Celebrating Constitution Day with a new Cato Supreme Court Review

A Term Overshadowed by Obamacare

On September 17, 1787, the delegates to the Constitutional Convention gathered in Philadelphia's Independence Hall to sign the newly drafted U.S. Constitution. Every year, to celebrate that momentous date in liberty's history, the Cato Institute hosts a daylong conference. This year marked the 11th and, as always, coincided with the release of the 2011–2012 *Cato Supreme Court Review*.

It was a term marked by a striking amount of unanimity, which, as *Review* editor-in-chief Ilya Shapiro noted, "many observers attribute to Chief Justice John Roberts's long-expressed desire for the Court to speak more with one voice."

Unfortunately, Roberts's decision in *NFIB v. Sebelius*—the case that overshadowed the rest—was little more than an exercise in "figleaf federalism," according to Baker & Hostetler's David Rivkin, Lee Casey, and Andrew Grossman. "Despite its strongest statement yet on the limits of Congress's power to regulate interstate commerce," Rivkin said at the conference, "the Court ultimately proved unwilling to strike down the centerpiece of a statute that a majority of the justices agreed blatantly intruded on the authority reserved to the states and the people."

In discussing *Sackett v. Environmental Protection Agency*, a case challenging the EPA's enforcement of the Clean Water Act, Jonathan Adler, of Case Western Reserve University Law School and the Volokh Conspiracy, offered a broad analysis of the overreach involved in federal environmental statutes. He focused on the EPA's routine evasion of providing adequate notice to property owners. "Progressives in particular have recognized that we need not sacrifice fundamental liberties in order to keep Americans safe from terrorist threats," Adler said, "Private landowners and corporations accused of environmental wrongs are no less worthy of due process protections than alleged terrorists."

The day sparked plenty of lively discussions. "I, like so many people before me, congratulate Cato for putting on such a wonderful event," said Tom Goldstein, cofounder of *SCOTUSblog*. Goldstein joined a panel—along with David Savage of the *Los Angeles Times* and Kannon Shanmugam of Williams & Connolly LLP—that looked ahead to the upcoming term. The Court will be deciding a number of high-profile issues over the next year, from affirmative action to the war on terror—while other cases on same-sex marriage and the constitutionality of the Voting Rights Act currently remain in the pipeline.

The conference closed with the annual B. Kenneth Simon Lecture, during which a distinguished legal scholar presents a paper to be included in the next year's *Cato Supreme Court Review*. This September, the Hon. Paul Clement—the former U.S. Solicitor General—presented his thoughts on *NFIB v. Sebelius* and the burden that the challengers faced. Given the likelihood that there were four unshakable votes in favor of the law, the challengers "needed to run the table" on each of the three constitutional justifications. They needed, in other words, 15 out of 15 votes supporting their interpretations of the Commerce, Necessary and Proper, and Spending Clauses. "The good news is that they managed the quite remarkable feat of getting 14 out of 15 votes," Clement said. The bad news, of course, is that it wasn't enough to strike down the law.

In his foreword to this year's *Review*, Roger Pilon, Cato's vice president for legal affairs, writes that the concern that most animated the founding generation was "to create a government that was effective where it was authorized but limited to those authorizations." The Cato Institute takes that heritage seriously. But for the better part of a century, the Court has not. "Is there any better example of our having abandoned that inheritance of liberty through limited government than the 2,700-page monstrosity known colloquially as Obamacare?"

We've drifted far from our founding vision. "In the end, however," Pilon says, "the ultimate remedy is in the hands of the people." ■

The *2011–2012 Cato Supreme Court Review* can be purchased for $15—or the essays downloaded for free—at www.cato.org.

At the 11th Annual Constitution Day Conference, (1) former U.S. Solicitor General PAUL CLEMENT led a luncheon for Supreme Court journalists; (2) RANDY BARNETT, the Carmack Waterhouse Professor of Legal Theory at Georgetown University, discussed the lessons from Obamacare; (3) JAMES F. BLUMSTEIN, University Professor of Constitutional Law at Vanderbilt University, analyzed Obamacare's Medicaid component; and (4) a distinguished panel of experts including (from left) TOM GOLDSTEIN of *SCOTUSblog*, ILYA SHAPIRO and ROGER PILON of Cato, KANNON SHANMUGAM of Williams & Connolly LLP, and DAVID SAVAGE of the *Los Angeles Times* looked ahead to the October 2012 term.