FOREWORD

Substance and Method at the Court

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The Cato Institute's Center for Constitutional Studies is pleased to publish this second 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. A year ago, on September 17, Constitution Day, we released the inaugural volume of the *Review* at a gala conference, ''The Supreme Court: Past and Prologue,'' held at the Cato Institute. The conference was followed by the first annual B. Kenneth Simon Lecture in Constitutional Thought, given by Douglas H. Ginsburg, chief judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Ginsburg's lecture, ''On Constitutionalism,'' could not have been better suited for the occasion. It is the lead article in this volume of the *Review*.

With that, we hope to have begun a tradition. This year, too, the *Review* will be released at a Constitution Day conference on the Court's recent and coming terms. And this year's lecture in honor of the late Ken Simon, who passed away this summer, will also be devoted to a basic, timeless theme that was dear to Ken, ''The Indivisibility of Personal and Property Rights: A View from the Founding.'' The lecture will be delivered by Walter E. Dellinger III, acting solicitor general under President Clinton. And it will appear as the lead article in next year's volume of the *Review*.

Both lectures treat fundamental, substantive subjects, focusing on why it is we have constitutional government in the first place. James Madison, like the rest of the Founders, understood that the purpose of government is to secure property. But he conceived of that term broadly, as did America's philosophical father, John Locke: ''Lives, Liberties and Estates, which I call by the general Name, *Property*.''

It is to secure such basic, substantive rights, the Declaration of Independence tells us, that governments are instituted among men. Unfortunately, with the rise and dominance of majoritarian process, that fundamental point has too often been obscured as the pursuit of policy has overtaken adherence to principle. One aim of this *Review* is to direct attention to that problem.

But there are other ways, too, in which we can lose sight of the substantive purpose of government. One is through a change in judicial methods, the methods employed by the branch of government charged with being the ''bulwark of our liberties,'' as Madison put it. As I argued in last year's Foreword, ''Restoring Constitutional Government,'' the structure of the Constitution suggests certain basic constitutional questions. First, is the governmental action authorized by the Constitution or by a state constitution? And second, if so, are the means employed necessary and proper—that is, could the authorized end be realized without those means; and do they violate either enumerated or unenumerated rights? A court that followed such a method would not go far wrong, constitutionally.

Unfortunately, the methods of the modern Court have been drastically altered by the New Deal's constitutional revolution, and not for the better. Today, except when governmental actions implicate ''fundamental'' rights, which are nowhere distinguished in the Constitution, the presumption of individual liberty implicit in question one has been replaced by a presumption of constitutionality in favor of the government. Thus, the burden is on the individual to defend his liberty, not on the government to defend its action. That switch is conceptually simple, however, compared with what has happened to question two. The word ''necessary'' in the Constitution's Necessary and Proper Clause was long ago lost, in *McCulloch v. Maryland* (1819), replaced by ''appropriate,'' which of course does not mean the same thing. But regarding rights (and the scope of ''proper''), if the governmental action implicates ''fundamental'' rights, the government must have a ''compelling interest'' if it is to win and its means must be ''narrowly tailored'' to that interest. That is the methodology of ''strict scrutiny.'' ''Mid-level'' or ''heightened scrutiny'' is applied when somewhat ''lesser'' rights are at issue—in cases involving gender discrimination, for example, as opposed to racial discrimination, which is subject to a strict scrutiny test. With mid-level scrutiny the government must have an ''important interest'' and its means must be ''substantially related'' to that interest.

Then there are even lesser rights—property, contract, and the rights at issue in ''ordinary commercial transactions,'' for example. To pass constitutional muster, governmental actions implicating those rights need only be ''rationally related'' to some ''conceivable interest'' of the government. Thus the ''rational basis'' test.

Nobody, including those on the Court, knows what any of that really means—certainly not the layman who tries to make sense today of ''constitutional law.'' We've had cases in which four levels of judicial scrutiny have been articulated—*e.g.*, *Turner Broadcasting Sys., Inc. v. FCC* (1994). More recently, Justice Ruth Bader Ginsburg hinted at a level of scrutiny between ''mid-level'' and ''strict'' when she spoke of the government's justification in gender discrimination cases as having to be ''exceedingly persuasive'' (*U.S. v. Virginia Military Academy* (1996)). And just this term, in *Lawrence v. Texas*, Justice Sandra Day O'Connor wrote that when laws exhibit a desire to harm a politically unpopular group, the Court has applied ''a more searching form of rational basis review'' to strike them down. Is that ''more searching'' form equivalent to ''mid-level'' review, or something just below it?

Interestingly, the issue of judicial methodology arose in the two most prominent cases before the Court this term, which is why it is featured in this Foreword. In the two University of Michigan affirmative action cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*, involving racial and ethnic discrimination, the Court purported to apply strict scrutiny, but the dissent complained that there was nothing strict about the scrutiny the Court applied. In *Lawrence*, the Texas sodomy case handed down three days later, on the Court's last day in session, it appears that the Court simply abandoned its post-New Deal levels-of-scrutiny approach.

The articles that follow discuss those issues more fully, but a note or two would be in order here as well. In summary, the Court in *Grutter* invoked strict scrutiny to find, first, that Michigan's Law School had a ''compelling interest'' in having a diverse student body; and, second, that the race-conscious admissions policy the law school followed toward that interest—''a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment''—was ''narrowly tailored'' to serve the interest. Not so, said dissenting Justice Clarence Thomas. Before this decision the

Court had allowed racial discrimination by the government only for national security and remedial purposes, neither of which was at issue here, he argued; and strict scrutiny precludes the kind of deference the *Gratz* and *Grutter* Court gave to the university in determining that diversity is a compelling state interest. Moreover, added Chief Justice William Rehnquist in his separate dissent, the ''critical mass'' of minority students the law school sought to admit was nothing but a thinly disguised scheme for proportional representation.

As I argue in my essay, however, the two sides at bottom are at war over ''strict scrutiny'' and its application. Yet the very idea of ''compelling state interest'' sits uncomfortably in our constitutional order. If the idea means anything at all, it is entailed in a power that may be constitutionally authorized to a government. If, however, it is a separate policy goal that some may think ''compelling,'' it is a mere value judgment; there is no principle at issue; and it is no surprise that justices differ about what interests are or are not ''compelling.'' As for ''narrowly tailored,'' when coupled with such an interest, it is an even more inscrutable idea, reducing to a series of subjective indicia. In the end in *Grutter*, interests trump rights, policy trumps principle, and that is the end of principle. But the deeper problem lies in the Court's methodology, which makes little sense when one presses it in a case like this. Indeed, it is hardly an accident that the case generated so many opinions.

Turning to *Lawrence*, in the run-up to the case there was much debate among lawyers about whether the Court would treat homosexuals as a ''suspect class,'' discriminated against historically, and apply strict scrutiny to the Texas statute criminalizing homosexual sodomy, or whether some lesser level of scrutiny would be applied, including the rational basis test. As Randy Barnett discusses in his essay, the Court cut through that debate, and through scrutiny theory itself, to chart a much simpler, more constitutionally credible course. At the extremes of the modern view, the Court had two choices. It could have found that there was a ''fundamental'' right to engage in homosexual sodomy, then insist that the state show that its statute overriding that right was narrowly tailored to serve a compelling state interest. But there were no precedents for finding that the right was ''fundamental.'' Indeed, the Court had upheld a similar statute only 17 years earlier. Alternatively, the Court could have applied

the rational basis test, presumed the constitutionality of the statute, and then insist that Lawrence show that there was no rational nexus between the statute and some conceivable state interest.

The Court did neither. It spoke simply of liberty—presuming, in effect, that Lawrence had a right to do what the statute forbade. The Court then asked the state to justify the statute—in other words, the burden was on the state to justify its restriction, not on Lawrence to justify his liberty. The state spoke of morality. The Court found, under the circumstance, that that reason was insufficient to restrict Lawrence's liberty. In a nutshell, that was the end of it. There was no need to talk about ''fundamental'' and ''nonfundamental'' rights, or different levels of state ''interest,'' or different degrees of fit between means and ends. None of that made any sense in this case, if it makes sense in any case. Methodologically, *Lawrence* was a breath of fresh air.

And so we are left with the question of whether *Lawrence* is like the train ticket that is good only for this train on this day, or whether it will have legs for future cases. It is hard to imagine that the Court will abandon the methodology that has shrouded its work in mystery for more than six decades, not least because those methods have served the political agenda of the New Deal that is with us still today. Under modern methods, certain political and personal liberties get exquisite attention from the courts, while property rights and economic liberties are relegated to the status of a ''poor relation'' in the Bill of Rights, as Chief Justice Rehnquist once put it. At the same time, it is hard to imagine that the Court can much longer pretend that there is not something seriously wrong—to say nothing of extra- or even unconstitutional—in the methodology it has used since the New Deal Court invented it from whole cloth in the late 1930s. The far simpler and far more straightforward methodology the Constitution itself suggests would encourage the Court away from subjective policy and toward objective principle. That alone recommends it for a nation founded in principle and in the idea, in particular, that judicial methods should serve substantive ends—and that substance, in America, is liberty.