

## FOREWORD

### Ten Years in Perspective

*Roger Pilon\**

The Cato Institute's Center for Constitutional Studies is pleased to publish this tenth 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.

Although the Court heard several important cases over the past year, the term was not marked by high-profile, landmark decisions—which is just as well for us, because for reasons only a numerologist would understand, when you reach the ten-year mark of an undertaking, you want to pause, step back, and take stock, if only to try to gain a little perspective. And so I shall do so, forgoing the more focused discussion that is the usual fare in this space in favor of a more wide-ranging review. And where better to begin than with our inaugural volume's foreword, entitled "Restoring Constitutional Government." Audacious as that title might have seemed, it captured what we at Cato's Center for Constitutional Studies have taken as our mission—long-range, to be sure—since the center was founded in 1989. More modestly, but precisely, we have sought to play a part in changing the climate of ideas to one more conducive to that aim, since we take it as axiomatic that ideas matter: they have consequences.

\* Roger Pilon is vice president for legal affairs at the Cato Institute, director of Cato's Center for Constitutional Studies, and publisher of the *Cato Supreme Court Review*.

Thus, in that inaugural volume I wrote that what distinguishes Cato's from other reviews, apart from its appearance soon after the term ends, is its perspective: "We will examine [the Court's] decisions and [upcoming] cases in the light cast by the nation's first principles—liberty and limited government—as articulated in the Declaration of Independence and secured by the Constitution, as amended. We take those principles seriously. Our concern is that the Court do the same." That it had not, for the better part of a century, was no better evidenced, we believed, than by noticing the Leviathan about us and then recurring, by way of contrast, to the Constitution's principal author, James Madison, who had promised in *Federalist* 45 that the powers of the new government would be "few and defined." Since the Court had long sanctioned and even abetted the transformation from limited to largely unlimited government, a sustained critique of its work from the perspective of classical liberalism was in order, we concluded, and we intended to provide it.

So how have we done—and how has the Court done—over the ensuing decade? As for us, not bad, if I may. As a benchmark, in the balance of that inaugural essay I outlined a general critique and agenda, beginning with the principles underpinning the Declaration, as incorporated at last in the structure of the Constitution through the Civil War Amendments, then turned to the social engineering schemes of the Progressives. In time those schemes were "constitutionalized" by the New Deal Court, not by amendment, as constitutionally required, but by legerdemain, following Franklin Roosevelt's infamous Court-packing threat. The evisceration of the doctrine of enumerated powers, the very foundation of constitutional legitimacy; the bifurcation of the Bill of Rights, combined with varying levels of judicial scrutiny; and the demise of the non-delegation doctrine all conspired to give us modern "constitutional law"—not to be confused with the Constitution. Thus emerged the modern executive state, dedicated far less to securing our rights and doing the few other things we'd authorized our government to do than to providing us with all manner of goods and services, reducing so many of us to government dependents.

It was a supine Court that emerged from the New Deal constitutional revolution, deferring to the political branches, federal and state alike. Over time, however, two schools of thought about the proper role of the Court took shape. Modern liberals urged continued

judicial deference, except when “fundamental” rights were at issue—defined quite often not as the Framers would have defined them, drawing on the common law, but as reflections of egalitarian aspirations. In reaction, conservatives too urged judicial deference to the political branches, partly from resignation, but also, for many, from deep-seated antipathy to what they saw as liberal judicial “activism” on the rights side of things. Thus, they urged judicial “restraint,” calling on the Court to secure only those rights that were expressly “in” the Constitution, thereby ignoring the vast body of unenumerated rights the Framers surely meant to be protected.

Since neither camp could be said to have grasped the Framers’ essential vision, it fell to those of us in the reemerging school of classical liberals to chart a different course, one in which the Court would extricate itself from the mistaken strictures of *stare decisis* and return to the Constitution’s first principles. That would mean, above all else, reviving the doctrine of enumerated powers, which the Framers understood as the very foundation of the Constitution, the method, by way of ratification, through which “We the People” authorized, instituted, *empowered*, and then *limited* the government that ratification brought into being. So fundamental was the doctrine that the Framers believed a bill of rights was not only unnecessary but dangerous: unnecessary because where there is no power there is, by implication, a right; and dangerous because the failure to enumerate all of our rights, which would be impossible, would be taken, by ordinary principles of legal construction, as implying that only those that were enumerated were to be protected.

And so we went for two years without a bill of rights, protected simply by the doctrine of enumerated powers. As a condition for ratification, however, several states insisted that a bill of rights be added. Madison drafted one during the first Congress; it was passed and sent to the states, ratified, and added to the Constitution in 1791. In it, of crucial importance, were the Ninth and Tenth Amendments, which summarized the Framers’ philosophy of government. The Ninth made it clear that the enumeration in the Constitution of *certain* rights was not meant to be construed to *deny or disparage others retained by the people*—and a right can be “retained” only if it is first held, as clear an allusion to the natural rights foundation of the Constitution as one could hope to find. The Tenth made it equally clear, by contrast, that the federal government had only those powers

that had been delegated to it by the people, as enumerated in the document, the rest being reserved to the states or the people. Thus, the doctrine of enumerated powers was reaffirmed. But of equal importance, the implication—that where there is no power there is a right, *whether enumerated or not*—was made explicitly clear by the Ninth Amendment. And with the ratification of the Civil War Amendments, that vision of individual liberty secured by limited government was at last imposed upon the states as well.

Thus, with that explication of the Constitution's first principles in view, we called upon the Court not only to revive the doctrine of enumerated powers but to abandon the spurious New Deal distinction between "fundamental" and "nonfundamental" rights and begin protecting both enumerated and unenumerated rights against federal and state actions alike. There, in a nutshell, was the classical liberal agenda.

Obviously, however, the Court could not pursue that agenda oblivious to the fact that it does not operate in a political vacuum. The Court may be the non-political branch, but its members are cognizant, of course, of their having neither sword nor purse but merely judgment, as Alexander Hamilton put it in *Federalist* 78. Yet judgment has a force all its own, to influence and change the climate of ideas, which in time constrains the political forces that brought us Leviathan, forces that in turn and in the end must free us from those shackles. In short, the Court cannot roll back Leviathan on its own, but it can put a brake on it and, by controlling its docket, chip away at its substance, all the while laying the intellectual and legal foundations for a revival of liberty through limited constitutional government.

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In our pages, then, we have sought, insofar as we might, to encourage movement along those lines, as a few examples will illustrate. These examples are of two closely connected kinds. First, there are the general discussions, as in these forewords, which have covered a variety of subjects: "Substance and Method at the Court," "Politics and Law," "Facial vs. As-Applied Challenges," and the like. More important have been the annual B. Kenneth Simon Lectures in Constitutional Thought, which conclude the annual Constitution Day

conferences at which this volume is released. Appearing in the next year's volume, these lectures afford a distinguished legal authority an opportunity to step back from the cases and issues of the day to reflect more broadly and deeply on the larger themes just discussed.

A perfect example was our inaugural Simon Lecture, "On Constitutionalism," delivered by Douglas H. Ginsburg, then the chief judge of the United States Court of Appeals for the District of Columbia Circuit. In his lecture Judge Ginsburg—noted for having coined the phrase, "the Constitution in exile"—developed many of the issues discussed above, from the evisceration of the doctrine of enumerated powers to the demise of the non-delegation doctrine, and more. The stage was thus set for the move from powers to rights, as discussed above, and for the next year's lecture by Professor Walter Dellinger, acting solicitor general under President Clinton, "The Indivisibility of Economic Rights and Personal Liberty." And a year after that, Professor Richard A. Epstein, whose seminal writings over the years have been so important for the revival of classical liberalism, took us to the great watershed in constitutional history with a lecture on "The Monopolistic Vices of Progressive Constitutionalism."

I would be remiss, of course, if I did not mention each of our Simon lecturers, since each has made a distinct and important contribution to this series: Professor Nadine Strossen, Judge Danny J. Boggs, Judge Janice Rogers Brown, Professor Randy E. Barnett (speaking of someone whose writings have been seminal in reviving classical liberalism), Professor Michael W. McConnell, and, in this volume, Professor William Van Alstyne. And this year we will hear from Judge Alex Kozinski, chief judge of the United States Court of Appeals for the Ninth Circuit, whose topic, "On Privacy and Technology," could not be more timely, even if the principles he will doubtless invoke in the course of discussing his subject are timeless.

The second way we have sought to encourage movement along the lines discussed above is of course through the bread-and-butter of the *Review*, the articles on specific cases the Court has handed down during the term just ended, and the annual "Looking Ahead" articles about cases coming up. Here the examples are so numerous that I can mention only a few by way of illustrating our aim, which is to both praise the Court when it gets it right and criticize it when it gets it wrong—our normative judgments grounded in the principles discussed above. Not that we always agree, even among

ourselves. In fact, in cases where we think it useful to offer more than one view, we do. Thus, in the case of *Hamdan v. Rumsfeld*, we offered contrasting essays by Professors Martin S. Flaherty and John Yoo. And with *Boumediene v. Bush* we did likewise, featuring essay's by Professors Eric A. Posner and David D. Cole.

That is not an issue in the great range of cases, however, and especially so when the Court gets it quite wrong, as Professor Epstein demonstrated in the first essay of our very first volume when he made short work of the Court's egregious decision in the *Lake Tahoe* case, which once again butchered the Fifth Amendment's Takings Clause. Nor was it the case in the next essay in that volume, where Robert A. Levy, now Cato's chairman, tackled difficult sovereign immunity issues under the Eleventh Amendment to show how the Court got it wrong in *Federal Maritime Commission v. South Carolina State Ports Authority*. In fact, in those cases, as in a good many we've covered, the Court comes in for criticism in substantial part because it feels compelled to square its decision with a raft of precedents that ought really to be overturned, or else clearly distinguished. What better example than Professor Douglas W. Kmiec's essay, "*Gonzales v. Raich: Wickard v. Filburn Displaced*," unless it is Erik S. Jaffe's essay upbraiding the Court for its decision in *McConnell v. FEC*, which upheld the McCain-Feingold Act's restrictions on political speech in the name of campaign finance reform.

But we've praised the Court too, and increasingly so, I'm pleased to say. An early example, again from our inaugural volume, was Clint Bolick's essay, "School Choice: Sunshine Replaces the Cloud," the title of which speaks for itself. In our second volume, Professor Barnett's essay, "Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*," nicely captured how the *Lawrence* Court had abandoned its *Carolene Products* footnote-four distinction between "fundamental" and "nonfundamental" rights and its related "scrutiny theory" and instead spoke simply of liberty. It was a breath of fresh air in an unenumerated rights case. More recently, Clark Neily of the Institute for Justice had good reason to praise the Court in his essay, "*District of Columbia v. Heller: The Second Amendment Is Back, Baby*," as did Kenneth L. Marcus, in "The War between Disparate Impact and Equal Protection," a discussion of the Court's decision in *Ricci v. DeStefano* to uphold the claims of New Haven firefighters that the city had discriminated against them on the basis of race when it

threw out the results of their officer advancement exams. And a final example of our giving the Court praise when praise is due—yet criticizing it at the same time—is the essay in last year’s volume by James Bopp Jr. and Richard E. Coleson, “*Citizens United v. Federal Election Commission*: ‘Precisely What WRTL Sought to Avoid,’” discussing another breath of fresh air, albeit mixed, coming in the extraordinarily and unnecessarily complex area of modern campaign finance law.

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Turning then to our second question above—How has the Court done over the decade since we began?—as this brief survey suggests, the record, not surprisingly, has been mixed. And of course it is not “the same” Court it was when we began. In fact, mid-way it changed markedly, with the resignation of Justice Sandra Day O’Connor in 2005 and, shortly thereafter, the death of Chief Justice William Rehnquist, followed by the nominations and confirmations of Chief Justice John Roberts and Justice Samuel Alito and then, in successive years, the ascensions of Justices Sonia Sotomayor and Elena Kagan. Whereas the Rehnquist Court, in its final iteration, had been “the same” Court for eleven years, the Roberts Court, in its short life so far, has already changed twice. Such changes are said to make a difference, even if, in principle, they should not.

That issue aside, looking at specific areas of our law, the Court’s protection of religious liberty has been quite good—a conspicuous exception being last year’s decision in *Christian Legal Society v. Martinez*. And, for the most part, it has protected speech, not only traditional speech rights in “controversial” cases but, in recent years, as just noted, the political speech that campaign finance regulations threatened. On that front there is far more to be done, but we are hopeful that a majority of the current Court will continue to see that political speech and campaign finance law are intimately connected.

Several critics have noted the Roberts Court’s “business friendly” rulings, the implication being that the Court has ruled on a basis other than the law. Yet as I point out in my essay in the present *Review*, ranging over the Court’s five preemption decisions this past term, in three the Court found for the business interests, in two against them. (And I found one on each side to have been wrongly

decided.) The Roberts Court may not always get the law right, but I see no evidence that it has a bias toward business interests—except insofar as it is recognizing that such interests are no less important than “personal” interests, which would be a welcomed shift from some recent Courts.

Another specific area in which the charge of political bias arises in some quarters is civil rights and, in particular, affirmative action. Here, the Roberts Court appears to be doing rather better than its predecessor at applying the Constitution’s Equal Protection Clause. The 2007 Seattle and Louisville public school “diversity” decisions come to mind here—a welcomed shift from the University of Michigan rulings of 2003—as does the New Haven firefighters case mentioned above. By contrast, the Court’s criminal law decisions remain quite mixed, in part because the Court is insufficiently critical of the legal underpinnings of the war on drugs. But we can be thankful, at least, that our right to have a gun for self-defense is now clearly protected under the Second Amendment, even against the states.

At a more general level, however, regarding how the Court is doing at reviving the doctrine of enumerated powers and securing both enumerated and unenumerated rights, as discussed above, the assessment is more difficult. Taking the rights side of things first, and unenumerated rights in particular, a decision like *Lawrence v. Texas*—in which the Court cut through the *Carolene Products* footnote-four nonsense in order to reach the essence of the matter, as any layman would—gives hope that the distinction between enumerated and unenumerated rights might be fading and that the Court might at last be grasping the theory of rights that underpins our entire constitutional order. But the decision and its methodology were something of an anomaly, and we haven’t seen anything quite like it since the Court handed it down in 2003.

Regarding those *enumerated* rights that are treated like “poor relations” in the Bill of Rights—the apt description Chief Justice Rehnquist used for property rights in 1994—after a period in the ‘90s during which the Court better protected the rights of owners, things started to fall to pieces. The *Lake Tahoe* decision mentioned above was but a precursor for the three property rights disasters of 2005, culminating in the infamous *Kelo* decision, all of which Professor James W. Ely Jr. analyzed for us that year. And two years later, Professor Laurence H. Tribe examined a complex decision for us,



*Wilkie v. Robbins*, showing in exquisite detail how the Court again failed to protect property rights or afford *Bivens* remedies for an owner the federal government had harassed for nearly a decade as it sought an easement over his property, all the while ignoring the Fifth Amendment's compensation requirement.

Turning at last to that most fundamental of constitutional concerns, the demise of the doctrine of enumerated powers, a bit of context is required. In 1995, in *United States v. Lopez*, the Rehnquist Court, for the first time in 58 years, revived enumerated powers federalism, holding that Congress had exceeded its power under the Commerce Clause. Five years later the Court reinforced that decision in *United States v. Morrison*. Although neither decision went to the heart of the matter—indeed, they changed little on the ground since they both held that the power at issue belonged to the states rather than to the federal government—many of us hoped nonetheless that the process of reviving the doctrine of enumerated powers had at least begun, as some of the language from those opinions suggested.

Alas, it was not to be. As mentioned above, in 2005 in *Gonzales v. Raich* the Court went the other way, holding that Congress, under its power to regulate interstate commerce, could prohibit Angel Raich from growing marijuana on her own property for medicinal purposes, consistent with California state law, even though the marijuana was no part of commerce, much less interstate commerce. It was a breathtaking decision, but perfectly consistent with the rationale behind the modern regulatory state.

The Court's decision did not end the debate, however. In fact, if anything it only enlivened it, making it stronger for the next thing to come along, and come along it did—Obamacare, followed soon thereafter by federal deficits and debt as far as the eye could see. And so, with the rise of the Tea Party and more, the debate spread far beyond the confines of Court watchers, to the media and the population in general. Does Congress, under its power to regulate interstate commerce, really have the power to order us to buy a product from a private vendor—any product? A Congress whose powers are “few and defined”? Is this how we got these massive deficits and debt—our modern Leviathan? At this writing, two appellate courts are split on the Obamacare question. But the debate is already well beyond the courts. It is not the debate of 20 years

ago, or even a decade ago. The climate of ideas is changing, in the direction of liberty through constitutionally limited government. And that is good.

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I would be remiss, once again, if I did not pay tribute to four men who, more than any others, have been responsible for the character and quality of this *Review*. Our first editor in chief, James Swanson, who organized, packaged, and promoted the first and second volumes of the *Review*, as well as the first two Constitution Day conferences, was responsible for everything from selecting the authors and speakers, editing their essays, and contributing essays himself, to choosing the format and color schemes for the series. He is a scholar and a bookman of the first order, who left us, in fact, to pursue his first love, the life of Abraham Lincoln (they share the same birthday), and to complete his magnificent *Manhunt: The 12-Day Chase for Lincoln's Killer*, which went on to be a national bestseller. I treasure James, because he was there at the beginning.

He was followed by another University of Chicago man—law, not the college, as with James—Mark Moller, who came to us from a distinguished appellate practice at Gibson, Dunn & Crutcher. A common law scholar who had studied at Cambridge under the noted English legal historian J.H. Baker, Mark was for four years the consummate detail man, whose judgment in the most complicated of cases I came to rely on. Indeed, so good was he—developing a specialty in class-action litigation while he was with us—that we lost him to academia, where he holds forth now at the DePaul University College of Law back in Chicago.

Speaking of Chicago, the law school at the university named after that great city rescued us once again in the form of our third editor-in-chief, Ilya Shapiro, the impressiveness of whose credentials—Princeton, London School of Economics, Chicago Law—is exceeded only by his boundless energy and ability. Not only has he done all the administrative work that has been necessary to turn out a first-class review barely two months after the Court's term ends, contributing to it himself, but he has overseen our ever-growing amicus brief docket as well, all the while publishing beyond Cato's presses, appearing regularly in the media, and delivering over 50 law school

speeches in the past year alone. And there's more, but his modesty precludes me from delivering it!

Finally, beyond the confines of *Cato* is a man who has been with us year in and year out, Tom Goldstein, the impresario of SCOTUS-blog and so much more. One of Washington's leading Supreme Court litigators, Tom is the go-to man if you want to know something—anything—about the Court, from its history to its docket to—you name it. He has been exceedingly generous with us, his specialty being our "Looking Ahead" essays and Constitution Day conference panels. Tom's expertise and insights have been invaluable.

I have been fortunate to have had at my side these four extraordinary men, a sense of whose work I hope to have conveyed in this all-too-brief foreword. Now please enjoy the rest of this tenth annual *Cato Supreme Court Review*.