

## FOREWORD

# Is the Court Any Longer Constrained by the Constitution?

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The Cato Institute's Center for Constitutional Studies is pleased to publish this seventh 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 third term of the Roberts Court—the second full term with both Chief Justice John Roberts and Justice Samuel Alito—but still it appears too early to place any clear stamp on its character. At term's end, Court-watchers were quick to note that the Court handed down only 67 merits opinions, the fewest in over half a century. And unlike in the previous term when the Court divided 5–4 in 24 cases, fully one-third of its docket, in this term it divided 5–4 in only 11 cases—although 3 other decisions, absent recusals, would likely have been 5–4. It would seem, therefore, that the Chief Justice was gradually moving the Court toward speaking with one voice, a hope he had expressed during his 2005 Senate confirmation hearings. But when looked at from the other end, that hope receded, for only 20 percent of the cases were decided by a fully unanimous Court (no dissents or concurrences), which contrasts with 25 percent in the previous term, and 45 percent in the term before that. Clearly, the court is still divided. And the divide has deep roots.

At least three of those 5–4 decisions—*Kennedy v. Louisiana*, *District of Columbia v. Heller*, and *Boumediene v. Bush*—take us to constitutional first principles—to basic questions of political and legal theory

and, in particular, to questions about the authority of the Court under that theory. The Court articulated its authority seminally in *Marbury v. Madison*, of course, a unanimous opinion that drew upon ideas that had evolved over years and upon principles that underpinned both the nation's founding and the Constitution itself. At the Founding, the Declaration of Independence had set forth the nation's theory of political legitimacy: that individuals are born free and are endowed with equal rights, including the right to create governments to secure those rights—their “just powers” derived “from the Consent of the Governed.” Eleven years later, speaking for “We the People of the United States,” the Framers drafted a new constitution that largely reflected that theory of legitimacy. Once ratified through state conventions, the document became the positive law under which the founding generation, their posterity, and those who in time would become Americans would govern themselves—which we've done ever since.

Thus, the Constitution is a compact among Americans—among “We the People of the United States”—reflecting the principles and legal relationships we've ratified—originally, and through amendment—that we believe will best serve the ends set forth in the document's Preamble. More precisely, it sets forth powers that have been granted by the people, vested in particular offices, and then checked and balanced against each other to ensure that they fully serve their ends, but only those ends.

But the positive law established by the Constitution does not enforce itself, of course. In particular, when disagreements arise over the document's rules or over actions taken under them, a disinterested “umpire,” as Chief Justice Roberts has put it, must settle those disagreements. Under our written Constitution that role falls ultimately to the Supreme Court. In *Marbury* Chief Justice John Marshall stated that clearly: He held, to put it succinctly, that the Court had jurisdiction to say that, in the matter before it, it had no jurisdiction. Thus, in one fell swoop the Court announced both its power and the limits on its power.

What Marshall was saying more particularly was that pursuant to the “Judicial Power” the people had vested in the Supreme Court under Article III, it was the duty of the Court “to say what the law is,” as Alexander Hamilton had explained in *Federalist* No. 78; but that in exercising that jurisdiction the Court had looked again at the

constitutional text and found that it lacked jurisdiction over the case before it; that the act of Congress purporting to expand the Court's jurisdiction over the matter at hand amounted to giving the Court more power than the people had authorized for it; and that, accordingly, the act of Congress was unconstitutional—the people had not given Congress that power. Thus, the Constitution is a document of positive law, to be sure; but its theory of legitimacy is grounded in the natural rights branch of natural law. It is the document through which the people, by right, granted, limited, and reserved their various natural powers.

Questions about the Court's authority or jurisdiction were at issue in the three cases mentioned above. In *Kennedy v. Louisiana*, Justice Anthony Kennedy, writing for himself and Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, held that the Eighth Amendment's ban on cruel and unusual punishments prohibited states from imposing the death penalty for the crime of child rape. The jurisdictional issue here is less clear than it was in *Marbury*, where mandamus was not among the categories of cases over which the Constitution had granted the Court original jurisdiction. Here the Court clearly had jurisdiction to decide whether Louisiana's statute authorizing capital punishment for child rape satisfied the Eighth Amendment. But the Court's exercise of its jurisdiction is what raises a further "jurisdictional" issue, as it were, bringing into question the Court's authority to rule as it did.

As with the Fourth Amendment's evaluative terms—"unreasonable" and "probable"—applying the Eighth Amendment's "cruel and unusual" involves policy questions and value judgments traditionally left to the discretion of the states and the political branches—except when such judgments go beyond the outer bounds those terms connote. There is no bright line here, to be sure, just as there is not in the jurisdictional questions that surround the political question doctrine, among other things. But that should not surprise: There are many vague matters of that kind that the people left to the political arena (state and federal), to be checked by the courts only in those exceptional cases that raise fairly clear constitutional concerns. Were it otherwise, were courts to make all or most of the competing policy judgments that surround the Eighth (and the Fourth) Amendment, they would be acting, in effect, like the political branches, yet would be immune from political accountability. That kind of judicial

micromanagement is today upon us, of course, but not because the Constitution authorizes it. In fact, Justice Alito, writing for the dissent, chides the Court on just that point when he writes, sardonically, that, “in the end, what matters is the Court’s ‘own judgment’ regarding ‘the acceptability of the death penalty.’”

Those same issues arose in *District of Columbia v. Heller*, a decision Seventh Circuit Judge Richard Posner, writing in *The New Republic*, called “the most noteworthy of the Court’s recent term.” That it was, because in overturning the D.C. ban on handguns and functional firearms, the Court, for the first time in its history, set forth the contours of the Second Amendment. Yet Posner finds Justice Antonin Scalia’s opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Alito, and Clarence Thomas, to be “questionable in both method and result.” Disparaging Scalia’s use of history as well as his originalist method, Posner appears to make the not uncommon mistake of reading the amendment’s militia clause as establishing not a sufficient but a necessary condition for there being a right to keep and bear arms. (In truth, his argument on the point is less than clear.) Thus, he concludes, notwithstanding Scalia’s close parsing of the text, that the amendment “creates no right to the private possession of guns for hunting or other sport, or for the defense of person or property.”

Posner’s larger concern, however, is to urge what he calls “loose construction,” a “flexible” method of interpretation “designed to adapt the Constitution (so far as the text permits) to current conditions,” such as “the crime problem in the large crime-ridden metropolises of twenty-first-century America.” Had the Court done what he wished it had and upheld the D.C. gun ban “it would merely have been leaving the issue of gun control to the political process.” Yet Posner notes in conclusion that this “preference for judicial modesty—for less interference by the Supreme Court with the other branches of government—cannot be derived by some logical process from constitutional text or history.” Rather, “it would have to be imposed” as “a discretionary choice by the justices.”

Perhaps “judicial modesty” cannot be derived from constitutional text or history, but judicial authority surely can, at least in basic outline. The Court was authorized, instituted, and empowered for a reason, after all, which text and history speak to—not precisely, to be sure, but clearly enough for most justices to have understood,

for a good part of our history, the scope and limits of their authority. And in *Heller*, I submit, the majority understood both. Leaving the issue of gun control to the political process, which the Court effectively did for over 200 years, worked well in most cases in most places, as Posner notes. But when and where it did not, where draconian restrictions like the District of Columbia's emerged from the political process, the individual rights the Second Amendment seemed to protect were ignored. Posner contends that *Heller* gives short shrift to federalism: "Why should the views of a national majority control?" he asks—and rightly so were this merely a political matter.

But it is not. As the *Heller* majority understood, the Second Amendment stands for something, and the Court had not only the authority but the duty to say what—and to make it clear too, as Scalia did, that the something for which the amendment stands cannot be diluted under the so-called rational basis test, which would reduce the amendment to a nullity. But the majority understood also that there are limits on the Court's authority. Inherent in the firearms issue are contextual value judgments concerning risk, about which reasonable people can reasonably disagree, much as in *Kennedy v. Louisiana* concerning punishment. Thus, having secured the principle of the matter and the general contours of the amendment, the Court did not attempt further to micromanage the details of our Second Amendment rights but left that, by implication, to the states and the political branches. There is already litigation over those details in lower courts, and over *Heller's* application to state regulations. But if the Supreme Court respects the limits on its authority, a good many of those details will in fact be left to politics. As *Heller* co-counsel Clark Neily notes in his essay below, "relatively few firearms restrictions are likely to fall."

But if there is an area in which Posner's "loose construction" and its attendant deference to the political branches are in order, it is foreign affairs. Judge Posner's son, Professor Eric Posner, makes that clear in his essay below on *Boumediene v. Bush*, where once again questions about the authority of the Court and its limits come to the fore. As in previous volumes of this *Review*, when certain seriously contested decisions come down from the Court, we present opposing views—which is not to say that this Foreword remains neutral. Thus, the reader will find below that Professor Posner's essay, highly

critical of the *Boumediene* decision, is followed by Professor David Cole's strongly supportive essay. Here I want simply to draw forth a few points about judicial authority and its limits as they emerge from the Court's opinion in the light shed by those essays.

In *Boumediene*, writing again for Justices Stevens, Souter, Ginsburg, and Breyer, Justice Kennedy held, as Posner states it, "that noncitizens held at Guantanamo Bay have the constitutional privilege of habeas corpus and that the review procedures established by the Detainee Treatment Act do not provide an adequate substitute." In crafting a detainee policy for the ongoing war on terror, the Bush administration had relied on the Court's 1950 decision in *Johnson v. Eisentrager* where, as Cole puts it, "the Supreme Court had expressly ruled that the writ of habeas corpus was unavailable to enemy fighters captured and detained abroad during wartime;" and, indeed, "both the district court and the court of appeals had found that decision to be controlling, and no subsequent case law had directly undermined its reasoning." The administration can be forgiven, then, for believing that, as Cole notes, "the government had precedent on its side."

But in a series of very recent sharply divided decisions, the Court has changed course. Briefly, by way of context, in 2004, in *Rasul v. Bush*, the Court held that *statutory* habeas reached Guantanamo Bay; and, in *Hamdi v. Rumsfeld*, it held that the detainees were entitled to contest their status as enemy combatants. Both the administration and Congress responded. The administration established Combatant Status Review Tribunals (CSRTs), which subsequently determined that the *Boumediene* petitioners were enemy combatants, prompting them to file the *constitutional* habeas writs at issue here. And Congress passed first the Detainee Treatment Act—limited by the Court in 2006 in *Hamdan v. Rumsfeld*—and then the Military Commissions Act, stripping federal district courts of jurisdiction over habeas writs filed by noncitizens held at Guantanamo Bay while giving the D.C. Circuit exclusive authority to conduct a limited review of CSRT determinations.

Thus, the *Boumediene* majority rejected not simply the administration's (and most others') understanding of the law, but also Congress's efforts to respond to the Court's changes in the law. Echoing the powerful dissents of Chief Justice Roberts and Justice Scalia, both Posner and Cole remark on how breathtaking a decision it

was. Calling the decision “groundbreaking,” Cole notes that (1) “for the first time in its history, the Supreme Court declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict;” (2) “also for the first time, the Court extended constitutional protections to noncitizens outside U.S. territory during wartime:” indeed, to “‘enemy aliens’—foreign nationals said to be associated with our enemy in wartime”—despite having said as recently as 2001 that “the Constitution was no solace for foreign nationals outside our borders;” and (3) “only on two prior occasions has the Court actually declared a jurisdiction-stripping law unconstitutional, and on both occasions there were rationales for doing so that were independent of the pure question of jurisdiction.”

Yet for all the breathtaking lawmaking the five justices undertook, Cole offers us an all-but-breathless apology. “The real significance of the Court’s decision” he writes, “lies not in whether it correctly applied or modified past precedent to a novel context, but in what it portends for modern-day conceptions of sovereignty, territoriality, and rights.” It “reflects new understandings of these traditional conceptions, understandings that pierce the veil of sovereignty, reject formalist fictions of territoriality where the state exercises authority beyond its borders, and insist on the need for judicial review to safeguard the human rights of citizens and noncitizens alike.” Indeed, *Boumediene* “fits comfortably within an important transnational trend of recent years,” Cole points out, citing foreign courts that are playing “an increasingly aggressive role in reviewing and invalidating security measures that trench on individual rights”—rights drawn from the UN’s Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights, among other sources.

But it is just that “significance” that most concerns Posner. To frame the issue he notes that while Justice Kennedy invokes separation-of-powers principles in reaching his conclusion, it is a focus on logistical concerns that looms largest in the opinion—there are just not that many *practical* problems with extending habeas rights to Guantanamo detainees. Yet in *Eisentrager* Justice Robert Jackson had rested his decision denying habeas on two main grounds: In Posner’s words, “the interests of these overseas aliens do not ‘count’ like those of Americans, and the logistical demands on the military would be

unreasonable." Kennedy "barely sees, and hardly acknowledges, the first point," Posner observes. "That leaves him with the logistical issue, which seems to melt away for Guantanamo Bay." But it leaves also a question: Why does Kennedy not see what seemed natural to Jackson, that nonresident aliens don't have the same rights as Americans? The answer, Posner says, is that "Justice Kennedy is a cosmopolitan."

"Judicial cosmopolitanism" stands for the idea that "judges have a constitutional obligation to protect the interests of noncitizens," as Posner puts it. To be sure, *resident* aliens have certain rights, both statutory and constitutional. But the idea that nonresident aliens have interests that deserve constitutional protection secured by American judges raises fundamental questions about the nature of the political community, questions that go well beyond the Court's increasing citations of foreign law as evidence of "evolving social values" in death penalty, gun control, and other such cases. Posner's essay is a theoretically sophisticated critique of the rationales one finds in the literature on the extraterritorial application of the Constitution. Drawing on democratic failure theory, and distinguishing arguments based on the systematic exclusion of certain groups from the political decisionmaking process, on one hand, and arguments based on net social welfare, on the other, he finds both wanting, if not impossible for judges to execute. And he concludes by asking whether Kennedy's cosmopolitan approach is wise, which raises policy questions more appropriately left to the political branches, not to judges with no special competence or role in such matters. Indeed, addressing commonly heard arguments based on "reciprocity" (if we respect their rights, they'll respect ours), Posner writes that "unilateral action by courts to grant unreciprocated benefits to noncitizens simply weakens the bargaining power of their own government."

Consequentialism aside, the argument against judicial cosmopolitanism is rooted at bottom in nothing less than the Constitution itself. As outlined above, the Constitution is a compact among "We the People of the United States." Foreigners are simply not party to it. The Constitution sets forth limited powers that have been delegated by the people and vested in certain offices. As *Marbury* made clear, power exercised beyond that delegated is *ultra vires* and hence unconstitutional—there, the power to hear a matter not authorized

for the Court, and the power to grant that power through legislation. Judges are authorized to interpret and apply the law in cases or controversies properly before them, which may entail “discovering” rights “retained by the people” pursuant to the Ninth Amendment. But “the people” referenced in that amendment are the American people—“We the People of the United States,” who ratified the Constitution and continue to consent to it, as best we can as a practical matter, by continuing to live under it. We delegated power over foreign affairs primarily to the executive branch, to be shared with Congress pursuant to its relevant enumerated powers.

It is those political branches that set foreign policy, checked by the courts when the policy is *ultra vires* or violates the rights of Americans or resident aliens. In that regard, Guantanamo Bay may have been a policy failure, Posner writes, “for which the Bush administration is responsible. Governments make policy mistakes all the time; it is not the role of the courts to correct them.” But Cole would have judges securing human rights that “are predicated not on an individual’s geographic location, nor on his or her relation to the state, but on human dignity.” Set aside just where a judge is to “find” such rights (“periodic holidays with pay”—article 24 of the UN Universal Declaration of Human Rights): Where does a judge find the *authority* to find those rights? According to our Declaration of Independence, to be “just” that power must be “derived from the Consent of the Governed.” Where in the Constitution is such wide ranging judicial power enumerated? Cole tells us that “the international human rights regime insists that democracy is not the ultimate test of a legitimate government, but that respect for inalienable human rights is.” That conflates moral and political legitimacy. And therein lies the Achilles’ heel of this new “international human rights regime.” It trades political legitimacy, which has been difficult enough to achieve over the long course of human history, for an undefined “moral legitimacy” tethered to the most evanescent and, indeed, disputed of institutions.

Our judges have a hard enough time discerning and applying American law. Do we need any better example than the *Boumediene* decision itself? Rather than defer to the political branches that had crafted a detainee policy in the give-and-take of politics, the Court majority rejected that political compromise; substituted its own “all-things-considered textual analysis [that] gives rise to few principles

of law," as even Cole points out, leaving "government officials guessing" and "the Court a relatively free hand;" and then left the details for lower courts to work out. Well, barely a month after the decision came down we got a glimpse of how that process is working when the Fourth Circuit, sitting en banc in *Al-Marri v. Pucciarelli*, split 5–4 on the two questions before it, with only one of the judges in the majority on both questions, in a decision that generated seven separate opinions and ran on for some 216 pages. And of course the case is not finished but instead was remanded to the district court for further proceedings. There is a reason the Framers left foreign policy, and war in particular, mainly to the political branches. The increasing "judicialization of war," as it is known, raises anew the question whether the Court is any longer constrained by the Constitution.