Divisive judgments, from marriage equality to Obamacare

A Tumultuous Term at the Supreme Court

The most recent Supreme Court term was not lacking for contentious subject matter: Obamacare in *King v. Burwell*, same-sex marriage in *Obergefell v. Hodges*, and environmental regulation in *Michigan v. EPA*, to name just a few. And unlike the previous term, which saw record-breaking unanimity in the Court, this year saw a return to split decisions on topics like governmental power and civil liberties. In September Cato's Center for Constitutional Studies released its 14th annual *Cato Supreme Court Review* at its 14th annual Constitution Day symposium, where the term's major cases were analyzed and the term coming up was previewed.

The day opened with Michael Cannon, director of Cato's health policy studies, charging Chief Justice John Roberts with rewriting the Affordable Care Act in *King v. Burwell*. The plain text of the ACA provides tax credits for qualified individuals who purchase their insurance through "an Exchange established by the State," but the IRS later ruled that credits were also available for those who purchase through *federal* exchanges. As Cannon explained, "The IRS effectively rewrote and expanded the ACA, claiming the power to tax nearly 100 million people, despite clear statutory language" limiting that power. Granting the text's "natural reading," Roberts upheld the IRS reading all the same, pointing to "context and structure." And that, Cannon concluded, transferred "the power of the purse and the power of the tax from the people's elected representatives to unelected judges and unelected government bureaucrats."

In a later panel, Yale Law's William Eskridge Jr., who coauthored Cato's amicus brief in the same-sex marriage case, *Obergefell v. Hodges*, expressed disappointment that the Court "lost an opportunity to ground this landmark holding on the original meaning" of the Fourteenth Amendment, relying instead on a fundamental right to marry. Yet from Magna Carta on, due process had been held to mean that government had a duty to provide a rule of law for all, and so equal protection was the proper ground here.

WILLIAM ESKRIDGE JR., a professor at Yale Law school (left), and STEVEN G. CALABRESI, a professor at Northwestern University School of Law, spoke at Cato's Constitution Day conference.

Cato senior fellow Walter Olson discussed the "hijab case," *EEOC v. Abercrombie & Fitch Stores*, which centered on religious accommodation in the workforce. The Court ruled in favor of Samantha Elauf, who was turned down at age 17 from a job at Abercrombie over her head covering, which violated their "look policy." Abercrombie had countered that Elauf never requested a religious accommodation, thereby placing the burden on them to assume her clothing was a religious choice, while employers are actually discouraged from bringing up religion during an interview. Normally a case like this would generate great public controversy — yet, Olson observed, it was "surprisingly uncontroversial," with both conservatives and liberals rallying behind Elauf. In fact, the Cato Institute was the only private group outside the business and employment sector to file a brief in support of Abercrombie, arguing that Elauf's case "puts the employer in the untenable position of having to inquire into certain sensitive personal information even as such queries themselves are legally disfavored."

The symposium concluded with Cato's annual B. Kenneth Simon Lecture, given this year by Northwestern University Law's Steven G. Calabresi, the co-author, with Professor Eskridge, of Cato's *Obergefell* brief. Speaking on originalism and liberty, Calabresi argued that the Constitution is more libertarian than is believed by many conservatives, including Justice Antonin Scalia, for whom he clerked.

To develop that argument, Calabresi drew first on the Constitution's text and structure, then on legal history running from Magna Carta through the Founding period, the post-Civil War era, and finally up to the present. He noted that "Fifty-nine percent of the American population in 1791, when the Bill of Rights was ratified, lived in states that had Lockean natural rights guarantees in their state constitutions." Arguing that the Ninth and Fourteenth Amendments have judicially enforceable libertarian content, he concluded that, when courts decide cases before them, originalism means endorsing a presumption of liberty, not a presumption of constitutionality. ■

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