Introduction

This is the second volume of the *Cato Supreme Court Review*, an annual publication that examines the most significant opinions of the Supreme Court of the United States. Each year the *Review* will publish essays covering ten to fifteen cases from the Court's most recent term. The volume that you hold in your hands includes cases from the term beginning in October, 2002, and ending in late June, 2003.

In three ways, the *Cato Supreme Court Review* is unlike any other publication that follows the Court. First, it is timely. Indeed, this volume is the first in-depth review of the 2002 October Term—published less than three months after the Court handed down its final decisions on June 26, 2003. Each year's *Review* will appear on Constitution Day—September 17—soon after the term ends, and shortly before the next term begins on the first Monday in October.

Second, because the Constitution is not the exclusive domain of lawyers and judges, we asked our contributors to write articles that will appeal to a diverse and large audience. Although the *Review* is of course a ''law'' book, in the sense that it is about the Court and the Constitution, we intend it not only for lawyers but also for journalists, editors, broadcasters, publishers, legislators, government officials, professors, students, and all citizens interested in their Constitution and the Court's interpretation of it.

Third, and most important, the *Cato Supreme Court Review* has a singular point of view, which we do not attempt to conceal. I confess our ideology at the outset: This *Review* looks at the Court and its decisions from the classical Madisonian perspective, emphasizing our first principles of individual liberty; secure property rights; federalism; and a government of enumerated, delegated, and thus limited powers.

October Term 2002 was a vintage one for the Court and produced a number of major decisions involving first principles, including *Lawrence v. Texas*, *Grutter v. Bollinger*, and *Gratz v. Bollinger*. In his

Foreword to this volume Roger Pilon discusses Randy Barnett's article on *Lawrence* and his own piece on *Gratz* and *Grutter*. The Court also issued noteworthy opinions on the First Amendment, intellectual property, punitive damages, campaign finance, federalism, and property rights.

Thomas Goldstein considers the term's major ''non-decision'' *Nike v. Kasky*, in which the Supreme Court appeared poised to resolve some of the uncertainty regarding the definition of, and constitutional protection afforded to, ''commercial speech.'' The *Kasky* case arose from Nike's public response—in editorials, letters to the editor, newspaper interviews, and the like—to allegations that its contract factories in Southeast Asia were essentially ''sweatshops.'' A California trial court dismissed a suit brought by a consumer against Nike on First Amendment grounds, but a bitterly divided state supreme court reversed.

Goldstein addresses the First Amendment issues that remain unresolved because the U.S. Supreme Court changed its mind and, after briefing and oral argument, dismissed the case. He argues that the California ruling is indefensible as a matter of basic First Amendment principles. Although the Supreme Court has articulated several tests for identifying ''commercial speech,'' Nike's statements are protected under any definition. Nike's discussion of overseas labor conditions is prototypical speech on matters of public importance. Goldstein therefore urges lower courts not to follow the California ruling.

In *Virginia v. Black* a divided Court overturned a state statute that outlawed cross burning. The Court concluded that sometimes the First Amendment protects cross burning, but when done to intimidate others, cross burning is a ''particularly virulent'' form of conduct that can be banned. In my essay I agree that the Court was right to affirm that the First Amendment protects symbolic speech, that cross burning is a type of such speech, and that the Virginia statute that banned it was unconstitutional.

But in holding that cross burning with the intent to intimidate can be proscribed, the Court drew no bright line rule to distinguish between protected and unprotected speech, engaged in content-based discrimination, and chilled protected expression. The opinion was a confusing combination of majority and plurality votes, concurrences in the judgment, partial and full dissents, and arguments

about whether cross burning was speech in the first place. The justices achieved consensus on but one issue: that the burning of a cross merits unique treatment by the Court. That view might serve as the limiting principle that will restrain the Court in proscribing other forms of offensive or threatening speech. But even if thus limited, *Virginia v. Black* raises profound questions about the very purpose of the First Amendment and the circumstances under which individuals can be protected from offensive or threatening expression or conduct.

First Amendment lawyer and Cato adjunct scholar Robert Corn-Revere writes that the Supreme Court's decision in *United States v. American Library Association* represents a significant missed opportunity for the Court to clarify how the First Amendment should apply to publicly funded expressive institutions. In that case a divided Court upheld federal funding conditions set forth in the Children's Internet Protection Act that require the use of content filters to block pornographic images on Internet access terminals in public libraries. Corn-Revere writes that the various rationales used in the plurality, concurring, and dissenting opinions highlight the difficulties in applying the First Amendment to restrictions on public institutions created for the purpose of disseminating speech. As a result, the precedential value of the *American Library Association* decision is questionable, and it raises the possibility of further as-applied challenges to the law.

The Supreme Court's decision in *Eldred v. Ashcroft*, upholding the Sonny Bono Copyright Term Extension Act, left the public waiting another twenty years for full access to many works of music, film, and literature that were about to enter the public domain. It also left the legal community without the hoped-for guidance on the scope of the Copyright Clause or on the tension between the Copyright Clause and the First Amendment. Instead, the Court placed heavy emphasis on past congressional practice in retroactively extending copyright terms without fully explaining how such retroactive extensions could be reconciled with the text and structure of the Constitution. Erik S. Jaffe takes issue with the Court's reliance on the questionable legal adage that a ''page of history is worth a volume of logic'' and argues that greater attention to first principles of constitutional interpretation makes retroactive copyright term extensions highly suspect. A history of congressional disregard for

the limits of the Constitution, he contends, is no substitute for the Copyright Clause's requirement that Congress act to ''promote the Progress of Science'' through grants of exclusive rights for ''limited Times.'' Similarly, Jaffe argues, the fact that copyrights in general can be reconciled with the First Amendment is no substitute for specific First Amendment scrutiny each time Congress expands copyright protection and thus increases copyright's burden on the freedom of speech.

This year's punitive damage case, *State Farm v. Campbell*, is about a lot more than punitive damages. That's why Robert A. Levy's article discusses such diverse topics as judicial activism, substantive due process, state long-arm jurisdiction, and choice-of-law rules. Fundamentally, *State Farm* is about whether punitive damage reform and federalism can coexist. Levy harmonizes the views of some conservatives who want to rein in runaway punitive damage awards with the views of other conservatives who find no federal judicial power to do so. Elaborating on the Scalia and Thomas dissents in *State Farm*, Levy traces the controversy over the Court's substantive due process jurisprudence and offers recommendations to restore sanity in the punitive damages arena while honoring traditional notions of federalism.

If First Amendment scholars agree on anything, it is that the Amendment must protect political speech. Yet in recent years, political speech has come to be more heavily regulated than commercial speech or internet pornography. How has that come about? Bradley A. Smith argues that *Federal Election Commission v. Beaumont* epitomizes the intellectual confusion and lack of political understanding underlying the Supreme Court's complex reading of campaign finance law. Smith writes that the Court, with little thought, has defined fundamental elements of our democratic system as ''corrupt.'' In so doing, the Court has provided leeway to legislatures to suppress disfavored speech and harass disfavored groups. Recent decisions, culminating in *Beaumont*, indicate that the Court is prepared to accept still more regulation of political speech. Smith suggests that challengers to the recently enacted ''McCain-Feingold'' campaign finance law may find the case has already been decided against them.

Jim Bond's article on *Nevada v. Hibbs* poses two provocative questions. First, does *Hibbs* clarify the Court's sovereign immunity jurisprudence? Probably not, says Bond. By backpedaling from recent

cases that refused to abrogate state immunity, *Hibbs* may have raised more questions than it answered. Second, Bond asks whether sovereign immunity has been effective in curbing federal power. The political left, to its dismay, says ''yes,'' and welcomes the partial about-face in *Hibbs*. The right is split. Conservatives applaud the pre-*Hibbs* opinions, warning that federal authority is unrestrained. Libertarians, concerned about state violations of individual rights, prefer to confine immunity to the express text of the Eleventh Amendment. Bond's view is that the dispute may be ''Much Ado about Nothing,'' because sovereign immunity has done little to curtail federal power and voters can abrogate immunity if they wish. In the previous volume of the *Cato Supreme Court Review*, Cato's Robert A. Levy argued the libertarian position. He was no less concerned than Bond about overarching federal authority, but he urged a frontal assault via the enumerated powers doctrine rather than a backdoor remedy that immunized rights violations. Our readers might be interested in contrasting the two articles.

It is no accident that the Bill of Rights lists the Right to Property along with other rights such as the Right to Free Speech and the Right to Free Exercise of religious liberties. In 1795, nearly a decade before *Marbury v. Madison*, the Court declared: ''The preservation of property then is a primary object of the social compact.'' As one prominent liberal law professor, Laurence Tribe, acknowledges—albeit in a footnote—many ''of the Framers believed that preservation of economic rights was the *central* purpose of civil government.'' Nearly a half century ago, the Supreme Court advised that the Takings Clause was designed to bar government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole. The founders would embrace that principle. According to Ronald D. Rotunda, it is less clear if they would embrace the result in *Brown v. Legal Foundation of Washington.* That case allows the state to take as its own the interest earned from the trust accounts of clients who hire lawyers and deposit money with them for safekeeping.

Rotunda argues that the five to four majority in *Brown* wrote its decision narrowly and in such a way as to give back that which it, at first, appeared to take away. The majority concedes that the government cannot take the principal (which belongs to the owners of that principal) unless it pays just compensation. Nor can the government take the interest, except under the peculiar facts of this case, where the Court found that the value of the money taken was

worth zero to the owners of the principal. The opinions are drafted narrowly and suggest that five members of the majority along with all four dissenters would not approve a program governing ''Interest on Lawyers' Trust Accounts'' that did not, as a legal and factual matter, contain all the caveats found in the majority opinion. The majority invites further attacks on IOLTA programs as the technology apportioning interest improves.

Finally, in a look ahead to the forthcoming October Term 2003, Michael A. Carvin identifies the cases of greatest interest—including the long awaited Bipartisan Campaign Reform Act argued on September 8, 2003 and *Locke v. Davey*, an intriguing religion clause case with broad implications—and the principles at stake.

I thank our contributors for their generous participation: There would be no *Cato Supreme Court Review* without them. I thank my colleagues at the Cato Institute's Center for Constitutional Studies, Roger Pilon, Timothy Lynch, and Robert A. Levy for valuable editorial contributions; David Lampo for producing and Elise Rivera for designing the *Review*; research assistant Elizabeth Kreul-Starr for valuable work in preparing the manuscripts for publication; Brooke Oberwetter, and interns Tyler Andrews, Michael McClellan, Sarah McIntosh, and Matthew Tievsky for additional assistance. Finally, I thank our readers for their generous comments and encouragement upon the publication of last year's inaugural volume.

We hope that this volume, and those to come, chart a journey of the Court toward a jurisprudence grounded on first principles. But we aspire to do more than document the Court's progress. We want the *Cato Supreme Court Review* to be more than a weathervane, merely reflecting the direction of the wind. Instead, we hope that these essays, and those in past and future volumes, influence, at least in some small way, how the wind blows. Our goal is to reanimate the principles laid down more than two centuries ago in the Declaration of Independence and the Constitution and to apply those principles today to the cases and controversies that come before the Supreme Court of the United States. In so doing we aim to resurrect the spirit of another age when, long before they were eclipsed by the rise of the modern regulatory and redistributive state, the natural rights of liberty and property superseded the will of government and of men. With continuing optimism for the task ahead, we present the second volume of this *Review*.

James L. Swanson
Editor in Chief