

Introduction

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The fourth volume of the *Cato Supreme Court Review* arrives at the end of an era: As this edition of the *Review* goes to press, Justice O'Connor has announced her retirement, signaling that the Court's current five member conservative majority will soon be no more. Her announcement is no surprise: Change has been anticipated since President Bush's election in 2000. But what it augurs remains anyone's guess.

There is a temptation to predict more of the same: The Court's changes tend to come in increments rather than in revolutions. But, some have suggested that deeper change in the direction of constitutional law may be silently under way.¹ One scenario—a pessimistic one from the *Cato Supreme Court Review's* Madisonian standpoint—has been sketched in a provocative 2003 article on the Rehnquist Court by law professor Thomas Merrill.² His analysis of voting behavior on the current Court suggests that the first casualty of a change in the conservative majority may be the Court's halting efforts to reinvigorate constitutional federalism.³

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¹Laurence H. Tribe, *The Treatise Power*, 8 Green Bag 2d 291, 292 (2005) ("in area after area, we find ourselves at a fork in the road—a point at which it's fair to say things could go in any of several directions").

²Thomas Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L.J. 569 (2003). I am indebted to Jonathan Adler for bringing this article to my attention.

³Merrill does not speculate on the effect of changes on the future course of the Court, but his analysis of the voting dynamics on the current Court, if correct, nonetheless suggests that the Court's federalism revolution is one area that may be a casualty of personnel changes.

Merrill tells the story, which centers around Antonin Scalia, this way: Justice Scalia came to the Court uninterested in federalism.⁴ Instead, in his early years on the Court, he yearned to achieve different goals: (1) scaling back judicial “interference” with democratic decisionmaking in morally contentious areas like abortion and religion; (2) promoting executive power; and (3) replacing the Court’s multi-factored balancing tests with hard-and-fast rules.⁵ By 1993, however, it was clear that he was doomed to failure on each those fronts, as he could not enlist the other four conservative justices in his efforts.⁶

Accordingly, suggests Merrill, Scalia decided to engage in “strategic voting.”⁷ Observing that the chief justice, and Justices O’Connor, Kennedy, and Thomas, shared a commitment to federalism, he saw an opportunity. By joining the federalism bandwagon, and forging a five to four majority that decided *New York v. United States*, *United States v. Lopez*, *Printz v. United States*, and *United States v. Morrison*, he became, for the first time, part of an influential governing voting bloc and, in return, gained token collegial support from other conservatives for his idiosyncratic pet projects—such as the promotion of executive power and the use of rules rather than standards to decide cases.⁸ If Merrill is right, the story of the Rehnquist Court is a story of the chaining and channeling of Scalia’s ambition.

The 2004–2005 term is, in all likelihood, if not the end, then at least the twilight of the Rehnquist era—and, with two great architects of the Court’s federalism “revolution” (O’Connor and, eventually,

⁴*Id.* at 609–11. Scalia, during the heady days of the first Reagan administration, chastised conservatives for failing to realize that “the federal government is not bad but good.” “The trick,” he said, “is to use it wisely.” See, e.g., Antonin Scalia, *The Two Faces of Federalism*, 6 Harv. J.L. & Pub. Pol’y 19, 22 (1982), quoted in Merrill, *supra* note 2, at 610 n.152.

⁵Merrill, *supra* note 2, at 604–05.

⁶*Id.* at 580–84, 604–06.

⁷*Id.* at 606–09 (describing the Scalia “strategic voting” thesis).

⁸*Id.* at 607. For example, in exchange for his support for federalism, the chief has given Scalia more opportunity to write key majority opinions, an opportunity that Scalia, in turn, has exploited (in cases like *Printz v. United States*) to smuggle in dicta favoring distinctive positions (in *Printz*, his support for the “unitary executive”) that previously had been rejected by other conservatives. See Jay S. Bybee, *Printz, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court’s Pocket?*, 77 Notre Dame L. Rev. 269 (2001).

Rehnquist) on the way out, Scalia is poised to be the incoming dean of the conservative majority. If the stars are aligned properly—if Bush appoints justices who share Scalia’s distinctive disinterest in federalism, his zest for democratic decisionmaking, his wariness of unelected judges, and his frustrated ambition to revisit hot-button issues like abortion rights and the separation of church-and-state—Scalia’s star may at last be in ascendance, emboldening him to once again press his long-silenced agenda. If so, we may see a significant shift in the priorities of this conservative Court.

Of course, we can only speculate whether this change will materialize. But this uncertainty makes this term all the more instructive, since it provides a snapshot of the state-of-the-Court—highlighting not only aspects of its legacy worth defending but also its unrealized potential.

Professor Richard Epstein frames analysis of the 2004–2005 term by looking at the Court in another time of transition—the Progressive Era. As Epstein details, the Progressives, led by Justices Louis Brandeis and Felix Frankfurter, overthrew nearly a century-and-a-half of constitutional learning in the service of a single dubious economic theory: that economic “progress” required the creation of state-run monopolies to remedy the supposedly weak bargaining position of consumers and laborers. To facilitate the implementation of that theory, the Progressive Court dismantled well-established learning rooted in constitutional text, history, and precedent—including a liberty-oriented understanding of state police power, correspondingly robust protections for private property, and rigorous judicial enforcement of the limits, textual and implied, on the scope of federal regulatory power. Progressive economic theory now lies on the ash-heap of history, but, says Epstein, the Progressives’ radical transformation of the Constitution—including their evisceration of the Constitution’s protections for freedom of property, contract, and association—remains with us, rendering all of our liberties, economic and personal alike, less secure.

Professor James W. Ely Jr. begins review of the term by focusing on the Court’s treatment of constitutional protections for private property. He concludes that *Lingle v. Chevron*, *Kelo v. City of New London*, and *San Remo Hotel v. City and County of San Francisco* together have rendered the Takings Clause virtually toothless, leaving owners’ possession of private property at the mercy of state and

municipal legislatures. That outcome is very far from the intent of the Founders, who, says Ely, intended the Takings Clause, and private property rights generally, as a potent curb on majoritarian excess. Indeed, notes Ely, the facts of *Kelo*—in which a municipality transferred property of middle-class homeowners to a rich, politically well-connected developer at the behest of a powerful corporation—underscore the wisdom of the Framers' conviction that property rights are an essential safeguard for the vulnerable and politically marginalized. While Ely notes that these cases contain some underreported bright spots, they illustrate, nonetheless, that a majority of the Court remains firmly in thrall to the worst legacy of the Progressive Era: the New Deal Court's demotion of the property clauses of the Bill of Rights to second class legal status.

Property rights were not the only front on which the Progressive vision of the Constitution emerged victorious this term. In *Gonzales v. Raich*, notes Professor Douglas W. Kmiec, the Court not only appeared to abandon its halting effort to limit the reach of Congress' regulatory power under the Commerce Clause, but may have displaced the New Deal-era precedent *Wickard v. Filburn* as the broadest articulation of federal commerce power to date. As Kmiec notes, the Court's reasoning in *Raich* is deeply at odds with the original understanding of the Commerce Clause, which was intended, he argues, to reach only those interests that states are demonstrably incompetent to regulate or that inhere in the nation as a whole. As Kmiec discusses, *Raich* is not only a startling defeat for the Rehnquist Court's efforts to redress the New Deal Court's radical expansion of the commerce power, but it marks Justice Scalia's bolt from the Court's federalism coalition in its twilight hours. Professor Kmiec criticizes Scalia for abdicating his judicial duty to respect the Commerce Clause for what it is—one of a set of powers that were enumerated so that states and individuals would otherwise be left free.

As Roger Pilon argues, *Town of Castle Rock v. Gonzales* is the latest in a long line of cases that have misread the Fourteenth Amendment. In *Castle Rock*, the Court was asked to decide whether a Colorado municipality, the Town of Castle Rock, should be held liable to a Colorado mother under section 1863 of the Civil Rights Act of 1871 after its police officers, exhibiting gross negligence, failed repeatedly to enforce a temporary restraining order (TRO) against her estranged husband, who kidnapped their three children in broad daylight. As

Pilon explains, Justice Scalia's strained opinion for the Court bent over backwards to deny the plaintiff any recovery, despite the clear intent of the Colorado legislature to make enforcement of such restraining orders mandatory, not discretionary. Employing the first principles of the Fourteenth Amendment, Pilon explains how the confusions that surround the Amendment today could lead to so counterintuitive a result as the Court produced in *Castle Rock* when it reversed the en banc court below.

Completing the term's quartet of exceptionally ill-reasoned cases, *Johanns v. Livestock Marketing Association* continues the Court's long-standing under-enforcement of the Free Speech Clause. In that case, the Court, in an opinion written by Justice Scalia, implicitly refused to accord commercial speech First Amendment protection comparable to that afforded political speech. *Johanns* involved a First Amendment challenge to a federal program that compels beef producers to underwrite financially the content of state-mandated advertising on their behalf. As Supreme Court litigator Daniel Troy explains, the Court's willingness to uphold this coercion demonstrates its continuing belief that commercial speech is less constitutionally important than other speech—a myopia that, he argues, defies the Founders' understanding of the Free Speech Clause. Nonetheless, Troy argues that *Johanns* has a little-noticed silver lining: The majority's reasoning departs from past precedents by refusing to expressly acknowledge that commercial speech is accorded lesser First Amendment protection. Accordingly, Troy argues that, in the right circumstances, savvy litigators may use *Johanns* as a wedge to nudge First Amendment protection for commercial speech closer to the protections accorded political speech by non-commercial actors.

Fortunately, the Court's 2004–2005 case list does have a few bright spots. Among them, says noted religious liberty scholar Marci Hamilton, number the term's Establishment Clause cases, *Cutter v. Wilkinson*, *Van Orden v. Perry*, and *McCreary County v. ACLU*. In this trilogy, religious pressure groups asked the Court to expand the scope of permitted government favoritism toward religious organizations. As Hamilton notes, the Court held its ground. In *Cutter*, it dealt the religious pressure groups an under-reported blow by clear-sightedly recognizing that Congress' efforts to “accommodate” religion—here, by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA)—must be interpreted in the same manner as

any other interest-group driven legislation. More fundamentally, in *Van Orden* and *McCreary County* (the so-called Ten Commandments cases), the Court refused to overrule *Lemon v. Kurtzman*. Professor Hamilton suggests that religious groups should celebrate, not criticize, the Ten Commandments cases since the First Amendment's insulation of religious practice from government meddling has contributed greatly to the richness and diversity of religious speech in our public square. Unfortunately, she notes that a cohesive minority on the Court, led by Justice Scalia, would open the door to far more government entanglement with religious speech, jeopardizing the vitality of our distinctively American religious traditions.

Professor John Hasnas argues that *Arthur Andersen LLP v. United States*, a case related to the Enron scandal, is another bright spot in the 2004–2005 term. In *Andersen*, the Court rejected federal prosecutors' creatively expansive reading of the federal "witness tampering" statute. Prosecutors asked the Supreme Court to find that Arthur Andersen violated the statute when it executed a longstanding, and otherwise legal, corporate document retention policy. While the decision will have little direct effect on Arthur Andersen—which has ceased to exist due to this litigation—the case, says Hasnas, may indicate the Court's recognition that the federal law of "white collar crime" has come dangerously close to granting federal prosecutors unlimited power over corporate defendants. If so, argues Hasnas, the case is a welcome development for all concerned about excessive federal prosecutorial discretion and federal overcriminalization of corporate conduct.

In his article on *United States v. Booker*, Cato's Timothy Lynch suggests that celebration of the Court's revolutionary decision to upend the federal sentencing guidelines may be premature. To be sure, *Booker* demonstrates that a majority of the current Court recognizes that the Sixth Amendment constitutionalizes key features of the common law adversarial criminal system, including jury determination of facts essential to the imposition of punishment. However, he warns that the *Booker* majority—led by Justice Scalia—is insufficiently committed to the common law adversarial model, failing as it does to recognize that other aspects of the Court's criminal procedure cases have fatally truncated the right to jury trial. For example, *Booker's* holding may be more form than substance, he says, if the Court does not revisit its permissive attitude toward

coercive plea bargaining, which prosecutors have used to harshly penalize defendants who insist on their jury trial rights. He concludes by surveying, and criticizing from a policy standpoint, likely legislative responses to *Booker*.

Turning to the Court's regulatory cases, co-authors David G. Post, Annemarie Bridy, and Timothy Sandefur explore the implications of *MGM Studios Inc. v. Grokster, Ltd.*, concluding that the Court's decision leaves for another day key questions regarding the legality of Internet file-sharing technology. Post et al. argue that record companies, much like movie studios in the days of the VCR, have simultaneously overreacted to the commercial threat posed by an innovative new technology and underestimated the possibility that this technology may be harnessed in ways that will promote both consumer and record industry welfare. After carefully unpacking *Grokster's* contribution to the evolving test for third party copyright infringement, the authors conclude that we will have to wait for later cases to learn whether file-sharing software programs, considered apart from their distributors' culpable acts of inducement, come within the protective limits of previously recognized safe harbors.

Legal historian Stuart Banner examines a different case involving the intersection of law and Internet technology: *Granholm v. Heald*, in which the Court held the Twenty-first Amendment does not authorize state discrimination against out-of-state Internet wine shippers. A coalition of wine distributors and wholesalers, who benefit from state protection against Internet competition, urged the Court to hold otherwise. Focusing on the history of the Twenty-first Amendment, Professor Banner concludes that *Granholm* reached the right result, correctly interpreting the original understanding of the Amendment's Framers. As he demonstrates, the Amendment's Framers were committed to preserving the protection of the so-called dormant Commerce Clause—the term for the Commerce Clause's implicit ban on state discrimination against interstate commerce—as a background constraint on state regulatory power in the area of liquor commerce. His article provides an illuminating illustration of the Court's and Congress' understanding of the dormant Commerce Clause before, during, and immediately after the Prohibition Era, underscoring, in the process, the importance of the Constitution's protections for open markets in an age in which technology has rapidly expanded the scope of interstate competition.

While the legal issues implicated by the war on terror have not yet percolated back to the Supreme Court, the Court did have an occasion to consider the legality of yet another sweeping assertion of executive foreign affairs power, this time in *Medellin v. Dretke*, a case arising out of the death penalty conviction of a Mexican national in a Texas state court. In *Medellin*, the petitioner challenged his death penalty conviction by relying on a judgment of the International Court of Justice (ICJ), which ruled that an international treaty required Texas courts to re-consider his sentence. Although the president rejected the ICJ's ruling as a blatant misinterpretation of the treaty, the president has nonetheless "directed" state courts to follow the ICJ, arguing that he has inherent power to command state courts to alter the structure of criminal justice proceedings when doing so furthers American interests overseas. As noted international law scholar Mark Weisburd meticulously demonstrates, the president's assertion of power in this case is unfounded, both as a matter of treaty and of constitutional structure.

Professor Jonathan Adler rounds out this volume of the *Review* by looking forward to the Court's next term. As he underscores, the 2005–2006 term will provide strong preliminary signals about the future direction of the changing Court. It will, for example, include another significant federalism decision, *Gonzales v. Oregon*, which may offer Justice O'Connor's replacement an early test of his fidelity to the Court's federalism jurisprudence. The next term will also include opportunities to revisit the abortion debate in a case involving parental notification rights and, perhaps, in a case in which a certiorari petition is now pending, involving partial birth abortion. Together, the federalism and abortion appeals may serve as early bellwethers for Scalia's changing influence over the new conservative majority. Professor Adler outlines the issues at stake in these and many other cases, venturing some predictions.

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Again, we reiterate our hope that this volume of the *Review* will aid and deepen understanding of our too often forgotten Madisonian first principles—individual liberty, secure property rights, federalism, and a government of delegated, enumerated, and thus limited powers. Our aim, again, is to advance the *Review's* distinctive mission, unique among law journals: to give voice 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, thereby serving as a bulwark against the abuse of government power.

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

