

Introduction

This is the third volume of the *Cato Supreme Court Review*, an annual review of the most significant opinions of the Supreme Court of the United States. This volume includes cases from the term beginning in October 2003 and ending in late-June 2004.

For readers new to our pages, the *Cato Supreme Court Review* has three principal aims: First, it provides the earliest in-depth review of each Court term. The *Review* appears on Constitution Day—September 17—soon after the Court completes its work, and shortly before the next term begins on the first Monday in October.

Second, the editors believe that the Constitution is not a technical document of interest only to lawyers and judges. Rather, we aim to bring together top-flight contributors to analyze the term in a manner that will make the Court's work accessible, insofar as possible, to a diverse audience. Although the *Review* is a "law" book, in the sense that it is about the Court and the Constitution, it is written for all citizens interested in the Constitution and the Court's interpretation of it.

Third, and most important, the *Cato Supreme Court Review* has a distinctive point of view, which we happily confess: The *Review* analyzes the Court and its decisions from a classical Madisonian perspective, emphasizing the Constitution's first principles: individual liberty; secure property rights; federalism; and a government of delegated, enumerated, and thus limited powers.

Fundamental constitutional questions about Madisonian first principles were not in short supply this term, as the trilogy of much-watched "national security" cases amply demonstrated. Each of the cases presented disturbingly broad presidential claims to power—claims that went to the heart of what it means to live under a system of checks-and-balances. In *Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*, the president claimed the unilateral authority to declare an American citizen an enemy combatant and strip him of constitutional rights, including access to courts or counsel. And in *Rasul v. Bush*, the

president contended that his powers as commander-in-chief permitted him to create his own prison system, with its own standards, just beyond our borders, without any meaningful judicial oversight.

Timothy Lynch begins analysis of these cases by articulating a framework, grounded in the Constitution, for balancing civil liberty and national security. Lynch starts with the premise that the Constitution limits the government in *both* peacetime *and* wartime, and then articulates a series of fundamental rules to protect civil liberties. Those rules, he explains, turn on three fundamental questions: What is the citizenship of the individual arrested? Where was he arrested, on American soil or on the battlefield? And, what punishment does the government seek to impose? Those questions, says Lynch, lead us back to the text of the Constitution, which underscores that during wartime, the Constitution is *not* silent and the president is *not* a power unto himself.

Neal Katyal takes up *Rasul v. Bush*, which asked whether accused enemy aliens, captured on foreign battlefields and detained in Guantanamo Bay, have any right to test the legality of their detention in U.S. courts. In an opinion that will no doubt be fodder for litigation for years to come, Justice John Paul Stevens ruled that the Guantanamo detainees do have such a right. Just why the Court believed so is less clear. Based on a close reading of Justice Stevens' opinion, Katyal concludes that *Rasul* is a potentially revolutionary case, one that has taken us from a constitutional regime in which no alien outside of the United States could challenge detention to one in which virtually anyone held by American forces beyond our shores may do so—and in which the president faces far more restraints on his powers as commander-in-chief than ever before. Katyal concludes that much blame lies with the administration, which pushed for extreme powers—and provoked a judicial backlash.

Finally, Jonathan Turley rounds out the analysis of the national security trilogy with a creative article that examines the Court's methods of constitutional interpretation by likening them to artistic styles. Turley finds much reason for concern. While the outcomes of these cases could have been worse, he says, *Hamdi*, *Padilla*, and *Rasul* collectively demonstrate that the Court, led by Justice Sandra Day O'Connor, has embraced what he calls "judicial impressionism": a style of judging that treats constitutional text and history as something that can be creatively altered to fit the needs of the

moment. As Turley notes, this is hardly a new style of judicial analysis in the realm of national security. And, if the past is prologue, its resurgence this term bodes ill for the Court's commitment to safeguarding our rights.

While the national security cases raised unusually important questions, this was a term replete with cases that illuminate first principles. Indeed, the next case addressed by this year's *Review* may well have dealt the most *under-reported* blow to constitutional structure. The facts of *Sabri v. United States* seem humdrum: The Court upheld the federal power to prosecute a private developer accused of bribing a Minnesota state municipal official. The case is important, argues Gary Lawson—the author of Cato's friend-of-the-court brief in *Sabri*—because it presented the Court with an opportunity to reinvigorate the Necessary and Proper Clause, and with it the Founders' conception of our government as one of limited, enumerated powers. The Court missed that opportunity—underscoring the limits of the supposedly “revolutionary” federalism jurisprudence of the Rehnquist Court. As Lawson details, *Sabri* is a microcosm of how far the Court's understanding of the Constitution has traveled from the Founders' original design.

In *Tennessee v. Lane*, the Court once again confronts the dubious claim that states are “immune” from suit under federal law, this time in a suit alleging the state of Tennessee discriminated against disabled persons and so violated Title II of the Americans with Disabilities Act. Cato scholar Robert Levy argues that the case is a study in constitutional confusion: On the immunity question, says Levy, the Court got it right, recognizing that Tennessee was not entitled to immunity. But the Court reached that result for the wrong reason, by ruling Congress validly “abrogated” Tennessee's immunity under section 5 of the Fourteenth Amendment. In fact, according to Levy, there was no need to abrogate state immunity, because the Eleventh Amendment does not grant states “immunity” from suits under federal law. Levy concludes by confronting the important unasked question in *Lane*: whether the Commerce Clause provides a constitutional pedigree for Title II of the Americans with Disabilities Act.

Vikram Amar writes that the Court's decision in *Cheney v. U.S. District Court for the District of Columbia* provides a window on a key theme this term: the Court's repeated decision not to decide

tough questions. In *Cheney*, public interest groups sued the vice president in an attempt to obtain the names of private lobbyists and oil company officials who allegedly participated in an energy policy working group headed by Cheney. The vice president argued that the doctrine of “executive privilege”—under which the president is protected from disclosing certain confidential communications—also protected him from making any disclosures. As Amar analyzes the case, the *Cheney* Court refused to answer a number of important and unsettled questions about the contours of executive privilege, leaving the constitutional limits on executive secrecy in a continued state of disarray.

Too often the Court ignores the robust role that our system of separation of powers has designed for it. Less often, the Court assumes powers inconsistent with constitutional structure. That, I argue in my essay, is what happened in *Sosa v. Alvarez-Machain*. In *Sosa*, the immediate question seems rather technical: The plaintiff argued that an obscure 1789 statute, the so-called Alien Tort Statute, authorizes foreign persons to vindicate violations of “customary international law” in U.S. federal courts. *Sosa*, however, raises important questions about which branch has primary responsibility for incorporating international law into our legal framework. As I argue in my essay, our constitutional structure places limits on the role of courts in this area—limits weakened by the Court in *Sosa*.

From constitutional structure, we move to individual rights. Political speech is at the core of the First Amendment: That makes modern campaign finance laws, and their regulation of financial support for political speech, difficult to justify. Nonetheless, at the very beginning of the October 2003 term, the Court upheld one of the most sweeping expansions of campaign finance restrictions in decades: the McCain-Feingold Act. The Supreme Court’s decision in *McConnell v. FEC*, argues Erik Jaffe—the author of Cato’s friend-of-the-court brief in the case—strikes at the heart of the First Amendment’s “jealous protection for core political speech.” Jaffe concludes that the Court in *McConnell* has handed Congress a powerful weapon against speech, and that “both freedom and the First Amendment will be the victims.”

This year’s internet free speech case, *Ashcroft v. ACLU II*, presented the Court with its latest opportunity to clarify the confused application of the First Amendment to the internet. In particular, *Ashcroft*

asked whether the Child Online Protection Act (COPA), which broadly regulates online speech in the interest of children, passes constitutional muster. The Court had long avoided resolution of COPA's constitutionality. But in *Ashcroft II*, the Court gave us the clearest sign yet that it believes COPA to be constitutionally infirm. First Amendment lawyer and Cato adjunct scholar Robert Corn-Revere argues that the case, even though it did not finally settle the constitutionality of COPA, is highly important, for two reasons. First, the case set a high bar for future regulatory efforts. Second, it highlights a significant doctrinal division between what he identifies as "collectivist" and "individualist" accounts of the First Amendment's protections.

As schoolchildren know, or should know, the American experiment began when persecuted Europeans fled to the New World seeking religious liberty and freedom of conscience. In *Locke v. Davey*, a case closely watched by school choice advocates, the Court considered whether a Washington State constitutional provision, with nativist roots, justifies exclusion of theology majors from a state scholarship program. As Susanna Dokupil argues, *Locke* presented the Court with an important opportunity to uphold the principle that the state cannot single out and penalize persons based on their choice to pursue educational ends dictated by religious belief. Unfortunately, in *Locke*, the Court missed that opportunity, upholding the challenged discrimination. Dokupil discusses the implications of the case for the First Amendment, the future of educational choice, and religious liberty.

In the wake of the September 11 terrorist attacks, federal and state governments have flexed their power to search and arrest citizens—and not just in cases involving "enemy combatants." In *Hiibel v. Sixth Judicial District Court of Nevada*, Nevada police arrested Nevada cowboy Dudley Hiibel. The charge? Hiibel's refusal to answer police questions—a "crime" under a Nevada law penalizing "noncooperation" with police investigations. The Nevada Supreme Court—citing the need to protect citizens against terrorism—upheld the arrest. So, unfortunately, did the U.S. Supreme Court. Christine Klein served as co-counsel on Cato's friend-of-the court brief in *Hiibel*. In her article, she argues that the decision represents a new low in the Court's willingness to police the police; further blurs the content of the "right to remain silent"; and erodes constitutional protection against police coercion and intimidation.

Hiibel is not the only blow to civil rights: The Fourth Amendment had its roots in American colonists' hatred of general search warrants, which permitted agents of the Crown to search houses and other property without individualized suspicion. *Maryland v. Pringle* therefore would have come as a shock to the Founders. In that case, the Court upheld the power of police to arrest persons who are not individually suspected of wrongdoing in certain cases where they are "guilty by association." Criminal law expert Tracey Maclin, who authored the ACLU's friend-of-the-court brief in *Pringle*, offers a comprehensive analysis of the case, which underscores that the Court effectively has abandoned fidelity to an individualized conception of "probable cause." *Pringle*, much like *Hiibel*, is likely to bolster police use of the arrest power to coerce the cooperation of innocent citizens.

The Court's criminal docket has at least one bright spot: *Crawford v. Washington*, a landmark decision in which the Court rediscovered the principle that an accused has a right to confront his accuser. Richard Friedman, a Confrontation Clause expert who has long advocated a sea change in the Court's understanding of the confrontation right, dissects *Crawford* and its implications. As Friedman emphasizes, *Crawford* is an important victory for constitutional text, original intent, and the rights of the accused, and promises to curb a longstanding prosecutorial abuse: The use of testimony made to police behind closed doors, and out of the presence of the accused, to obtain convictions.

Sometimes, the appeals that the Court doesn't take are as important as those it does consider. In the October 2003 term, says John Eastman, the Court's refusal to consider a series of Commerce Clause challenges to environmental land use regulations raises questions about the Court's commitment to *Lopez v. United States* and *United States v. Morrison*, cases in which the Court finally put some restraints on Congress's power to regulate interstate commerce. As Eastman analyzes the matter, the environmental land use cases before the Court in 2003 showcased an exercise of federal power directly at odds with *Lopez* and *Morrison*, and so cried out for review. The Court's failure to take these cases on appeal, says Eastman, lends credence to the claim that property rights are low on the Court's list of priorities.

Finally, in a look ahead to the October 2004 term, Supreme Court litigator Thomas C. Goldstein identifies the cases thus far of greatest

interest—and the principles at stake. The next term will feature important questions concerning the scope of the Commerce Clause, state power to interfere with freedom of interstate trade, and First Amendment protections for commercial speech. The 2004 term will also bring to a head questions about the constitutionality of the Federal Sentencing Guidelines, as the Court squarely confronts the application of *Blakely v. Washington* to our federal sentencing system. Goldstein outlines the issues at stake, and ventures some predictions.

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, Robert A. Levy—as well as Cato friend Jerry Brito—for valuable editorial contributions; David Lampo for producing and Parker Wallman and Elise Rivera for designing the *Review*; research assistants Elizabeth Kreul-Starr, Madison Kitchens, Tim Lee, and Thomas Pearson for valuable work in preparing the manuscripts for publication; and interns Jacinda Lanum and Henry Thompson for key all-around assistance.

Again, we reiterate our hope that this volume will deepen understanding of our too often forgotten Madisonian first principles, and give voice to the Framers' belief that ours is a government of laws and not of men. In so doing we hope also to do justice to a rich legal tradition—now eclipsed by the rise of the modern regulatory state—in which jurists understood that the Constitution reflects, and protects, natural rights of liberty and property, and serves as a bulwark against the abuse of state power.

We hope that you enjoy the third volume of the *Cato Supreme Court Review*.

Mark K. Moller
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