FOREWORD

Can Law This Uncertain Be Called Law?

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The Cato Institute's Center for Constitutional Studies is pleased to publish this third 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. As in previous years, we will release this volume on September 17, at the Center's annual Constitution Day conference. And again this year, the annual B. Kenneth Simon Lecture in Constitutional Thought will follow the conference. Last year's Simon Lecture by Duke University's Walter Dellinger, ''The Indivisibility of Economic Rights and Personal Liberty,'' is the lead essay in the present volume. This year's lecture by the University of Chicago's Richard A. Epstein, ''The Progressive Vision of the Constitution,'' will lead next year's volume.

Our Simon Lecture series was instituted to encourage leading figures in the law to address fundamental issues in constitutional thought. Two years ago, Judge Douglas Ginsburg did that with his inaugural lecture, ''On Constitutionalism.'' Pointing to the virtues of a written constitution, among the most important of which is the assurance it gives citizens that they can plan and live their lives under a fairly clear rule of law, Judge Ginsburg went on to show what happens when those charged with securing that law—primarily judges, in our system—fail to abide by the authority granted them. Whether ignoring the restraints the Constitution places on the political branches, as during the New Deal, or ignoring the restraints it places on their own branch, as later judges would do, the result is the same—the triumph of policy over principle, politics over law.

But in his own Simon Lecture a year later, appearing below, Professor Dellinger, in the spirit of continuing dialogue, took some small

exception to Judge Ginsburg's thesis—not that it did not raise fundamental issues, and raise them well, but that it, too, ignored crucial elements in our constitutional structure, namely, the unwritten, yet implicit aspects of our Constitution. There are, in particular, certain principles that should structure our thought about the document, and a substantive vision that flows from those principles, which the text captures only in broad language. Thus, it falls to the judge not so much to *create* those principles and that vision as to *discover* and be guided by them. Central to that effort, as Dellinger writes, is the idea that ''before the state deprives a citizen of liberty, it must have a reason—and a good one, too.'' Under a Constitution written to secure liberty through limited government, that idea should guide a judge and inform his understanding of the rights implicit in the document's broad language.

Yet down that path is peril, as both Ginsburg and Dellinger are aware; for the line between discovering and creating law is fine, and judges do not always discern it clearly. At the same time, responsible judges, sworn to uphold the Constitution, cannot ignore written text simply because it is broad. On the contrary, they must grapple with it, in the knowledge that the Framers could not have committed every detail to writing; yet neither did the Framers mean to leave most matters to political determination. In fact, they wrote a constitution designed to leave most of life *free* from political determination—most of life, in a word, free. Their broad strokes, whether in the enumeration of powers or in the articulation of the Ninth, Tenth, and Fourteenth Amendments, were meant to frame that vision and afford judges general guidance toward securing it. That guidance will lead to sound opinions, however, only if judges bring to their craft a sure grasp of the underlying principles of our constitutional order—the theory of political legitimacy that underpins the Constitution, the theory of moral rights that underpins that.

A term ago, we had a wonderful example of how the Court might undertake its responsibilities with that understanding in mind. In *Lawrence v. Texas*, Justice Anthony Kennedy cut through the methodological distractions that have arisen since the notorious *Carolene Products* case of 1938 to ask a refreshingly simple question—not where in the Constitution Mr. Lawrence found the right he claimed, but what justification the state had for interfering with Mr. Lawrence's liberty. It was not Mr. Lawrence's burden to justify his liberty,

that is; under our Constitution, he was presumed to be free. Rather, it was the state of Texas that had to justify its restrictions. The best it could do, in that regard, was to speak of that subset of morality, morals. Since ''defending morals'' could be said of virtually any legislation, Kennedy noted, it was not good enough; and so Mr. Lawrence's moral right to do as he pleased, even if it offended some in the community, was secured.

One would like to have seen the same approach taken in the other case that term that drew so much attention, *Grutter v. Bollinger*. Instead, paying lip service to *Carolene Products* methodology, Justice Sandra Day O'Connor turned ''strict scrutiny'' on its head by accepting, uncritically, the state of Michigan's assertion that having a racially diverse student body is a ''compelling state interest'' and that racial discrimination is necessary to achieve that end. Thus, instead of taking the Fourteenth Amendment's broad Equal Protection Clause at face value, and presuming that Ms. Grutter had a right to be free from state discrimination, O'Connor reversed the presumptions, in essence, by reducing the state's burden to a virtual nullity. The opinion is a textbook example of policy trumping principle—an opinion devoid of discipline, leaving us altogether unclear about when a state may and may not discriminate (witness the companion case, *Gratz v. Bollinger*, which went the other way). If a cardinal purpose of law is to give notice about what is permitted and prohibited, we are without law on this matter.

That is the theme for the term just ended. And where better to illustrate it than with the term's first decision (technically, a carryover from the previous term), after a special oral argument last September, *McConnell v. FEC*. Perhaps the best thing that can be said of the opinion is that it came down in only 298 pages, compared with the lower court's 1,638 pages. With three majority opinions and five other opinions concurring in part and dissenting in part—numbers that hardly capture the complexity of the cross-references—the ''decision'' drives one to Latin: *res ipsa loquitur*. If ever a decision spoke for itself, albeit in the negative, and illustrated a court without a compass, this is it. After this decision, can anyone credibly claim to understand our campaign finance law? It was unclear enough under the *Buckley v. Valeo* decision of 1976, which opened the door to broad restrictions on campaign contributions. Today, on the campaign trail, this ''law'' is an endless source of

charges, countercharges, and calls for still more ''reform.'' Yet the core principle, to which the Court's majority seemed oblivious, could not be simpler: Campaign contributions are political speech; political speech is protected by the First Amendment. The government's claim that restrictions were needed to prevent corruption was incredible on its face, given the absence of evidence. But once the principle of the matter was abandoned in *Buckley*, it was all tinkering, trying to ''get it right.'' The result is a body of ''law'' that looks like the IRS code. For those with the patience, Erik Jaffe plows through the details below.

Fortunately, in the three national security cases that drew so much attention late in the term, the Court did stand for principle, at least on first impression. But the impression is doubtless as much a function of the president's overreaching, as Professor Neal Katyal argues, as it is of the Court's having articulated the kind of principled approach to the issues that our Timothy Lynch sets forth. In fact, Professor Jonathan Turley's clever perspective piece treating all three of the cases draws out several uncertainties with which the Court has left us and many of the confusions that beset ''the O'Connor Court'' generally—confusions that are better understood, perhaps, through the analogies he draws with the world of modern art. Ambiguity in art is often a virtue. In law it seldom is.

The Rehnquist Court's ''new federalism'' may still be alive, barely, but it is no clearer than it ever was. Back in 1995, when *United States v. Lopez* returned us at last to ''first principles,'' Justice Clarence Thomas cautioned the Court that its reading of the Commerce Clause, however welcome after nearly sixty years of misreading, was still wide of the mark. If the Framers had wanted to empower Congress to regulate anything that substantially affects interstate commerce, he said, they could have written that. They did not. And so the Court's reading to that effect was still mistaken. The Court had a chance this term to begin correcting its misreading of another of the Constitution's most important provisions, the Necessary and Proper Clause. It ducked the opportunity, as Professor Gary Lawson shows in his searching treatment of *Sabri v. United States*, and so we are left with uncertainty about the reach of federal criminal law. Given the ubiquity of the federal funding federal criminal law follows, the reach could be vast.

Not surprisingly, the Court continues to struggle with federalism in those complex cases that implicate both the Eleventh and the

Fourteenth Amendments. Two years ago in these pages our Robert Levy straightened out the mess the Court left us in *Federal Maritime Commission v. South Carolina State Ports Authority*. We call on him to do the same again this year with *Tennessee v. Lane*. If ever there were a need to return to first principles to get clear about an issue, it is here. Yet the Court seems content to ''wing it,'' unable to shed the errors of the past.

And it does the same with a relatively simpler issue, property rights. Fourteen years ago, in *Lucas v. South Carolina Coastal Council*, Justice Antonin Scalia spoke of the Court's seventy odd years of ad hoc regulatory takings jurisprudence, even as he was adding yet another year to the string. As Professor John Eastman demonstrates below, in an essay about the dog that didn't bark, things are little better today, since the Court is declining to hear a string of cases that cry out for its attention—circuit splits involving property rights cases replete with unresolved federalism issues. This is an area in which the Court could relatively easily bring order out of chaos, but it would require the Court's grasping the principle of the matter, and that it seems unprepared to do.

A final example from a disquieting year is a case so simple that one wonders why it was even before the Court. When Dudley Hiibel, standing beside his pick-up truck on the shoulder of a rural Nevada road, was asked by a local sheriff for identification, he declined to provide any. In Nevada, as in many other states, that is a crime. In fact, many state laws require individuals to provide police officers with their names, their addresses, and their business about. Both the Fourth and Fifth Amendments are implicated here, of course—the right to be free from ''arrest'' (being stopped) on less than probable cause; and the right to remain silent so as to avoid the possibility of self-incrimination. As Christine Klein details below, the Court allowed an inroad on the first right in 1968 when it sanctioned the so-called *Terry*-stop—a stop based on mere suspicion. This term it went further when it upheld the Nevada statue. We have a situation, then, in which an officer may demand identification; and if that proves incriminating, the officer must then say, ''You have a right to remain silent.'' Where we go from here, whether state statutes that require divulging considerably more information are legal, is anyone's guess.

Unlike mere legislation, which is rooted in will, law is supposed to be rooted in reason. That is an ancient distinction, drawn to serve

legitimacy. Under our system, legislators pursue policy—when the Constitution authorizes them to do so. Judges check that effort to ensure that it is authorized and that it is done in a way that respects our rights, enumerated and unenumerated alike. Judges ensure, in a word, the rule of law. When they are overwhelmed with a surfeit of legislation, however, as ours have been since they opened the floodgates during the New Deal, it is all too easy for them to start thinking like legislators, to abandon principle, as they did then, and to think only of policy. We see too much of that on this Court. We need a Court of judges, not policymakers.