# A Series of Constitutional Thunderclaps

*By Joshua Hardman*

How Cato's Robert A. Levy Center for Constitutional Studies went from a napkin sketch to a crucial independent voice in America's courtrooms.



Roger Pilon (right), who founded the Center for Constitutional Studies in 1989, in conversation with Supreme Court Justice Clarence Thomas at Cato headquarters.

In 1992, Alfonso Lopez was a high school student in San Antonio, Texas, when prosecutors charged him under the federal Gun-Free School Zones Act with bringing a handgun to school. Surprisingly, Lopez's young public defender asked a question not heard since the New Deal's 1937 constitutional revolution: Did Congress's power to regulate interstate commerce authorize it to enact this statute? On appeal, the Fifth Circuit answered: no.

Roger Pilon, who founded Cato's Center for Constitutional Studies in 1989 and directed it for the next 30 years, had long argued that the commerce clause was never meant to be an open-ended regulatory grant to Congress. When he saw that decision, plus the Supreme Court's decision to review it, he ordered a study by a leading constitutional scholar and provocatively titled it "Is the Court Ready for Constitutional Government?" (Only later would the center launch its amicus program.) Six weeks before oral argument, Pilon sent the study to the justices and their clerks, then made Cato's argument widely known.

At term's end, Chief Justice William Rehnquist ruled that the act exceeded Congress's authority to regulate interstate commerce. Days later, invited by the *Washington Post* to explain the *United States v. Lopez* decision, Pilon noted that it had "jarred official Washington," adding that *Lopez* was not about guns. It was about that most fundamental of political questions: Where

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does government find its constitutional authority, and how far does it go? So sure was Congress of its authority that it hadn't even bothered to cite its source.

"That decision was a real thunderclap," says Thomas Berry, the current director of Cato's Robert A. Levy Center for Constitutional Studies. "It put the center on the map. Nobody thought the commerce clause had any limits anymore."

### A Sketch on a Paper Napkin, a Gauntlet Thrown Down

As Cato approaches its 50th anniversary, Levy Center scholars are counting the thunderclaps that have flowed from the center's creation: the more than 1,100 amicus briefs, filed mostly in the Supreme Court, cited 29 times across 23 decisions; the *Cato Supreme Court Review*, released annually at Cato's Constitution Day Symposium, the first scholarly review of the Court's term plus its term ahead, reflected to date in nearly 400 articles; the distribution of more than 10 million *Cato Pocket Constitutions*; and the lectures, debates, symposia, publications, and media appearances imparting the center's unique perspective to countless law students, lawyers, academics, and judges.

But none of that could have happened had a tiny band of intellectual pioneers not begun preparing a proper ideological foundation in the 1970s. At that time, the legal landscape looked bleak for those taking the Constitution's limits seriously. Liberal judges were inventing governmental powers from whole cloth, Pilon said, while conservative judges, in democracy's name, were deferring to Congress and state legislatures, thus slighting the Constitution's natural-rights foundation and limited-government structure. In short, both camps were advancing the progressive agenda that the New Deal Court had "found" in the Constitution. Both were undermining the Founders' Constitution by opening the floodgates to the modern administrative state.

Thus, in the mid-1970s, Pilon and Richard Epstein at the University of Chicago, Bernard Siegan at the University of San Diego, and a very few others began developing an approach to judicial review contrary to the legal establishment's more political approach. By the early 1980s, these classical liberal scholars had developed a fairly robust account of the matter, but they had no institutional foundation for further work and implementation.

Enter the Cato Institute. Pilon, then a senior political appointee in the new Reagan administration, saw that as an opportunity to begin advancing the classical liberal approach. Thus, in 1983, at lunch with Ed Crane and James Dorn—then Cato's president and editor of its *Cato Journal*, respectively—Pilon sketched on a paper napkin the program for a seminal conference on "Economic Liberties and the Judiciary." Through it, "we sought to fundamentally transform the climate of ideas," Pilon said. "Our premise? The Constitution creates a government of delegated, enumerated, and thus limited powers, leaving us otherwise free to plan and live our lives."

That 1984 conference of Washington insiders featured a marquee debate between Antonin Scalia, then a federal appeals court judge, and Epstein, who argued that judges should actively defend economic liberty against the political branches. *Reason* magazine historian Damon Root's *Overruled: The Long War for Control of the US Supreme Court* tells the story: "Libertarians threw down the gauntlet," Pilon said.

Five years later, Pilon founded Cato's Center for Constitutional Studies. The center addresses many legal matters, but its fundamental mission is advancing "principled judicial engagement," an approach distinct from judicial activism and judicial restraint. In 2017, thanks to an anonymous gift, the center was named in honor of Robert A. Levy, a businessman-turned-lawyer who would play a central role in some of the center's legal victories after joining in 1997.

## A Thousand Flowers Bloom

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Libertarian litigation shops like the Pacific Legal Foundation, Institute for Justice, Goldwater Institute, and New Civil Liberties Alliance are ideological allies.

"Our focus is on legislation and litigation," said Timothy Sandefur, vice president for



Thomas A. Berry is the director of Cato's Robert A. Levy Center for Constitutional Studies and editor in chief of the *Cato Supreme Court Review*. (Photo by Richie Downs)

legal affairs at the Goldwater Institute and a Cato adjunct scholar. "But every victory we win for liberty in legislatures or in the courts will be short-lived when the political winds change, unless we win the philosophical battles waged by Cato."

Lawyers with clients face another constraint: A constitutional argument they believe correct might undercut their client's chances of winning, but they owe their clients a duty of zealous representation. For Cato, amicus briefs offer opportunities to argue without compromise for decisions that restore the original meaning of the Constitution.

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Briefs can also be entertaining, Berry said, fun to read, and attractive for audiences beyond judges or litigants. He first encountered Cato's work as a Stanford law student in 2014, when he read the "Truthiness Brief" challenging an Ohio law that punished political advertisements for being untrue. Ilya Shapiro, who followed Pilon as center director, wrote it with Trevor Burrus and Gabriel Latner, joined by satirist PJ O'Rourke, who was then Cato's H. L. Mencken Fellow. The brief traced the history of such laws, asked exactly who should decide what's true, and invoked the "truthiness" term coined by comedian Stephen Colbert to extol the role of assertions of gut feeling in political discourse. In *Susan B. Anthony List v. Driehaus*, the Supreme Court ruled unanimously that the challengers could sue. Ohio's law was later struck down.

Shapiro turned that institutional voice into a prolific brief-producing program. Under his leadership, Cato created and grew its legal associates program and began filing dozens of briefs annually, each a well-researched achievement. Anastasia Boden, the center's third director, brought a litigator's sense of what attracts a judge. Berry, who became the fourth director in September 2024, says he wants briefs that are "principled and personal."

### An Oft-Lonely Constitutional Perspective

Given that our courts are arguably the least understood branch of government, persuading audiences to distinguish their

# TWO DECADES *of Constitutional Thunderclaps*

***Lawrence v. Texas* (2003).** In 1998, John Lawrence and Tyron Garner were prosecuted under Texas's Homosexual Conduct Law. Cato's brief argued that "a law authorizing the police to intrude into one's intimate consensual relations is at war" with the Constitution's protection of individual liberty. Justice Anthony Kennedy's majority opinion cited the brief twice. "This was an easy call for us," Pilon told Root in *Overruled*. "It's your classic case of majoritarian tyranny."

***District of Columbia v. Heller* (2008).** In 2002, Levy began planning a self-financed lawsuit against the District's handgun ban, working with Clark Neily, then at the Institute for Justice, and attorney Alan Gura. Levy was cocounsel when the case reached the Supreme Court. "The case never would have happened or been successful without his participation," Neily said. Writing in the 2008–2009 *Cato Supreme Court Review*, Neily observed that before *Heller*, "the Second Amendment was a sort of constitutional Loch Ness Monster: Despite occasional reported sightings, many people—and certainly most judges—were inclined to believe it didn't really exist."

Cato then joined the Pacific Legal Foundation in *McDonald v. City of Chicago* (2010), urging the Court to revive the Fourteenth Amendment's privileges or immunities clause, thereby requiring state and local governments to respect the Second Amendment right recognized in *Heller*. In a 5–4 ruling, four justices relied on the due process clause. Justice Clarence Thomas supplied the fifth vote, relying on the privileges or immunities theory Cato had pressed.

***National Federation of Independent Business v. Sebelius* (2012).** Ask Berry for a turning point in Cato's influence, and he points to Cato's interdepartmental opposition to the Affordable Care Act's individual insurance mandate. Remembered mainly for the Supreme Court's decision, the case had previously wound through several lower courts. Cato filed briefs at every stage, starting with a case in Florida, working alongside scholars such as Georgetown Law professor (and Cato-affiliated scholar) Randy E. Barnett. It was a perfect fit, Berry says, because this fight over health care policy was also a fight over first principles: What are the limits of the federal government's enumerated powers?

Recall that question in *Lopez*, back in 1995. To challenge the individual mandate, the center drew on Pilon's scholarship. Five justices agreed that the commerce clause couldn't support the mandate, but Chief Justice John Roberts upheld it anyway—as a tax—a reminder of how much work remains.

***Loper Bright Enterprises v. Raimondo* (2024).** Cato's influential "cert" brief in 2022 urged the Supreme Court to take this case and overrule *Chevron USA v. Natural Resources Defense Council*, the doctrine that for 40 years had instructed courts to defer to federal agencies' interpretations of unclear statutes. As of June 28, 2024, *Chevron* was gone, a decision that was "not at all guaranteed," Berry says.

He notes that Justice Scalia, emblematic of the conservative judicial restraint school, had clearly supported *Chevron*, while Justice Thomas had written a leading opinion expanding it. "If you had polled them 20 years ago," Berry believes, "the Court would likely have upheld *Chevron* 9–0." He credits the reversal to a full-court press by academics and practitioners who started from first principles about the respective roles of judges and policymakers. It was a monumental win for judicial engagement: Judges must independently interpret the law, not defer to bureaucrats.



Staff and scholars for the Levy Center are seen here during Cato's 25th annual Constitution Day on September 17, 2026. Not present: senior fellows Walter Olson, Dan Greenberg, and Irina Manta, and Ilya Somin (B. Kenneth Simon Chair in Constitutional Studies). (Photo by Richie Downs)

role from that of the political branches is the center's hardest job.

To illustrate, in *Obergefell v. Hodges* (2015), Cato filed briefs supporting a constitutional right to same-sex marriage, while in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), Cato's brief supported a constitutional right against compulsory speech celebrating same-sex marriage. Among major legal institutions, only Cato took both positions.

While Pilon and Berry note that one of the center's most important accomplishments is in mainstreaming principled legal thought, their recent visits to law schools concern them. Within right-of-center law school groups, chiefly the Federalist Society, Berry says a still-small contingent has grown more openly illiberal over the past decade and is more willing to use government power to advance social conservatism or to punish private entities it finds biased or harmful—arguments he once expected only from the left. In the Trump era, he adds, many students are less exposed to the classical liberal perspective than ever before.

So, Berry and other Cato scholars go to campuses to show students there is another way. With faculties upwards of 90 percent left of center, there are hardly any libertarians, let alone libertarian originalists. Students often tell him they've never heard his perspective. Not all originalists want

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to expand presidential power, he explains, and small-government, individual-rights originalists can call out executive abuses whether the president is a Democrat or a Republican.

### New World, Same Constitution

Berry often watches the Supreme Court deliberate in person, so he can see when the justices lean in and when they check out. At the April 2026 birthright citizenship argument, Solicitor General D. John Sauer argued that airplanes and "birth tourism" had created a new world that should merit the administration's interpretation of the Fourteenth Amendment's straightforward citizenship clause. Chief Justice Roberts replied: "It's a new world, it's the same Constitution."

On June 30, 2026, Roberts wrote the Court's opinion in *Trump v. Barbara*, striking down the president's executive order aimed at denying citizenship for people born in the United States to parents without permanent immigration status.

At a time when Congress has ceded so much authority to the executive branch, it's one recent decision evincing the intellectual integrity of the Supreme Court and the ever-vital role of judicial engagement.

"Observers who think that justices simply rule for or against Donald Trump based on party or ideology would likely be confused by his mixed win-loss record this year," Berry emphasized in his foreword to the 2025–2026 *Cato Supreme Court Review*. "When Trump has asserted powers claimed by a long line of presidents before him and supported by Framing-era history [see the *Slaughter* decision affirming his power to fire executive officials], he has been relatively successful."

Nearly four decades after Pilon founded the Center for Constitutional Studies, Cato continues to bring a principled constitutional perspective to future lawyers and judges, to the public, and to the Supreme Court itself. Yet for all those constitutional thunderclaps we've witnessed in a short time, Berry says the job is far from finished: "We're not even close to the ideal number of people working on these issues."

### ABOUT THE AUTHOR

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