hope of getting a government contract, as opposed to trying to make products that people would buy willingly in the marketplace.

There's a countervailing view about spinoff technologies, and how military effort can actually help the commercial economy by inventing great products. The spinoff story is exaggerated.

President Eisenhower was looking at this in the fifties when he observed the risk. What was the exciting, high-tech industry of the time? Jet aircraft. New, exciting, and related to the military. The military was buying a lot of jets, and we were entering the era of commercial jet travel. The Boeing 707 is the hero story for the spinoff people.

I don't think there is any doubt that some of the basic technology, like swept wings, came from military research. And that's what we would expect. The government does basic


Eugene Gholz

> "President Eisenhower warned against the crowding out of commercial economic activity by military spending."

research. Private companies do applied research. You look to the government to do basic things, like figure out the core technology of swept wings, but then when you make a product that people want to buy, swept wings isn't enough. You have to decide how far the plane will go, how fast, how many passengers, will it be quiet or noisy, and how much fuel will it use. The question for Boeing was, were they better off competing in the commercial aircraft market selling their 707 because they also had military aircraft contracts at the same time? Were they helped by developing the products in parallel? Not really.

The military was such a powerful customer that Boeing really had to tailor their products to military requirements—and they had to pay attention to the military first. From the military's perspective as a customer, if a company wants to sell products to commercial airlines, that's a distraction. The military is not going to reward you if you say, "Yes, I really would like to make your product. I'll make you a fighter plane or a bomber, but first, I'm going to take care of this thing for American Airlines. I'll get around to dealing with the military when it's convenient." That's not how it works. The military says, "You pay attention to us first. If you have a little free time to do something for commercial people, that's fine. But we don't believe you have free time because we think every second of every day you should be working on the military contract." Boeing had a problem because commercial airlines didn't trust them. Those commercial airline companies thought, "Our order from Boeing will be delayed because the military will ask them for a hurry-up on production on the tankers, or something else will divert them so they can't pay attention to our needs."

JOHN C. HULSMAN: I see the Farewell Address as a culmination of the way Eisenhower ran the presidency, of the way he lived his life, of the things he believed in. It's sad that it all sounds rather odd now, because I believe he was right.

In 1954, the French were in agony over Dien Bien Phu, and there was tremendous pressure on Eisenhower to intervene. Eisenhower realized General Ridgway was against the incursion, and so what did he say to him? Think of the difference from the way things work nowadays. He said: "Cost it. What would it cost to go in and intervene in a real way in Indochina?" Ridgway dutifully did.

He didn't make up fanciful numbers as did our former Deputy Secretary of Defense during the recent Bush administration, who said, "Iraq will cost nothing." Because he's so good at math, we made him head of the World Bank. I find this absolutely breathtaking that the man was rewarded. I was in

the room when he said, "It'll be a neutral cost," and I thought "I've had a heart attack, I'm sure I've misheard." That's not a small mistake. The one line I say to every American now is "Do you want your trillion dollars back?" As you might guess, no one argues with me. Realists nowadays say, we simply don't know what will happen, and we might need the trillion down the road. That's a totally different way to look at the world than one does in Washington.

Anyway, the number came back from Ridgway. The hero of Korea told the hero of Normandy, "$3.5 billion." So then what does Eisenhower do? Does he call in a neoconservative decisionmaker, a Democratic hawk, a nation builder? No, he calls in the Secretary of the Treasury. He says to George Humphrey, "What will this mean? I made three campaign promises in 1952: I'm going to get out of Korea, I'm going to balance the budget, and I'm going to cut taxes. What will that mean for two of those three promises?" Mr. Humphrey gives him an unequivocal answer: "It'll mean a deficit, Mr. President." And Eisenhower says, "Well, that's the end of it."

Boy do I miss that.

The thing that Eisenhower got right is the notion that economic strength is the ultimate lodestar of national power. That's what's missing today. As the fifties went on, particularly after Sputnik, when things got dicey, Eisenhower was asked why he was not raising defense spending, and he said, "Well, without fiscal soundness, there is no defense." Amen to that.

RICHARD K. BETTS: Eisenhower's cautionary Farewell Address seems a beacon to the forces of frugality and restraint today, because despite total victory in that long contest, against a hefty threat, the United States remains intensely engaged militarily around the world, fighting twice as many wars, though smaller ones, in the two decades since the Berlin Wall fell, than it did in more than four decades of the Cold War. The wave of ambition to reshape the world has crested since setbacks in Iraq and Afghanistan, but the sources of this ambition have been resilient, and in constant need of the reminder about costs that was so well emphasized in Eisenhower's farewell.

U.S. policy has gone beyond what Eisenhower expected, but not so much because of the warning about the military-industrial complex that's most remembered. True, corporate interests, and to a smaller degree, the direct influence of the professional military have something to do with it, but I think the more important reasons have been a perverse convergence of paleoliberals and neoconservatives, strange bedfellows, promoting intervention abroad; the evaporation of constituencies in both major political parties for enforcing military frugality; "victory disease," after the stunningly successful and surprisingly easy liberation of Kuwait in 1991; disengagement of most of the public from the consequences of military activism in the decades after the Vietnam War; and the institutionalization of empire and government organization and habits of operation, which would become second nature over the course of the half century since Eisenhower reflected on what was then the new permanence of peace-time mobilization.


Richard K. Betts

"The wave of ambition to reshape the world has crested since setbacks in Iraq and Afghanistan, but the sources of this ambition have been resilient."

The main reason for ambitious American behavior lies less in the military-industrial complex than in political developments beyond it. At the time Eisenhower said goodbye, military contractors competed and lobbied over which programs would be funded within a set defense-budget ceiling. They couldn't compel an increase in the aggregate level of spending. What changed after Eisenhower was that presidents stopped imposing formal, and frankly arbitrary, limits on the defense budget. Truman and Eisenhower had forced the services to bargain and logroll rather than simply ratchet up programs. What changed, as well, was the further evolution of what Eisenhower had wanted to call the "complex" in the original draft of his speech, which was changed before delivery, and that was the "military-industrial-Congressional complex." Eisenhower could get away with setting an arbitrary cap on military spending because his credentials as a warrior were bulletproof, and subsequent presidents had to claim that they would spend whatever security required. The formula for trying to measure that became a hopeless political football.

It's a shame that damaging setbacks in recent wars have been required to disabuse Americans of heady optimism about our capacity to control world order at low cost, and to make more modest conceptions of American missions politically viable options again, but at least we shouldn't let costly reverses go to waste. Let's hope they remind policymakers of the risks and costs that Eisenhower saw so long ago.

CHRISTOPHER PREBLE: Many Americans confuse military power with national strength. This mindset is particularly prominent, I would argue, among Washington's foreign policy elite, who view increases in the military's budget as synonymous with an increase in national strength and national security.

Eisenhower saw things differently. "Our problem," he explained in his first State of the Union Address, "is to achieve adequate military strength within the limits of endurable strain upon our economy. To amass military power without regard to our economic capacity would be to defend ourselves against

Continued on page 19

50 years after Eisenhower's "military-industrial complex" speech

Assessing the National Security State

On January 17, 1961, President Dwight David Eisenhower delivered the most famous speech of his storied career. In a televised farewell address to the American people, Eisenhower warned of the burdens imposed by a large, and seemingly permanent, military establishment, something that the nation had managed to avoid for most of its history. He charged his countrymen to be on guard against a "military-industrial complex" acquiring "unwarranted influence" in the halls of power.

By any objective measure, efforts to control the expansion of the military-industrial complex have failed. In inflation-adjusted terms, Americans will spend more than twice as much on national security in 2011 than they did during Eisenhower's final year in office—without a large, nuclear-armed adversary to justify the cost. These spending patterns persist in large measure because of the influence of interested parties who derive enormous benefits from the maintenance of a permanent arms industry.

Five decades after Eisenhower's prescient remarks, the Cato Institute convened a conference of analysts and scholars to discuss how the evolution of the military-industrial complex has conformed to his vision, and what might be done about it.

The event opened with remarks from Susan Eisenhower, chairman emeritus of the Eisenhower Institute and granddaughter of the past president. She discussed how the speech underscored "the transformational times in which Dwight Eisenhower served as president," noting that "there is a contemporary resonance to this speech because we are today also living in transformational times."

Some of the most acrimonious debates within the Eisenhower administration pitted the president against his former colleagues in the uniformed services. Eisenhower's attempts to adapt military force structure to a new national security strategy became highly politicized and ultimately failed. Eisenhower was especially worried that future presidents, lacking his military credentials and deep knowledge of national security matters, would be even less willing and able to confront the military. Was he right? Can a commander-in-chief lacking military experience prevail over uniformed officers who are national figures in their own right?

SUSAN EISENHOWER (above left), chairman emeritus of the Eisenhower Institute and granddaughter of the president and JOHN C. HULSMAN (above right), senior research fellow at the Hague Centre for Strategic Studies, discuss the military-industrial complex. CHRISTOPHER PREBLE, Cato's director of foreign policy studies, speaks during a panel which featured (left to right) CHARLES J. DUNLAP, JR., Maj. Gen., USAF (Ret.); LAWRENCE KORB, assistant secretary of defense under President Reagan and now senior fellow at the Center for American Progress; and LAWRENCE WILKERSON, former top aide to Secretary of State Colin Powell.

Three former military officers discussed the complex interplay between civilian leaders and Pentagon brass throughout the last five decades and offered suggestions for improving civil-military relations. Retired Air Force major general Charles J. Dunlap, Jr., stressed the need to circumscribe the military's influence, especially over domestic issues. "Is it a good thing that the armed forces are more trusted than the Supreme Court?" he said. "Is it a good thing that the armed forces are more trusted than the Congress? Is that a good thing for democracy?" Lawrence Korb, senior fellow at the Center for American Progress, noted the difficulty civilians face in arguing with decorated military officers. "But it's important to be able to challenge them," he said. Lawrence Wilkerson, a top assistant to Secretary of State Colin Powell, discussed the imbalance between the influence of America's military and its diplomatic efforts. "Diplomacy should be the leading instrument. It should be the instrument most coveted by leadership," he said. But instead, that role falls to the Department of Defense. "That is the greatest and starkest imbalance of power within the civil and military relationship that I know of."

Eisenhower noted that the "conjunction of an immense military establishment and a large arms industry [was] new in the American experience." Though he believed that such an establishment was necessary at a time when the United States was confronting an ambitious nuclear-armed adversary, he nonetheless worried about its long-term effects on the nation's economy and politics. Since then, however, much of the Pentagon's budget has served as a thinly veiled jobs program that has created powerful, entrenched political constituencies who oppose reductions in military spending even in peacetime. Given the political and economic realities, what are the prospects for restraining military spending and reorienting the nation's force structure?

Video of the conference is available at www.cato.org. ■

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Cato on Campus, the Cato Institute's college outreach program, hosted a forum in January, "Debating Social Welfare Policy in the 21st Century: What's the Best Way Forward?" The panel of interlocutors featured MICHAEL D. TANNER of the Cato Institute, ISABEL V. SAWHILL of the Brookings Institution, and PETER EDELMAN of Georgetown University Law School, the highest-ranking official to resign from the Clinton administration in protest of welfare reform.

CHAKARIN KOMOLSIRI, minister-counsellor at the Royal Thai Embassy, offers proposals for reforming U.S. trade law from the perspective of one of its developing-country beneficiaries. He spoke at a Policy Forum held in December to discuss Cato Institute trade policy analyst Sallie James's new paper, "The U.S. Generalized System of Preferences: Helping the Poor, But at What Price?"

MARIAN L. TUPY (right), former policy analyst at Cato's Center for Global Liberty and Prosperity, testifies about Zimbabwe before the Subcommittee on Africa and Global Health of the Foreign Affairs Committee of the United States House of Representatives in December. He was joined by (left to right) Steven McDonald, consulting program director of the Africa Program at the Woodrow Wilson International Center for Scholars; Sydney Masamvu of the South Africa–based Institute for Democracy in Africa; and Deprose Muchena of the Open Society Initiative for Southern Africa.

Syracuse Information School professor Milton Mueller discusses his new book, *Networks and States: The Global Politics of Internet Governance*, at a lunch at the Cato Institute in January. Mueller offered a new way of categorizing and understanding net politics that instead of using the traditional left-right spectrum looks at transnational versus national sympathies and advocacy of networking versus hierarchy. Former Cato tech analyst Adam Thierer calls the book "a beautiful case for cyber-libertarianism."

At an event on Capitol Hill in December, Christopher A. Preble, director of foreign policy studies at the Cato Institute, said that the Department of Defense should not be exempt from the emerging consensus in Congress that we must cut spending. He argued that national security spending cuts "are feasible both politically and strategically if we refocus our goals."

DECEMBER 1: Cato Institute Policy Perspectives 2010 (Chicago)

DECEMBER 7: Banking and Insurance in the 112th Congress

DECEMBER 8: Spending Cuts or Devaluation? Resolving the Financial Crisis in the Baltic Countries

DECEMBER 14: The U.S. Generalized System of Preferences: Helping the Poor, But at What Price?

DECEMBER 16: Obama's Fiscal Commission and the GOP Budget Agenda

JANUARY 11: Fiscal Undertow: How Public Schools Are Drowning State and Local Budgets, and What to Do about It

JANUARY 12: *Adam Smith: An Enlightened Life*

JANUARY 13: The Military-Industrial Complex at 50: Assessing the Meaning and Impact of Eisenhower's Farewell Address

JANUARY 18: *Liberty of Contract: Rediscovering a Lost Constitutional Right*

JANUARY 19: The 112th Congress and Military Spending

JANUARY 20: The Future of the Right to Keep and Bear Arms

JANUARY 26: Location-Tracking Technology and Privacy

JANUARY 28: Cloning "Superman": What Other Countries Already Know about Scaling Up Good Schools

Audio and video for all Cato events dating back to 1999, and many events before that, can be found on the Cato Institute website at www.cato.org/events. You can also find write-ups of Cato events in Ed Crane's bimonthly memo for Cato Sponsors.

Cato Calendar

CATO UNIVERSITY SUMMER SEMINAR
Annapolis, Md. • Loews Hotel
July 24–29, 2011
Speakers include Rob McDonald, Don Boudreaux, Robert Levy, Edward H. Crane, David Boaz, Tom G. Palmer, and Lynne Kiesling.

CONSTITUTION DAY
Washington • Cato Institute
September 15, 2011
Speakers include Alex Kozinski.

CATO CLUB 200 RETREAT
Newberg, Ore. • Allison Inn and Spa
September 22–25, 2011

MONETARY REFORM IN THE WAKE OF CRISIS
29th Annual Monetary Conference
Washington • National Housing Center
November 16, 2011
Speakers include James Grant, Judy Shelton, Richard H. Timberlake, George Selgin, Roger Garrison, and Allan H. Meltzer.

24TH ANNUAL BENEFACTOR SUMMIT
Palm Beach • The Breakers
February 23–26, 2012

The pernicious influence of elite law schools

Reign of the Philosopher-Kings

Many terrible policies either spring from the minds of, or are eventually written into law by, lawyers. But those lawyers don't appear, fully formed, in positions of power within the apparatus of state. They are made in the nation's elite law schools, incubators for bad thinking.

"That the law schools churn out so many bad ideas is notable enough," Cato Institute senior fellow Walter Olson writes in *Schools for Misrule: Legal Academia and the Overlawyering of America*. "But equally notable is that they predictably churn out certain kinds of ideas." Olson examines how law schools evolved into America's "hatchery of bad ideas," the impact that change has had on how they educate future lawyers, and the influence of legal academics on public policy. "Overall," he concludes, "the ideology of law schools is biased toward the expansion of law and its uses, and away from a recognition of the inevitable costs, limitations, and inaccuracies of law."

The growth of legislation-by-litigation, a common tactic of legal academics, means that the unpopular ideas of activists don't need to win voters. Instead, well-trained arguers, forged at Harvard, Stanford, and Yale, must convince only a judge or two. Even with this more focused activism, Olson shows, most of these lawsuits fail to achieve their broad goals. And any gains from these suits are often swamped by unintended consequences and mammoth costs. But, as Olson points out, "in a different sense the suits clearly *have* worked. They have redistributed power and wealth to the class of lawyers and interest groups who can master the techniques of suing."

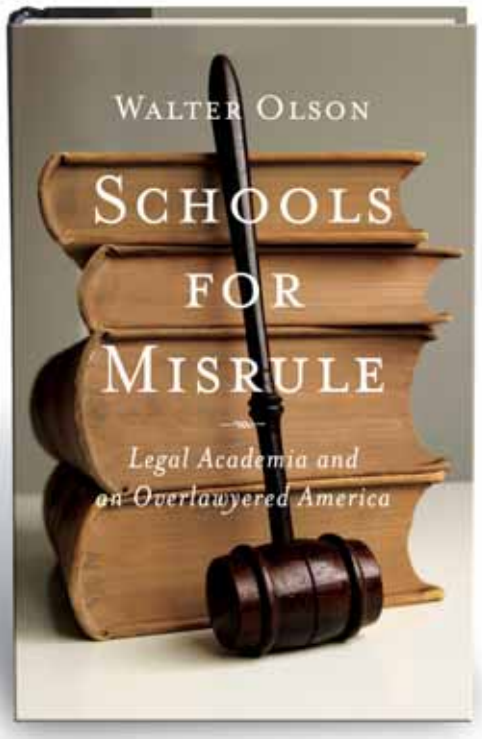
Olson articulates the ideological profile of America's top law schools, finding it remarkably uniform for institutions so vocally proud of their commitment to diversity—a uniformity "all the more tight and hermetic for going unacknowledged." But even if few are aware of the political characteristics of the elite schools, they are deeply impacted by the influence those schools have on public policy.

Olson unearths the origins of many of the worst trends in American law in recent decades—and finds them often in legal academies. This dramatic influence isn't simply a consequence of the law's importance. It was a conscious decision on the part of professors and deans, who maneuvered to make sure "lawyers were to be on top as society's natural decisionmaking class—as its technocratic managers, if not outright philosopher-kings."

What this meant in practice was that law schools lessened their focus on drilling students in so-called "black letter law" and instead launched advocacy centers and legal clinics. These clinics used free student labor to engage in litigation on behalf of underrepresented groups and marginalized causes. They expanded the reach of administrative law, made tort actions more plaintiff-friendly, sued on behalf of Native American sovereignty and reparations for slavery, and contributed to the rise of "international human rights."

> "This hard-hitting, witty account reveals the effect of law on the individual and the collective and astutely forecasts the future of law reform, in the academy, in politics, and across the globe."
>
> — *Publishers Weekly*

This last provokes particular concern from Olson. While human rights should be applauded and protected, the influence of academic elites has driven things very much out of hand. "Indeed," he writes, "new universal human rights are identified and proclaimed on a regular basis, including rights to fresh water, corruption-free government, and access to gender-reassignment surgery." He warns of the "dangers in yielding up U.S. sovereignty to a new global governance class" but notes that the response by academia and activists has been, "Quit complaining, you're too late."



"The growth of the new international law is the perfect logical culmination of 50 years' worth of bad ideas from legal academia," Olson writes near the end of *Schools for Misrule*. Law schools have positioned themselves as global players with powerful influence, much of it for no good. As Olson shows, this pedagogical shift away from the trade of lawyering and toward activism is both dangerous and unfortunate. "We neither need nor want more philosopher-monarchs," he writes. "But we could use more good lawyers." ■

Schools for Misrule **is published by Encounter Books and is available in bookstores nationwide, or order it direct from Cato by visiting www.cato.org/store or calling 800-767-1241; $25.95 hardback.**

If it sounds too good to be true, it probably is

The High Cost of "Green Jobs" and Green Energy

Green jobs. Politicians, activists, and green energy entrepreneurs promise they will revitalize the economy, banish unemployment, free the United States from dependency on foreign oil, and make us all happier, healthier, and richer. But only if, advocates quickly note, the federal government makes a big enough commitment—in the form of mandates, regulations, and subsidies.

It sounds too good to be true. And it is. In *The False Promise of Green Energy*, economic and legal scholars Andrew Morriss, William T. Bogart, Roger E. Meiners, and Andrew Dorchak show how "the concrete results of following these policies will be a decline in living standards around the globe, including for the world's poorest; changes in lifestyle that Americans do not want; and a weakening of the technological progress that market forces have delivered, preventing us from finding real solutions to the real problems we face."

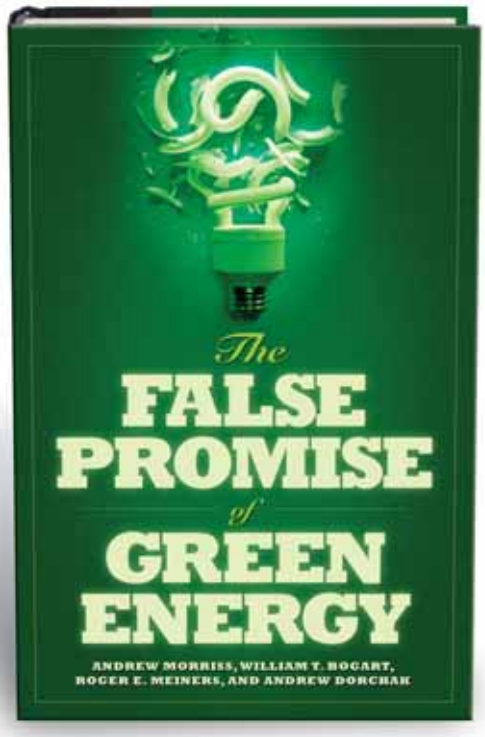
Many of those lifestyle changes will come from suddenly spending far more on energy than we'd like. Green technologies mean diverting production from cheap sources, such as coal and oil, to more expensive, highly subsidized ones, like wind and solar. These price spikes won't be limited to our electricity bills either, the authors argue. "Anything that increases the price of energy will also increase the price of goods that use energy indirectly."

The better solution to improving America's energy economy, the book shows, is to let the market work by putting power in the hands of consumers. But "many environmental pressure groups don't want to leave conservation to individuals, preferring government mandates to change energy use." In other words, green-job proponents know they're pushing a bad product. Rather than allow the market to expose the bad economics of green energy, they'd use the power of government to force expensive and unnecessary transformation.

"To a large extent the choice we face on greening the economy is whether we will continue to rely on people and firms responding to price signals received in the market, or whether we will supplant those signals with decisions made by politicians and bureaucrats in Washington, D.C.," the authors write. This latter strategy brings considerable risk. Morriss, Bogart, Meiners, and Dorchak argue that when government chooses technologies, it often fails for three reasons. First, governments are insulated from market signals. Second, firms reorient away from producing quality, cost-efficient products and toward consuming government largesse. Third, government decisionmakers are only responsible for what happens between now and the next election, meaning they are unlikely to take long-term costs into account.

> "This concise book dispels a number of myths and leads to the realization that wind power and solar power, long touted as effective power sources, are neither cheap nor 'green.'"
>
> — Robert L. Bradley Jr., Founder & CEO, Institute for Energy Research

The False Promise of Green Energy carefully analyzes the arguments for subsidies and regulation. The authors address the trouble in defining just what a green job is: "Highly credible sources, such as the Bureau of Labor Statistics and the Specialist in Labor Economics at the Congressional Research Service, confirm that there is no coherent definition of a green job." They look at the impact of green policies on trade, personal transportation, and mass transit. They expose the economic fallacies behind green jobs claims and debunk the idea that a top-down greening program will stimulate the economy. And they offer solutions, with a focus on incremental change.



"Our current mix of energy technologies is deeply embedded within our society and our economy. We need to focus on how to improve the reliability and environmental impact of our energy system, not propose massive change," the authors write. There's even a place for government, they admit. Rather than subsidies and regulation, however, governments can promote a more secure energy future by distributing information and setting standards in their role as consumers. ■

Visit www.cato.org/store or call 800-767-1241 to get your copy of *The False Promise of Green Energy* today; $24.95 hardback.

Of Bureaucrats and Matrimony

Federal marriage law is a muddle of "more than 1,100 rights, responsibilities, prerogatives, duties, entitlements, tax breaks, and tax obligations for married couples," writes Cato research fellow Jason Kuznicki in **"Marriage against the State: Toward a New View of Civil Marriage"** (Policy Analysis no. 671). This is because, "in one largely unrelated policy area after another, legislators have added provisions that address marriage in the context at hand, but in no others." To establish a coherent federal marriage policy, one consistent with the Supreme Court's opinions supporting marriage as a fundamental right, "the government should recognize marriages only so it can more effectively leave them alone." The federal government's role, in other words, should be to assure that marriage remains an individual right—and protect it as such. Kuznicki looks at existing marriage policy to show where it is and is not consistent with this principle, then goes on to apply the principle to such contentious debates as taxation, same-sex marriage, and immigration. Much confusion can be dispelled, Kuznicki writes, "by separating welfare rights from marriage, separating civil marriage from religious marriage, and preserving only those aspects of federal-level civil marriage that act as safeguards of individual rights."

A Gridlocked Government Is a Good Government

Divided government is a recipe for gridlock. Libertarians applaud this, recognizing that gridlock limits the state's ability to enact more, usually unsound, policies. But Progressives think otherwise, and so attempt to route around gridlock by moving lawmaking out of Congress and into administrative agencies, a move they contend will lead to more efficient and informed policymaking. In **"The Case for Gridlock"** (Policy Analysis no. 672), Marcus E. Ethridge, professor of political science at the University of Wisconsin–Milwaukee and author of *The Case for Gridlock: Democracy, Organized Power, and the Legal Foundations of American Government* (Lexington Books, 2010), shows how the Progressive critique is wrong. "Decades of experience and research on interest groups and the workings of administrative policymaking clearly demonstrate that the more efficiently responsive the government is, the greater the influence of interests that enjoy the political advantages of superior organization," he writes. "A return to the frustrating, sluggish, gridlock-prone system of legislation set forth in the Constitution will actually enhance representation of broad, unorganized, public interests." Ethridge traces the history of Progressive attempts to thwart the Constitution's checks and balances and demonstrates how an inefficient government is often a better one.

Protectionism by Any Other Name

"The antidumping remedy is a much larger problem than the dumping it is presumed to address," argues Daniel Ikenson, associ-

CATO POLICY REPORT is a bimonthly review published by the Cato Institute and sent to all contributors. It is indexed in PAIS Bulletin. Single issues are $2.00 a copy. ISSN: 0743-605X. • Correspondence should be addressed to *Cato Policy Report*, 1000 Massachusetts Ave., N.W., Washington, D.C. 20001. • Website: www.cato.org, call 202-842-0200, or fax 202-842-3490.

ate director of the Center for Trade Policy Studies at the Cato Institute, in **"Protection Made to Order: Domestic Industry's Capture and Reconfiguration of U.S. Antidumping Policy"** (Trade Policy Analysis no. 44). As the Obama administration proposes to amend certain aspects of the Commerce Department's oversight of the U.S. antidumping law, Ikenson reflects on the history of antidumping and shows how it changed from a program designed to help

consumers to one that is indistinguishable from protectionism. "No longer are anti-competitive or predatory pricing practices the target of the antidumping law," Ikenson writes. "Rather, its target is price discrimination—specifically, the act of a foreign firm charging lower prices in the United States than it charges in its home market for the same product." The paper outlines the history of antidumping and its evolution "from an obscure offshoot of competition law into the predominant instrument of contingent protection that it is today." He shows how the recent increase in antidumping activity has nothing to do with nefarious action by foreign firms but, rather is a "progressive expansion of the definition of dumping, relaxation of evidentiary standards, and a pro-domestic-industry bias in the law's administration at the U.S. Department of Commerce." Given these facts, new attempts to expand the reach of these laws are misguided.

The Root of Africa's Troubles

"The contemporary era of globalization has afforded unprecedented opportunities to billions of people in emerging markets," writes Greg Mills in **"Why Is Africa Poor?"** (Development Policy Briefing Paper no. 6). Yet the growth arising from those opportunities appears to have passed Africa by. Mills, director of the Brenthurst Foundation in Johannesburg, South Africa, and author of *Why Africa Is Poor—and What Africans Can Do about It*, first examines the reasons often given for African poverty, including lack of access to international trade, too much foreign aid, little technical and development expertise, and scant natural resources. Each of these is either inadequate to explain Africa's state or simply a myth. Rather, Mills writes, "The main reason for African poverty is the bad choices made by African rulers." He notes that "it is important to recognize that those leaders have often taken decisions under difficult circumstances" but that "in other parts of the world, those challenges are usually regarded as obstacles to be overcome, not as permanent excuses for failure." Mills offers explanations for the sorry state of African governments, including the fact that "African societies . . . have overwhelmingly been run along the lines of the 'politics of the belly'—a primordial lust for wealth and power along crude racial, tribal, party, and familial lines." He says the key to promoting economic growth is not more aid from rich countries but liberalization, even if this means an uphill battle against African political elites who "must be willing to prioritize economic growth over political power." ■

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one kind of disaster by inviting another."

Such sentiments may strike many of you today as timeless principles that need not be dusted off during momentous anniversaries. And yet, we must not forget that 50 years ago, liberal Democrats, men like Henry M. "Scoop" Jackson, Missouri's Stuart Symington, Senate Majority Leader Lyndon Johnson, and a young senator from Massachusetts, John F. Kennedy, knocked Eisenhower for constraining the military's budget and allowing fiscal considerations to shape the nation's strategic objectives. They charged that Eisenhower was forcing the nation to fight the Cold War with one arm tied behind its back and that his decision to shift resources out of the Army, especially, limited the nation's flexibility to engage in land wars in Asia.

Today's neoconservatives, the intellectual descendants of the liberal hawks of the late 1950s, are equally dismissive of deterrence, but I would also say of basic geography. They say that we Americans can only be safe if the whole world is safe; that democracy in North America depends upon democracy in Southwest and Central Asia. They call for the U.S. military to drain the swamp wherever terrorists might poke up their heads, or for Washington to embark on open-ended nation-building missions whenever a petty despot with a megaphone seems poised to seize control of any plot of land on the planet.

I'm not naive; neither was Eisenhower. He correctly anticipated that the military-industrial complex's influence over politics would be difficult to break. He hoped that an engaged and knowledgeable citizenry would serve as the necessary corrective, but as I've noted, most Americans are simply too busy with their daily lives to pay much attention. And a few do benefit handsomely.

But that might be changing. The depths of the nation's fiscal crisis have evoked warnings that our insolvency threatens our national security. The Pentagon's budget has doubled in inflation-adjusted dollars since 1998, and remains one of the few government agencies for which the Obama administration has programmed real growth for the foreseeable future. But as more Americans come to understand the high costs and dubious benefits, a backlash is all but inevitable.

At this point in time, we wish we had another Eisenhower, or someone like him: articulate, knowledgeable, whose credentials on national security are unassailable, who can communicate an alternative vision for U.S. national security that does not depend upon a massive military scattered in a vast archipelago of hundreds of bases around the world.

As it struggles to bring the costs of our enormous military under control, Washington, the city of Washington, should embrace strategic restraint—an approach to global affairs characterized by the minimal use of force combined with extensive economic and cultural engagement around the world. That is a foreign policy befitting of a constitutional republic, a foreign policy in close harmony with the vision of the Founders, and one that is consistent with the vision set forth 50 years ago by Dwight Eisenhower. ■

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"To Be Governed..."

ENVIRO vs. ENVIRO IN TAKOMA PARK

The modest gray house in Takoma Park was nearly perfect, from Patrick Earle's staunchly environmentalist point of view. It was small enough for wood-stove heating, faced the right way for good solar exposure and, most important, was in a liberal suburb that embraces all things ecological.

Or almost all. When Earle and his wife, Shannon, recently sought to add solar panels to the house, which they have been turning into a sustainability showplace, the couple discovered that Takoma Park values something even more than new energy technologies: big old trees.

When they applied to cut down a partially rotten 50-foot silver maple that overshadowed their roof, the Earles ran into one of the nation's strictest tree-protection ordinances. Under the law, the town arborist would approve removing the maple only if the couple agreed to pay $4,000 into a city tree-replacement fund or plant 23 saplings on their own. . . .

Takoma Park City Council members, who are considering revising the 1983 tree-protection law, listened Monday night as otherwise like-minded activists vied to claim the green high ground.

Tree partisans hailed the benefits of the leafy canopy that shades 59 percent of the town: Trees absorb carbon, take up stormwater, control erosion and provide natural cooling. . . .

Solar advocates at the hearing said that they are tree lovers, too, but that scientific studies support the idea of poking select holes in the tree cover to let a little sun power through.

—***Washington Post,*** January 13, 2011

WELL, BUSH GOT TWO TERMS

Former Vice President Dick Cheney ... said President Obama is likely to be a one-term president because his policies are unpopular with the public.

"His overall approach to expanding the size of government, expanding the deficit, and giving more and more authority and power to the government over the private sector," Mr. Cheney said in an interview with Jamie Gangel for NBC News. "Those are all weaknesses, as I look at Barack Obama. And I think he'll be a one-term president."

—***New York Times,*** January 17, 2011

IT'S EASY TO SUPPORT HIGHER TAXES IF YOU'RE NOT PLANNING TO PAY THEM

Since joining the D.C. Council two years ago, Michael A. Brown has become the chief advocate for raising taxes on the city's wealthiest residents, arguing that those who earn at least $250,000 a year are not paying their share.

Yet Brown and his wife have failed to pay the property taxes on a Chevy Chase home assessed at $1.4 million, according to public records. Brown, who earns more than $300,000 a year, owes the District $14,263 for property taxes, the records show.

—***Washington Post,*** January 14, 2011

GEORGE W. MCDONNELL

Virginia Gov. Robert F. McDonnell plans a massive spending campaign that he said would unclog state roads, award thousands more college degrees and spur job creation as part of an aggressive legislative agenda he is expected to roll out this week.

McDonnell (R) will press lawmakers to approve a series of statewide projects he said would be paid in part through Virginia's $403 million budget surplus, $337 million in higher-than-expected tax revenue, and $192 million generated through cuts and savings. . . .

He plans to borrow nearly $3 billion over the next three years.

—***Washington Post,*** January 9, 2011

THE DEVIL MADE HIM DO IT

Opening a segment on faith-based prison rehabilitation on his show The 700 Club this week, [Pat] Robertson noted that many conservatives look at drug addicts and "think 'lock 'em up, throw away the key.'" . . . Beyond putting criminals behind bars, he argues, "we've got to take a look at what we're considering crimes. I'm not exactly for the use of drugs, don't get me wrong, but I just believe that criminalizing marijuana, criminalizing the possession of a few ounces of pot, that kinda thing it's just, it's costing us a fortune and it's ruining young people. Young people go into prisons, they go in as youths and come out as hardened criminals. That's not a good thing."

—***Mediate.com,*** December 22, 2010

JUST WHAT THE WORLD NEEDS: TENSE AND JITTERY LEADERS NAGGED INTO NICOTINE WITHDRAWAL

In Washington and across the country there's understandably a great deal of speculation on whether President Obama and the incoming speaker of the House, John Boehner, can work together and on what issues.

Here's a suggestion on where to start.

Stop.

Stop smoking.

—**Tom Brokaw,** ***Washington Post,*** December 12, 2010