

## Celebrating Constitution Day with a new Cato Supreme Court Review

# How Libertarian Is the Constitution?

The 2008–2009 Supreme Court term may have slipped past without great controversy, but that was not the case at Cato's eighth annual Constitution Day seminar on September 17. It was an event bookended by extraordinarily different views of the role of the Constitution in protecting individual rights, beginning with the lead article in the simultaneously released *Cato Supreme Court Review* and ending with Judge Michael McConnell's delivery of the annual B. Kenneth Simon lecture.

Professor Randy E. Barnett of Georgetown University opens the *Review* with "Is the Constitution Libertarian?" Although his answer—it "may be the most explicitly libertarian governing document ever actually enacted into law"—is likely no surprise at a Cato Institute event, how he gets to that answer provides a fascinating trip through constitutional history and interpretation. The article, delivered as the B. Kenneth Simon lecture at last year's Constitution Day and revised for the *Review*, distinguishes the libertarian Constitution, as written and conceived by the framers, from the anti-libertarian Constitution of today, as interpreted by the past 70 years of Supreme Court decisions. Barnett traces this decline in freedom to the switch from a presumption of liberty—the Court errs on the side of upholding freedom and limiting government authority—to a presumption of constitutionality—the Court errs on the side of upholding government authority and limiting freedom. The Constitution itself has not changed, however, and, Barnett says, retains its original, libertarian meaning. In practice, we can return to a libertarian Constitution by electing "a president who will appoint faithful originalist justices who believe in the power of courts to nullify unconstitutional laws and senators who will confirm them."

Judge Michael McConnell, formerly of the U.S. Court of Appeals for the Tenth Circuit and now professor of law and director of the Constitutional Law Center at Stanford Law School, closed Constitution Day by delivering this year's annual B. Kenneth Simon lecture. McConnell's speech, titled



Judge Michael McConnell (top left) delivered the B. Kenneth Simon lecture at Cato's 2009 Constitution Day conference. McConnell dismissed the libertarian reading of the Constitution presented at last year's conference by Professor Randy Barnett (top right), who challenged him during the question period, as did other members of the audience, such as Judge Douglas H. Ginsburg (bottom right) and Georgetown University Professor Nicholas Quinn Rosenkranz (bottom center).

"Natural Rights and the Effect of Partial Enumeration," and proved both thought provoking and controversial. McConnell argued against Barnett's libertarian reading of the Constitution's unenumerated rights and advanced the potentially troubling thesis that those rights not explicitly listed in the text can claim only the common law protection they may have had prior to the signing of the Bill of Rights. In other words, any rights "retained by the people," in the words of the Ninth Amendment, can be abridged by Congress, provided the abridgement is conducted with precise language not open to less invasive interpretation. Thus McConnell argued not for a "presumption of liberty" but a presumption of congressional power. Barnett, who was in attendance, argued at length with McConnell during the question-and-answer session following the lecture. The speech and the question session are online at Cato's website.

One case that did grab headlines during the last Supreme Court term was *Ricci v. Destefano*, not just because the lower court decision it overturned was joined by then nominee Sonia Sotomayor, but also because it dealt with the always blockbuster topic of racial discrimination. In an article, "The War between Disparate Impact and Equal Protection," Kenneth L. Marcus finds in the case important indicators about the Court's thinking on the Equal Protection Clause. "Equal protection is consistent with disparate impact," Marcus writes, "only when the latter provision is narrowly construed."

Cato's vice president for legal affairs and director of the Center for Constitutional Studies Roger Pilon predicts that the obscure regulatory case of *Wyeth v. Levine* will lead to "yet more conflicting regulations at the state and local level" and will only exacerbate the existing preemption problem.