

Cato publishes third annual Supreme Court Review

The Supreme Court's "Impressionist" Year

Liberty and judicial clarity took a beating in the Supreme Court last term, as the high court handed down a series of decisions that George Washington University law professor Jonathan Turley characterizes as "judicial impressionism." Like the impressionistic paintings you might find in a freshman art class, he writes in this year's edition of the *Cato Supreme Court Review*, this year's major decisions eschew bright lines and clear precedents in favor of vague,

multifaceted opinions that look different to each interpreter. Although that allows the Court to sidestep tough calls and gives them ample flexibility in deciding subsequent cases, it exacts a toll on the rule of law, which demands clear and predictable precedents so that all parties know how the law will be applied. As Vice President for Legal Affairs Roger Pilon wrote of the Court's pair of affirmative action cases, "If a cardinal purpose of law is to give notice about what is permitted and prohibited, we are without law on this matter."

For the third year in a row, the *Review* was published on Constitution Day, September 17. Its publication was kicked off by a daylong conference, at which leading constitutional scholars examined the just-completed term and previewed the most important cases in the upcoming term. Probably the most anticipated decision last term was *McConnell v. FEC*, in which the Court upheld the controversial McCain-Feingold campaign finance reform law. FEC chairman Bradley Smith blasted the decision, which he said gives Congress wide latitude to restrict political speech, traditionally a core First Amendment value. He predicted that the current legal confusion



Richard Epstein of the University of Chicago Law School delivers the annual B. Kenneth Simon Lecture.

will only get worse, as more independent groups find ever more inventive ways to skirt the law, and political candidates use the law as a club to prevent independent groups from criticizing them.

Judge Andrew Napolitano, a judicial analyst for Fox News, criticized the Court

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Judge Douglas H. Ginsburg, Neal Katyal of Georgetown University Law Center, and Jonathan Turley of the George Washington University Law School discuss the Supreme Court's record on executive war powers at Cato's annual Constitution Day conference.

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for a series of decisions that weakened civil liberties. In the *Hiibel v. Nevada* decision, the Court stripped citizens of their right to remain silent when asked by a police officer to identify themselves. In *Illinois v. Lidster*, the Court ruled that “informational roadblocks” seeking witnesses to a crime do not violate the First Amendment’s limitations on unreasonable searches and seizures. In those cases and others, Napolitano argued, the Court missed the opportunity to uphold civil liberties.

Attorney Erik Jaffe expressed exasperation with the *Elk Grove Unified School District v. Newdow* decision, which sidestepped the controversy over the Pledge of Allegiance on the grounds that plaintiff Michael Newdow lacked standing to sue on her daughter’s behalf. The Court was clearly seeking to avoid the political firestorm that would ensue if they struck down the pledge, he said, but on the merits, Newdow should have prevailed, he said. The claim that the phrase “under God” has only ceremonial signifi-

cance, he argued, is belied by the vociferous opposition to removing it.

The University of Chicago’s Richard Epstein delivered the third annual B. Kenneth Simon Lecture to conclude the day’s festivities. He examined the legacy of the Progressive movement’s judicial philosophy, which rose to prominence in the first half of the 20th century. The progressives rejected the dominant judicial philosophy of their day, which held that the state must remain neutral between different economic interests—protecting competition and acting in the public interest, but not serving the interests of one segment of society at the expense of the rest. The Progressives, in contrast, held that conflicts between economic classes were inevitable, and that the state must therefore throw its weight behind favored groups, especially the labor movement. They favored coercive cartels, provided that those cartels were controlled by the state and designed to act in the interests of the majority. Only in recent decades, with the development of public choice economics, has the influence of such ideas begun to wane.



Cato senior fellow Robert A. Levy discusses state power and sovereign immunity at Cato’s annual Constitution Day conference.

Other contributors to the *Review* examined decisions on the separation of church and state, federalism, state sovereign immunity, and the constitutional right to confront one’s accusers. The *Cato Supreme Court Review* is available in paperback for \$15.00. It can be purchased in bookstores, at www.cato-store.org, or by calling 800-767-1241. ■

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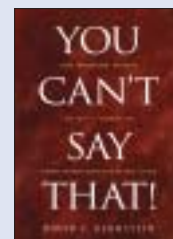
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