

FOREWORD

The Roberts Court Emerges: Restrained or Active?

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The Cato Institute's Center for Constitutional Studies is pleased to publish this sixth volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended, plus a look at the cases ahead—all from a classical Madisonian perspective, grounded in the nation's first principles, liberty and limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

This was the first full term of the Roberts Court, of course, and many were the commentaries at term's end about how things may have changed from the long years of the Rehnquist Court. A useful context for those commentaries appeared early this year with the publication of ABC News correspondent Jan Crawford Greenburg's important new book, *Supreme Conflict*, which chronicled the largely failed struggle over the past quarter century of the politically ascendant conservative movement to reshape the Court in its own image. Ms. Greenburg concluded, however, that with the confirmation of John Roberts and Samuel Alito—more savvy and focused than the justices they replaced—the movement may have succeeded at last in putting its stamp on the Court. But what is that stamp? And do we see signs of it in this first full term?

During his confirmation hearings and after, Chief Justice Roberts made it clear that his was an evolutionary approach to legal change, if change there must be—that is one sense of “conservative.” Cognizant of the need to bring the Court's independent minds together to some degree if the Court is to speak at all, he thought it better

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that the Court speak less ambitiously than it has in recent years, but with one voice, if possible—the two are not unconnected. There is much to be said for that view. Bitterly divided 5-4 decisions—to say nothing of fractured multi-opinion decisions—suggest fundamentally opposing visions of the Constitution and the law enacted under it. Yet the Constitution was written for all of us: it is the set of rules, we believe, on which we all agreed at the beginning. A deeply divided Court undercuts that conception of our basic law, undercuts the Court’s own authority, and, more important still, nourishes the idea that all is politics, little is law.

Much as the chief justice may have wished to see the Court travel down that ecumenical path, it did not happen this term. By term’s end, only one-quarter of the Court’s cases were decided unanimously, the lowest percentage in a decade, whereas fully one-third ended in 5-4 splits, the highest percentage in a decade, with several dissents read from the bench. Of the 24 5-4 decisions, 19 were “ideological” insofar as all of the Court’s conservatives or liberals were on one side or the other. In 13 of the 5-4 decisions, all of the Court’s conservatives were in the majority; 6 decisions had all of the Court’s liberals in the majority. But since 4 of those 6 were Texas death penalty cases, liberals fared even worse this term than the numbers alone would indicate. And as many have noted, Justice Anthony Kennedy was in the majority in all 24 5-4 decisions: in fact, he was in the majority in all but two of the Court’s decisions; thus, it is no stretch to call this the Kennedy Court.

Not surprisingly, the Court’s clear ideological outcome drew sharp commentary, especially from liberals. But conservatives responded that when looked at more closely the actual doctrinal shifts were slight: abortion is still legal, for example, and campaign finance regulations are still very much in place. From a deeper perspective, however, that result-oriented, ideological approach to analyzing the Court’s term, so prominent today, plays directly into the contention that all indeed *is* politics, little is law. Were that true, it would mark the death of the rule of law, of course, along with the principle of equality that underpins it, as Chief Judge Danny Boggs brings out in his B. Kenneth Simon Lecture below.

Doubtless, there are many conservatives, like all too many liberals, who look at the Court and its decisions in just that result-oriented way, as if it were simply one more political branch of government,

not the non-political branch charged with applying the law. But the more thoughtful conservatives who constituted the movement about which Jan Greenburg wrote were not of that sort. In fact, quite the opposite: they were rebelling against the Warren and Burger Courts that had, they believed, politicized the Constitution and the law by deciding cases as if they were *making* and not simply *applying* the law. Thus, the image they sought to stamp on the Court through the confirmation of new justices was one of judicial “restraint”—as opposed to the judicial “activism” they saw the Court’s liberals practicing.

But all too often the kind of restraint those conservatives would have the Court exercise has taken the form, essentially, of deference to the political branches. We see that, in fact, in Judge Robert Bork’s 1990 best-seller, *The Tempting of America*, which set forth what for some time had been the dominant strain of conservative constitutional thought on such matters. America’s first principle as a nation, Judge Bork wrote, is self-government, which means “that in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities.” Our second principle, he continued, is “that there are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule” (emphasis added).

That vision of America’s moral, political, and legal foundations plays directly, of course, into the conception of judicial restraint as deference to the political branches. But it also affords an expansive role for politics—and, therefore, government—in our lives—for majorities to rule “in wide areas of life,” leaving individuals free only “in some areas of life.” Moreover, because it is largely indifferent substantively, it is a vision available not only to conservatives but to liberals as well. It came as no surprise, therefore, that when the Rehnquist Court began eventually to rediscover constitutional limits to Congress’s enumerated powers and the constitutional rights of individuals to use their property free from government interference, liberals objected to the Court’s “activism” and began urging judicial “minimalism.” (Some conservatives did as well, it should be noted.) If “restraint,” understood as deference, is to be the order of the day, those liberals said, let’s practice it evenhandedly, not selectively.

And so we come to the question of whether terms like judicial “restraint” and “activism,” whether invoked early on by conservatives or more recently by liberals, are useful for reflecting on the

work or direction of the Court, because behind them there is always a substantive theory, where the focus inevitably ends. With “restraint” understood as deference to the political branches, that substantive theory is one of constitutional majoritarianism. And that implies, as a normative matter, that legitimacy is a function simply of political will.

But as articles in this *Review* have argued from its inception, that is not America’s theory of legitimacy. If it were, the Constitution would never have been ratified. Anti-federalists, after all, were wary of the proposed Constitution from the start, for fear that it authorized too much government. Federalists sought to assure them by pointing to the document’s many substantive limits on expansive government. Both sides understood the problem of majoritarian tyranny, of course. And far from grounding legitimacy in mere political will, both sides invoked reason and the theory of natural rights.

Thus, our first principle as a nation was not that in *wide areas of life* majorities were entitled to rule simply because they were majorities but rather that in wide areas individuals were entitled to be *free* simply because they were born free. Nevertheless, majorities were entitled to rule in *some* areas of life—our second principle—not because they were majorities but because we had *authorized* them to rule in those areas, pursuant to our natural right to govern ourselves as individuals. That is the theory of legitimacy that is implicit in the Declaration of Independence; in the Constitution, especially in its Preamble and its doctrine of enumerated powers; in the Bill of Rights, especially in the Ninth and Tenth Amendments; and later in the Civil War Amendments, which brought the states more fully, at last, under those principles.

That, of course, is a rich, *substantive* theory of the Constitution, grounded not simply in political will but in the substantive theory of natural rights, the foundation for our system of government. It has judges, who are authorized to say what the law is, deferring to the political branches only insofar as the actors in those branches are acting within the scope of their authority and consistent with the rights retained by the people, enumerated and unenumerated alike. Thus, judicial “restraint” under this view implies anything but a supine Court sanctioning vast government powers—as both liberal and conservative jurists do today—powers restrained only by rights expressly in the Constitution or rights gleaned from “evolving

social values,” common touchstones for conservative and liberal jurists, respectively. Rather, restraint on this view means applying the law fully and *actively*—not to be confused with judicial “activism.” It means assiduously policing the Constitution, recognizing power when it is authorized, limiting it as it is limited.

Far from being free-standing descriptions of judicial behavior, then, the terms “activism” and “restraint,” if at all helpful and not simply confusing, take their force from the underlying substantive law. And arguments invoking them, when employed other than for praise or obloquy, reduce inevitably to arguments over what the underlying law really is. That understanding is coming increasingly to be appreciated in conservative jurisprudential circles. So too, and more important still, is the richer, more substantive conception of the Constitution—as opposed to Judge Bork’s majoritarian conception, its roots in the Progressive Era. The question for us, however, is whether the nominally “conservative” Roberts Court reflects this evolving conservative thought. As the articles below indicate, the answer is mixed. To illustrate that I will touch very briefly on just three of the decisions that are discussed more fully in those articles.

The issue of judicial restraint came up pointedly in what may turn out to be the most important decision of the term, *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL II)*, when Justice Antonin Scalia, joined in his concurrence by Justice Kennedy, and Justice Clarence Thomas, charged Chief Justice Roberts, writing for the Court, with “faux judicial restraint.” Unfortunately, *WRTL II* is the kind of decision that is all but impossible to explain to the educated layman, an audience this *Review* tries to reach, because it is simply the latest in a series of campaign finance cases that got off on the wrong foot from the start. By now this law is so complex—and confused—that one would sooner read the Internal Revenue Code than plow through it. Nevertheless, Professor Lillian BeVier does an excellent job below of placing this decision in its doctrinal context, particularly as she shows how it reinserts the First Amendment in the campaign finance debate.

To abbreviate the decision for present purposes, the Court’s five conservatives joined to find that because broadcast ads that were aired before the 2004 federal elections by Wisconsin Right to Life, Inc., a nonprofit ideological advocacy corporation, did not expressly advocate the election or defeat of a particular candidate, nor were

they the functional equivalent of such express advocacy, the prohibition of corporate expenditures on such ads by §203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) does not apply. Because §203 burdens political speech, the Court ruled, the Federal Election Commission (FEC) must show that applying it to restrict a particular ad secures a compelling governmental interest by narrowly tailored means. The FEC failed in that because the “intent-and-effect” test it proposed to judge whether such ads were the functional equivalent of express advocacy was no part of the law. For in *McConnell v. FEC*, which upheld a facial challenge to BCRA in 2003, the Court established no such test, nor did it address the intent-and-effect test the Court rejected in 1976 in *Buckley v. Valeo*, the Court’s seminal campaign finance case. Thus, the Court found the WRTL ads outside the §203 prohibitions, as applied.

Justice Scalia’s concurrence went further. In 1990 in *Austin v. Michigan Chamber of Commerce* the Court had upheld a Michigan statute prohibiting corporations from using treasury money for independent expenditures to support or oppose candidates in elections for state offices. Scalia dissented, but at least the decision was limited to express advocacy; issue ads remained protected under the First Amendment. In *McConnell*, however, the Court expanded “express advocacy” to include ads that are the “functional equivalent” of express advocacy. The problem there, Scalia said, as well as with Chief Justice Roberts’s “susceptible-of-no-other-reasonable-interpretation” standard for discerning “express advocacy,” in which he was joined only by Justice Alito, is that all such tests are impermissibly vague and thus ineffective in vindicating fundamental First Amendment rights. Any test that would protect all genuine issue ads, Scalia concluded, would cover so many ads nominally prohibited by §203 as to make §203 overbroad and hence unconstitutional. Indeed, he noted that the chief justice’s claim that “§203 on its face does not reach a substantial amount of speech protected under the principal opinion’s test . . . seems . . . indefensible,” adding that seven justices on the Court, including the four dissenters, “agree that the opinion effectively overrules *McConnell*’s §203 holding] without saying so. This faux judicial restraint is judicial obfuscation.”

Returning to the question of how judicial restraint or activism may have been at play in this case, it should be clear initially how difficult it is to apply those terms in so complex a case in so heavily

and mistakenly litigated an area. The Court went astray at the outset when in *Buckley* it upheld many of the 1974 amendments to the Federal Election Campaign Act of 1971, thus deferring to Congress when it should instead have deferred more fully to the First Amendment. The Court's many campaign finance decisions since then have constituted a checkered history that has, if anything, only muddied the waters further. But little compares with *McConnell* in 2003, upholding BCRA's sweeping restrictions on political speech. There the Court stated plainly that it was concerned to show "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." To its credit, therefore, the Roberts Court took it upon *itself* to weigh those "competing constitutional interests"—the duty ultimately of the Court, after all, not the Congress. (And as Professor BeVier points out, Congress was hardly a disinterested party in this matter.)

The question, then, is whether the Roberts Court got it right, whether it applied the law and not something else, and that is a much closer call. Again, as a matter of first principle, this whole body of law is wrong, as Justice Thomas noted in 2000 in his powerful dissent in *Nixon v. Shrink Missouri Pac*: "The analytic foundation of *Buckley* . . . was tenuous from the very beginning and has only continued to erode in the intervening years." But judicial restraint limits courts to issues properly before them, and that fundamental question was not before this Court.

In fact, in his concurrence joining the principal opinion of Chief Justice Roberts, Justice Alito adverts to just that point:

because §203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether §203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell* that §203 is facially constitutional.

That is proper judicial restraint, because the Court decides only questions properly before it—questions that, presumably, have been properly briefed and argued. Since this was an as-applied challenge, that restraint leaves open the possibility that an as-applied challenge might fail.

But the issue is narrower still, and it comes out in a Roberts footnote. The Court in *Buckley*, to avoid constitutionally fatal vagueness, had narrowed the statute so that it restricted only expenditures on express advocacy—ads employing such “magic words” as “vote for” or “vote against.” The *Buckley* Court then struck down the narrowed statute on the ground that it still impermissibly restricted speech. “From this,” Roberts writes,

Justice Scalia concludes that “[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it.” We are not so sure. *The question in Buckley was how a particular statutory provision could be construed to avoid vagueness concerns, not what the constitutional standard for clarity was in the abstract, divorced from specific statutory language. Buckley’s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test. The Buckley Court’s “express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.”* *McConnell*, 540 U.S., at 190. And despite Justice Scalia’s claim to the contrary, our citation of *Buckley* along with other decisions in rejecting an intent-and-effect test does not force us to adopt (or reject) *Buckley’s* statutory construction as a constitutional test (emphasis added).

One can appreciate Justice Scalia’s concern to cut to the quick, and in a proper case that is likely what Chief Justice Roberts will do. But the restraint we see exercised here, far from being deference to the political branches, appears simply to be preparing the ground for a future constitutional test. The Court got it right here.

The pair of public school integration cases that Professor Samuel Estreicher discusses below, *Parents Involved in Community Schools v. Seattle School District No. 1*, are far less complicated than *WRTL II*, notwithstanding the complex “racial tiebreaker” schemes the school districts before the Court had devised to try to structure their admissions policies so that the racial demographics of their particular schools reflected, roughly, the demographics of the larger community rather than those of the vicinities of the particular schools. Faced, that is, with de facto residential segregation, school district officials instituted “voluntary” integration plans to address what they saw as the problem of de facto school segregation when students were assigned to neighborhood schools. But when those plans failed to achieve the desired racial balances in particular schools, the districts

assigned students, by race, to schools not of their choosing, often necessitating long bus rides for the affected students. Not surprisingly, the parents of those students sued the school districts, asking that the schemes be found unconstitutional as racially discriminatory.

The Court agreed with the parents, Chief Justice Roberts writing for the five conservatives who constituted the majority. Justice Kennedy concurred in part and concurred in the judgment. The Court's four liberals dissented. Applying strict scrutiny, Roberts found the racial tiebreaker schemes unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Unlike in *Gratz* and *Grutter*, the 2003 University of Michigan college and law school decisions in which the Court found "diversity" to be a compelling state interest, here the goal was simply preventing racial imbalance, and "racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity,'" Roberts wrote. Moreover, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," yet here the districts failed to show that their objectives could not have been met with non-race-conscious means. "The way to stop discrimination on the basis of race," Roberts concluded, "is to stop discriminating on the basis of race."

For his part, Justice Kennedy agreed that the plans before the Court did not survive strict scrutiny, but he thought that parts of the plurality opinion implied that race-conscious plans could never be used, and he wanted to leave the door open on that question. Public schools have a legitimate interest in ensuring equal opportunity for all, he said, regardless of race. To achieve that, however, officials may need to devise race-conscious measures in a general way that do not treat students by race individually.

Some critics complained that the *Parents Involved* decisions constituted a clear example of conservative judicial activism, following as closely as they did on the heels of the University of Michigan decisions. Yet the Court carefully distinguished those sets of decisions. Moreover, that complaint presumes that the Michigan cases were rightly decided. They were not. Equal protection means what it says: from a consideration of first principles, government may classify and discriminate on the basis of race only for the most compelling of reasons. "Good" reasons are not good enough. It is unclear, as a

practical matter, how much light there is between the plurality opinion and Justice Kennedy's. But here too the Court applied the law of the Constitution correctly, even if it left to another day the questions in this area of the law that were not before it.

In the final case I want to touch upon, *Wilkie v. Robbins*, the Court got it very wrong, as thoroughly detailed in the article below by Professor Laurence Tribe, who argued Mr. Robbins's case before the Court. Both the facts and the law in this case are complex. In a nutshell, the title Robbins took when he purchased a Wyoming ranch was unencumbered by a public easement the federal Bureau of Land Management (BLM) had obtained from the prior owner because BLM officials had failed to record it. Upon realizing their mistake, they "demanded" the easement from Robbins. Willing to negotiate a fair price for the easement, Robbins was unwilling to capitulate to the BLM's demands that he give the government the easement free of charge. With that, the officials began a campaign of egregious misconduct, a far-reaching plan of harassment designed to "bury" Robbins, to get his BLM permits, and to "get him out of business." The record is appalling.

After suffering years of illegal actions as well as abuses of authority otherwise lawful, followed by futile administrative appeals, Robbins brought suit against the BLM officials in federal court under *Bivens v. Six Unnamed Agents* for violation of his Fifth Amendment rights under the Takings Clause and for repeated attempts at extortion under the Racketeer Influenced and Corrupt Organizations Act (RICO). Following rulings on preliminary motions in the trial court and the Tenth Circuit, discovery was conducted, after which the defendants moved for summary judgment on qualified immunity grounds. The district court denied the motion as did the court of appeals, which held that Robbins had "a clearly established right to be free from retaliation for exercising his Fifth Amendment right to exclude the Government from his private property."

With that, the U.S. solicitor general, representing the BLM agents, petitioned the Supreme Court for certiorari on the RICO question, the *Bivens* question, and the qualified immunity question. But in its eventual decision on the merits, as Professor Tribe shows in exquisite detail,

the Court did not answer the one question (qualified immunity) without which the case could not have reached it at all in

this pre-trial, interlocutory posture. Bypassing that question, and remaining silent on the existence of any anti-retaliation right for property owners, the Court held that, even if such a right had been clearly established, and even if the defendants had knowingly violated it and thus were entitled to no immunity from trial or from liability for damages, they were nonetheless entitled to escape trial altogether inasmuch as the *Bivens* doctrine gave Robbins no cause of action against the officers who had made good on their threat to “bury” him for standing firm on his Fifth Amendment rights.

The procedural issue highlighted here goes directly, of course, to questions about the Court’s “activism” or “restraint.” I will return to it in a moment, but first a look at the arguments on the merits.

At bottom, Roberts’s claim was really quite simple. As Tribe put it succinctly, the BLM agents were putting a proposition to Robbins, “Your easement or your life”—a variation on the mugger’s proposition. More fully,

the BLM agents engaged both in unlawful exercises of their otherwise legitimate regulatory powers and in entirely illegitimate acts—independently illegal acts performed under color of their office but outside their delegated authority—in order to coerce [Robbins] into relinquishing his property without the Government being forced actually to “take” it and thereby incur an obligation to pay just compensation.

In a word, Robbins was put to a choice between two of his entitlements: his right to exclude the government from his property—except, under the Fifth Amendment, after receiving just compensation; and his right to be free from gratuitous governmental harassment. He could have one or the other of his rights, but not both. That is the classic definition of “coercion.” And as Tribe shows, the point is perfectly generalizable: not only property but any right of choice protected by the Constitution is susceptible to being relinquished if such practices are immune from sanction. Thus the Court’s longstanding and widely applied hostility toward government retaliation against the exercise of constitutional rights—in First Amendment cases, compelled self-incrimination cases, access to federal court cases, and more, including property rights cases like *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*.

Justice David Souter wrote for the Court, with only Justices Ruth Bader Ginsburg and John Paul Stevens dissenting. In finding that *Bivens* gave Robbins no cause of action, however, Justice Souter was hard-pressed to distinguish this case from others in which he *would* allow a *Bivens* sanction: “[U]nlike punishing someone for speaking out against the Government, trying to induce someone to grant an easement for public use is a perfectly legitimate purpose: as a landowner, the Government may have, and in this instance does have, a valid interest in getting access to neighboring lands.”

The problem with that argument is patent, of course. True, the government’s interest is valid, but it cannot pursue that interest by any means. Fortunately, the Framers thought about that issue: they wrote the Fifth Amendment, which provides a means through which the government may *legitimately* pursue its interest. It can induce an owner to grant an easement simply by paying for it. But that oversight in Souter’s argument is only compounded by his mischaracterization of Robbins’s challenge, which he says “is not that the means the Government used were necessarily illegitimate; rather, [Robbins] says that defendants simply demanded too much and went too far.” To the contrary, it was precisely those illegitimate means that drove Robbins to court. Yet Souter reduces the government’s illegal acts to mere “hard bargaining.”

Those comments barely begin the critique of the Court’s argument, a much fuller version of which will be found in Professor Tribe’s article. Readers of this *Review* will be especially disappointed, however, by the one-paragraph concurrence of Justice Thomas, joined by Justice Scalia—the same Justice Scalia who described the California Coastal Commission’s action in *Nollan*, where the commission withheld a building permit in order to induce owners to grant it an easement, as “an out-and-out plan of extortion.” Far more than in *Nollan*, *Robbins* involved a prolonged and systematic pattern of illegal actions by government officials; yet Thomas and Scalia would grant no remedy for those constitutional wrongs because, as Thomas writes, citing Scalia in *Correctional Services Corp. v. Malesko*, “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.” That is judicial “restraint” amounting to judicial abdication. When Thomas adds: “*Bivens* and its progeny should be limited ‘to the precise circumstances that they involved,’” one can only ask, “Why?” If wrongly crafted here (to

remedy egregious BLM behavior), why not also in *Bivens* (to remedy egregious behavior by federal narcotics agents)?

The Court's argument on the merits aside, it is, if anything, the procedural issues in this case that are most disturbing. Recall that *Robbins* was before the Supreme Court on an interlocutory appeal of the denial of a motion for summary judgment on qualified immunity grounds. As Professor Tribe notes, with narrow exceptions, "the general rule in the federal courts, as enacted by Congress, is of course that litigants may appeal only from *final judgments*, not interlocutory rulings such as a denial of a summary judgment motion." Rather than trying to summarize the complex arguments at issue here, let me simply move to Tribe's conclusion that if the rationale for interlocutory appellate review of the qualified immunity issue, where it can be authoritatively determined in advance that no violation of law has occurred, is to preclude needlessly subjecting officials to trial, that rationale has no application here unless the evidence is insufficient at the outset that the officials acted illegally. But "where the only issue the Court ends up addressing is a question of judicial policy as to what the appropriate remedy would have been on the *assumption* that the officials had in the end been found guilty of clearly unconstitutional conduct, the rationale for forgoing a trial and resolving that question on appeal *prior to trial* is altogether lacking." Indeed, "a Court that had previously taken care at least to respect the boundaries Congress had set on the appellate jurisdiction of the Supreme Court (and of the federal circuit courts) to review non-final judgments of the federal district courts left no doubt that its eagerness to cut back on *Bivens* exceeded even its fidelity to those jurisdictional boundaries."

We are left, then, with the question of whether the Roberts Court in this case was applying the law or making it. Professor Tribe makes a compelling case that the settled law on these issues was not applied. Mr. Robbins's constitutional rights were egregiously violated, yet he was left with no remedy—and hence, effectively, with no right. No "new" remedy had to be crafted, as the Court contended; it was necessary simply to apply an existing remedy to a new, but hardly novel, set of facts. Thus, the Court ignored the substantive law pertaining to the facts—engaging in "restraint" amounting to abdication—but that is tantamount to "activism" insofar as the Court is making the new law that emerges from ignoring the existing law.

And Congress's procedural instructions to the Court, pursuant to its constitutional authority to establish such rules, were ignored as well. Here, proper deference to Congress's authority *was* in order, but rather than stay within its authority, the "activist" Court reached out to issues it had no authority to decide. Yet the larger rationale for what the Court did had the cast of the "judicial restraint" that so many conservatives urge—deference to government and its officials. A court so unable or unwilling to discern and apply the law is a court engaged in *faux* restraint.

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Each year we at the *Review* struggle mightily to produce this volume in the brief period between the end of the Court's term in late June and the time we release it to the public at Cato's annual Constitution Day conference on September 17. This year that task has been especially difficult because our editor in chief, Mark Moller, left for Chicago in mid-July to begin a teaching career at the DePaul University College of Law. And in mid-August our administrative and research assistant, Anne-Marie Dao, joined the Justice Department to gain experience for a year before law school beckons her. I want to thank Anne-Marie for the work she has continued to do, even after leaving, to bring this *Review* together. And I am especially grateful to Mark, who likewise continued to work on the *Review* even as he was preparing his classes. During his four years as the *Review's* editor in chief, he has done a marvelous job. We wish Mark and Anne-Marie the very best.